



**CRIMINAL**

- **The effect of drunkenness of accused facing murder charge**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 21 OF 2009**

**REPUBLIC.....STATE**

**VERSUS**

**BENSON KAIGERA MUTUNGWA.....1<sup>ST</sup> ACCUSED**  
**COSMAS MWIRIGI RAIKANYA.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

The two accused persons **Benson Kaigera Mutungwa and Cosmas Mwirigi alias Raikanya** were charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. Particulars of the offence were as follows:-

***“Benson Kaigera Mutugwa and Cosmas Mwirigi alias Raikanya: On the 9<sup>th</sup> day of February, 2009 at Mbirikene, Kiburine Location, Imenti North District within the Eastern Province, jointly murdered George Koome.”***

The accused pleaded not guilty. The evidence adduced by the prosecution witnesses was that both accused on 9<sup>th</sup> February 2009 were seen struggling with the deceased whilst they had the deceased pinned down on the ground. PW1 Justus Stephen Muchera on that night of 9<sup>th</sup> February 2009 at about 8pm was visiting the home of his sub area called Charles Thurinira. He was there from 8.15 to 10pm. As he walked out of the house of his sub area he heard someone crying:-

***“Councillor, come and help before I am killed.”***

He did not recognize the voice. He walked towards where the voice was coming from. When he was about 10mts away, he shone his torch towards that direction. He saw three people struggling. Two had pinned one to the ground. As he approached them, he asked them what they were doing. By then he was 5mts away from them. The two stood up. It was then that he

identified them as the 1<sup>st</sup> and 2<sup>nd</sup> accused. He stated that he knew the 1<sup>st</sup> accused. He said that the 1<sup>st</sup> accused was his neighbor and his sister had a child with one of his sons. In respect of the 2<sup>nd</sup> accused, he knew him because he was also his neighbor. When the two accused persons stood up, the person they had pinned down did not get up. PW1 said that his torch had sufficient light and that there was bright moonlight which enabled him to identify the accused persons. Although he asked the two accused who it was that they were assaulting, they did not answer. They however began to approach PW1 whilst holding each others hands. They passed PW1. PW1 said that he had also seen a third person at the scene standing by. That person was the son of the sub area and he is called Josphat Kinyua, PW2. He however was not participating in the assault. PW1 shone his torch to the person who was being assaulted and found that person was the deceased who was his son. He called out to his son but he did not answer. He said that the deceased was then breathing "hard". PW1 asked the accused why they were assaulting the deceased but they did not respond. The 2<sup>nd</sup> accused went away towards his house but the 1<sup>st</sup> accused returned to the scene. He said that it was the 2<sup>nd</sup> accused who was assaulting the deceased. The 1<sup>st</sup> accused said that he was protecting the deceased from being hurt by the 2<sup>nd</sup> accused. 1<sup>st</sup> accused told PW1 that the deceased needed to be taken to hospital otherwise he would die. After getting a wheelbarrow, PW1 with his younger son took the deceased to their home. The deceased died at 11pm as PW1 was searching for a vehicle to take him to hospital. PW1 said that the accused persons were friends of the deceased and that at one time the 2<sup>nd</sup> accused lived with the deceased for quite sometime. PW1 said that during that day of the day in question, he had given the deceased Kshs. 10,000/= to go and pay a loan. The time they found him after he had been attacked they noted he did not have the money on him. PW1 also confirmed that the deceased did not pay the loan. On being cross-examined, PW1 accepted that the 1<sup>st</sup> accused had stated that he was assisting the deceased. He further stated that the 1<sup>st</sup> accused requested him not to tell anyone that he was drunk. PW2 Josphat Kinyua said that on 9<sup>th</sup> February 2009 whilst he was in his house which is in his father's compound, he heard some people quarreling. He went to the gate and noted there were three people lying on each other. PW1 came with a torch and asked those people why they were attacking the person on the ground. The two people stood up and this witness was able to recognize them as the two accused before court. He was aided in their recognition by a bright moonlight. He stated:-

***"The moon was sufficient for me to recognize them."***

He said that he knew them prior to this incident. He heard PW1 asking the accused what they were doing but they failed to answer and walked away. He saw the 1<sup>st</sup> accused return to the scene. The 1<sup>st</sup> accused tried to pick up the deceased but he could not. He then stated that the deceased was badly beaten and needed to go to hospital. 1<sup>st</sup> accused told them that it was the 2<sup>nd</sup> accused who was beating the deceased and that, the 1<sup>st</sup> accused was assisting the deceased. On cross examination, he accepted that he recorded in his statement the following:-

