



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA NYERI**

**CIVIL DIVISION**

**CRIMINAL CASE 134 OF 2003**

**REPUBLIC.....PROSECUTOR**

**Versus**

**SHADRACK KURIA MAINA.....ACCUSED**

**JUDGMENT**

The Accused is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code, particulars alleging that on 2nd day of November 2003 at Nyangiti Village in Muranga District, Central Province, the Accused Person murdered Martin Ndongo Mwangi.

The Prosecution alleges all that. So the Prosecution must prove it all. The Accused Person does not have to prove anything.

I observed witnesses as they gave evidence, most importantly, those who were with the Deceased in Weru Bar taking beer during the early hours of the night of 2nd to 3rd November 2003. They were five and if P.W.9, William Kamau Thiongo, from the sister shop is added, they become six. Out of that number three of them said all they saw was the incident when the Accused and the Deceased first started quarrelling and ended up pushing each other before everything cooled down and that was all as those witnesses claim to have left the bar either during that incident or immediately thereafter.

The remaining three are the only ones who used the word fighting. One of them said he heard and saw the Accused and the Deceased quarrelling and when they were beginning to fight, they were separated. The witness then left, leaving the Accused and the Deceased, apparently at peace, in the bar. The other witness William Kamau Thiongo said he went to the bar, from his shop, responding to the noise in the bar. Found the Accused and the Deceased fighting. They were separated. The Accused and the Deceased decided to go outside the bar so that they do not disturb people in the bar. As the two were going outside the bar, William Kamau Thiongo also left the bar and returned to his shop.

It was P.W.8 only who talked more about the fighting. He was Onesmus Gichobi Maina a brother of the Accused. He said the Accused and the Deceased started quarrelling, which ended up in fighting inside the bar. When he wanted to separate them, he was stopped by another Maina who wanted the Accused and the Deceased to continue fighting. One Anthony was also stopped. The person selling in the bar told the Accused and the Deceased to go out and they obeyed and while outside they continued fighting as other people who were in the bar followed them and continued to watch the two fighting outside until Kamau from the nearby sister shop came out and separated them and told P.W.8 to take his brother home and P.W.8 did so leaving the Deceased standing. P.W.8 added that it was not a serious fight and it lasted for five minutes only. But blood was coming from the Deceased's nose when P.W.8 left.

That Kamau mentioned by P.W.8 is Kamau Thiongo as P.W.8 clarified during cross-examination and Kamau Thiongo is P.W.9 William Kamau Thiongo whose story in the evidence he gave this court is not consistent as according to him, when the Accused and the Deceased went outside the bar, he never knew what happened between them as he did not see them together again.

P.W.9 was not alone in that kind of behaviour in this court as his was typical to the behaviour of virtually all those six witnesses who seem to have decided not to reveal to this court all that happened between the

Accused and the Deceased inside and outside Weru Bar that night yet they seem to have been there and saw all that happened before they dispersed. According to them therefore, none of them therefore saw the Accused inflicting any fatal injury upon the Deceased and that includes P.W.8 who tried to be a bit more open to the court.

P. W. 10 P.C. Felix Mauda and the area Chief Dedan Kamau Mathiu, P.W. 3, went to the scene when all had happened and the Deceased had passed away. So was the Deceased's father.

Those were the witnesses before this court. The doctor who performed postmortem on the body of the Deceased was not brought to give evidence. Yet that was a very important prosecution witness.

In his defence, the Accused denied that he committed this offence. It was not the Accused's duty to prove anything. The duty was all along upon the prosecution to prove the case against the Accused person beyond reasonable doubt. Where there is doubt, the benefit of that doubt goes to the Accused person.

From what I have been saying, the Prosecution's case cannot succeed as the evidence adduced is inadequate. None of the witnesses called to give evidence, those who were with the Accused and the Deceased in the bar, told the court that he saw the Accused inflicting any injury upon the Deceased. They are all relatives including the Deceased person. The doctor who performed postmortem on the body of the Deceased was not brought to give evidence to tell the court the cause of the death of the Accused and no evidence of the postmortem, if any, was therefore adduced.

Assessors unanimously found that the Accused person is not guilty. Accordingly, this case is hereby dismissed and the Accused acquitted. He be set at liberty forthwith unless lawfully detained in some other cause.

**Dated this 5th day of July 2005.**

**J. M. KHAMONI**

**JUDGE**