***"They carried him, deceased, home thinking since he was drunk he would get better."***

PW3 Fredrick Mutethia M'Ituuru was visiting the sub area together with PW1. He left the home of sub area and whilst he was on his way home he saw PW1 chasing some people. He noted that the deceased had been hurt and was on the ground. He saw the 1<sup>st</sup> accused return to the scene and he heard him say that he was helping the deceased so that the deceased would not be hurt too much by the 2<sup>nd</sup> accused. 1<sup>st</sup> accused said that he was using a plate to try and shield the deceased from being hurt by 2<sup>nd</sup> accused. PW3 saw the plate at the scene. On being cross examined, this witness said that the accused persons passed him as they walked away from the scene. He heard the 2<sup>nd</sup> accused say to the 1<sup>st</sup> accused:-

***"Leave me I can walk."***

PW3 confirmed that the accused persons were drunk. Margaret Ndumba PW4 said that the deceased used to visit her. On the 9<sup>th</sup> February 2009 at 9 to 10pm, while she was at home, the deceased came to her residence. He asked for food. As he ate the food, he was called by somebody from outside. This person identified himself as the 1<sup>st</sup> accused. The deceased went out of her residence with the food he was eating. He did not return. PW4 said that the deceased seemed to have taken some alcohol but was not drunk. She said that he was talking normally. PW5 the assistant chief of Mbirikene sub location. He arrested the 1<sup>st</sup> accused on the night in question. The 2<sup>nd</sup> accused was arrested by police the following day. PW6 was Doctor Isaac Macharia who carried out the post mortem examination on the deceased body on 12<sup>th</sup> February 2009. He found the body peripheral and central cyanosis. In ordinary language, he explained that it meant the darkening of the tongue and finger nails which was a sign of lack of oxygen in the deceased's body. He found that the deceased windpipe was fractured. He formed the opinion that

death was due to strangulation. Although there was initial suspicion of poisoning, the internal organs did not show poisoning when subjected to examination by the government chemist. PW7 was the acting inspector called Ndegwa. He was given the responsibility to collect the deceased body from his father's home the following day after the incident. He noted that there was no visible injuries on the deceased body. At the close of the prosecution's case, the accused persons were found to have a case to answer. The 1<sup>st</sup> accused in his defence stated that on 9<sup>th</sup> February 2009 he was on his way home from Mbuta area where he had been taking photographs as is his profession. He met three people at the gate of the sub area Thurania. One of those was PW1 whom he referred to as his in-law. He heard the deceased say that his stomach was hurting him. By then, the deceased was on the ground. He said that PW1 told him the deceased was drunk. 1<sup>st</sup> accused said that he allowed PW1 to use his bicycle to carry the deceased. The deceased was carried up to the gate of PW1. When they reached that gate, the 1<sup>st</sup> accused said that PW1 requested him to leave telling him that he would take the deceased inside the house. The 1<sup>st</sup> accused went to his home and slept but was arrested at 1am. On being arrested, he was informed that the arrest related to an issue of his sister's children. He was later shocked to hear that Koome had died. The 2<sup>nd</sup> accused in his defence said that he was a farmer and broker. On 9<sup>th</sup> February 2009, he went to Meru town. His boss had promised to pay him some money. He returned home at 5pm. He gave his sister-in-law Kshs. 10,000/=. At 7.30pm, he met the deceased at a club that sells chang'aa (illicit brew) and another alcoholic drink which he called "tartitan". 2<sup>nd</sup> accused said that he drunk alcohol with the deceased. He had found the deceased in that club already drinking alcohol. 2<sup>nd</sup> accused said he left the club at 8pm. He was woken up at 6am the next day by police officers. He was informed when being arrested that he was arrested for drinking alcohol with the deceased. He denied that he committed the offence that he faces. 2<sup>nd</sup> accused in his defence stated that he had drunk alcohol in Meru before he drunk with the deceased. He was cross examined, on whether it was possible that he might not have remembered what had happened on that night. He responded:-

***"No, but I was drunk."***

The prosecution has a burden to prove the case against both accused beyond reasonable doubt. The evidence adduced by PW1 and 2 was that when inquiry was made, why the accused were attacking the deceased, 1<sup>st</sup> accused said that he was protecting the deceased from the 2<sup>nd</sup> accused. PW3 stated that he heard the 1<sup>st</sup> accused saying that he used the plate which was at the scene to protect the deceased. It will be recalled that the deceased had been given food by PW4 and he walked out of her house with that food. That would explain the presence of the plate at the scene. The evidence of PW1 was clear that two people had pinned down the deceased as he approached them. PW2 also gave similar evidence. It is when the two attackers stood up they were recognized by PW1 and 2 as the two accused. Having had the opportunity to see PW1, 2 and 3 give evidence, I was impressed by their candidness and I believe them. Looking at their evidence, it is clear that they corroborate each other. What however is not clear is what the 1<sup>st</sup> accused was doing when confronted by PW1. The 1<sup>st</sup> accused at the scene informed those that were there that he was protecting the deceased from the 2<sup>nd</sup> accused. I make a finding that the prosecution failed to prove that the 1<sup>st</sup> accused assaulted the deceased. On being confronted that very night, he stated that he was protecting the deceased and he was consistent on this statement. The 2<sup>nd</sup> accused however refused to respond and walked away. I am satisfied that the prosecution's evidence clearly point to the 2<sup>nd</sup> accused attacking the deceased on the night in question. The recognition of the accused persons was under unfavourable circumstances, that is, it was at night. PW1 and 2 stated that there was a bright moonlight on the day in question and PW1 had a torch which he used to identify the accused persons. In the case Karanja & Another Vs. Republic [2004] 2KLR the Court of Appeal had this to say about visual identification of an accused person:-

***"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger."***

The Court of Appeal in the case Joseph Mutuma Vs. Republic Criminal Appeal Case No. 462 of 2007 did not fault the identification of the appellant by means of a torchlight and moonlight. PW1, 2 and 3 knew the accused persons. They were their neighbours. It is clear that there was no possibility of error in their recognition of the accused persons. It will be recalled that PW1 and 2 saw the accused persons as they walked past them. It is also clear that PW3 saw and recognized both accused persons. The defence of the 2<sup>nd</sup> accused was that although he drunk alcohol with the deceased earlier in the evening, they parted ways. The 2<sup>nd</sup> accused was raising the defence of *alibi*. The Court of Appeal in the case Kiarie Vs. Republic [1984] KLR held:-

***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable....."***

The 2<sup>nd</sup> accused defence is rejected in view of the overwhelming evidence of PW1, 2 and 3 who placed him at the scene. The doctor who carried out the post mortem examination found that the deceased died of strangulation. That cause of death is consistent with what PW1 and 2 heard and saw that night. They did not see the act but they heard the effect of the actual act of strangulation of the deceased. The deceased did not revive after the accused persons stood up. Prosecution's evidence exonerated the 1<sup>st</sup> accused who stated that he was protecting the deceased from the 2<sup>nd</sup> accused. That evidence however incriminated the 2<sup>nd</sup> accused who on being asked why he attacked the deceased refused to respond. I find that the prosecution proved a case against the 2<sup>nd</sup> accused beyond reasonable doubt. I saw and I heard the evidence of PW1 and 2 which incriminated the 2<sup>nd</sup> accused and as stated before, I believe that evidence. I however did not believe the evidence of the 2<sup>nd</sup> accused. Although I find that the evidence of the prosecution directly proved that the 2<sup>nd</sup> accused had strangled the deceased, the 2<sup>nd</sup> accused was drunk on the night in question. He admitted having consumed alcohol earlier in the day and later in the company of the deceased. There is also evidence of the prosecution witnesses which pointed to the drunken state of the 2<sup>nd</sup> accused. PW1 said that he saw the 1<sup>st</sup> and 2<sup>nd</sup> accused holding hands as they walked away from the deceased. PW3 heard the 2<sup>nd</sup> accused telling the 1<sup>st</sup> accused that he could walk on his own. PW3 confirmed that the accused persons were drunk. On the issue of drunkenness, the Court of Appeal in the case Said Karisa Kimunzu Vs. Republic Criminal Appeal Case No. 266 of 2006 stated:-

***“Drunkenness as such is not a defence to a charge of murder but section 13 of the Penal Code provides as follows:-***

***“13. (1) save as provided in this section, intoxication shall not constitute a defence to any criminal charge.***

***(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and:-***

***(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person, or.***

***(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.***

***(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and the Criminal Procedure Code relating to insanity shall apply.***

***(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.***

***(5) For the purposes of this section “intoxication” includes a state produced by narcotic or drugs.”***

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***“In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”***

The 2<sup>nd</sup> accused did not have malice aforethought and cannot be guilty of the charge of murder. I therefore find that the 2<sup>nd</sup> accused, Cosmas Mwirigi Raikanya is guilty of manslaughter contrary to section 202 as read with section 205 of the Penal Code. I acquit the 1<sup>st</sup> accused, Benson Kaigera Mutungwa of the charge of murder. I now invite the 2<sup>nd</sup> accused to address me on mitigation. I order 1<sup>st</sup> accused be set free unless he is otherwise lawfully held.

*Dated, signed and delivered at Meru this 3<sup>rd</sup> day of March 2011.*

**MARY KASANGO**  
**JUDGE**