



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 51 of 1997

REPUBLICPROSECUTOR

-versus-

FREDRICK ALUKHABA NEUNDU.....ACCUSED

JUDGMENT

The Accused, Fredrick Alukhaba Neundu is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 15th day of February, 1997 at Makongeni Estate, Nairobi within Nairobi area, murdered PETER MUTINDA MUNYOKI. The Accused denied the charge.

Briefly, the prosecution case was that on the evening of 14th of February, 1997, at about 5 p.m, while Mrs. Alice Nduku (PW17) was taking some drinks at Top Life Bar, Nairobi, she saw Peter Mutinda Munyoki (now deceased) walking in. She had been at the said bar herself as from around 1 p.m taking various types of beer and the local brew known as "Chibuku". She testified that the deceased did not stay long at the said bar. He then left. Later at about 9 p.m, when one Kadenge Julius Ngui (PW10) went to Bonita

Bar he found the deceased there while taking some beer he was then drunk. Ngui (PW10) joined him and after taking some drinks, the deceased asked him to escort him to Makongeni Estate, Block P7 door 7 to see his girlfriend. He agreed and accompanied him to that house.

The evidence of Kadenge (PW10) was confirmed by the girl friend, Petronina Kanini Mulwa (PW3) and Winfred Mbeti Manthi (PW1) who were sharing a single room at Makongeni Estate. They testified that when the deceased and Kadenge arrived, they had already gone to bed but as he knocked and introduced himself, Winfred woke up, put on the lights and opened the door for them. The deceased then entered the house and sat on their bed as she briefly talked with Patronina. By then it was a few minutes to 10 p.m as the 9 p.m radio news had been broadcasted. Both of them testified that the deceased was then very drunk, he was staggering and could not walk properly. Kadenge who had brought him to see his girlfriend was turned away, by the girls as they did not approve of his smoking in their house. The deceased then stayed behind for about 10 minutes urging his girlfriend to escort him to his house. He even gave her shs 900/- to keep for him. It was a dark night, and it is a pity that Petronina refused to escort him and left him alone to find his way to his next destination or to his house.

It would appear that the deceased found his way upto a small Kiosk at the gate of Makongeni Estate known as "Sisi Kwa Sisi Bar" in which a local brew known as "Miti ni Dawa" and other brands of beer

are sold. This is clear from the testimony of Alice Nduku (PW17) who earlier on met with him at Top Life Bar at about 5 p.m.

She testified that the deceased found her at this bar where he came in the company of the Accused who was known to her by the nick name, "Muguu Mbaya" as he had been walking with a limping gait and supporting himself with a walking stick. She testified that the deceased ordered a pilsner beer for himself and also for her. The deceased was then already drunk and could not even finish his beer which she happily took to clear for him. She testified that both the Accused and the deceased then left that Kiosk bar to the funeral ceremony within Makongeni Estate. Indeed there was a funeral ceremony at the house of the late GODWIN KADU at Block 68C door B, Makongeni Estate, according to the evidence of his widow. Peris Atieno Kadu (PW14) and her sister Pamela Adhiambo (PW8).

There was some music being played at the said funeral ceremony which was used to raise funds for the bereaved family. Light at the scene was from a single electric bulb which had been sourced from a neighbouring house at Kaloleni Estate since houses at Makongeni had no lights.

At about 12.30 a.m while Pamela Adhiambo (PW8) came out of the house of the deceased to draw some water, she spotted the deceased seated some 5 meters away from the entrance to the deceased house. She noticed that he appeared drunk and was slightly bleeding on the left side of his head. The deceased then moved and sat just close to the door. This is what drew the wrath of Pamela who loudly complained how a man who was bleeding could sit near the door step of the house of the deceased. Jimmy Okuku (PW11) who was one of the mourners also saw the deceased, he was then bleeding slightly from the forehead and he appeared drunk. Mrs. Peris Atieno Kadu (PW14) also came out and noticed that the deceased was seated at the entrance to her door. He was a stranger to her and he appeared to be drunk. She ordered the deceased to move away from her door entrance. At that stage, the Accused who was among the crowd stated that he knew the man and that he was his guest. She then told him to take him away. The Accused then left with the deceased who was quite drunk and was staggering.

While the Accused was escorting the deceased from the funeral gathering, Alice Nduku (PW17) testified that she followed them on her way back to "Sisi kwa Sisi bar." According to her testimony, there was moon light. She then saw two men walking a head of her within the open field within the Estate. She could not tell who they were from a distance. She then saw one of them hit the other who fell down and the man who had beaten him lay on top of him. It was then that she heard a voice which she recognised as that of the deceased while screaming and saying that " instead of killing me, take all that I have as I will get some more." She then shouted loudly at the man who was pinning down the deceased by asking him why he was killing Mutinda. The said man then threw a stone at her. She then went and stood near the fence of Makongeni Police Station. She then observed that it was the Accused who had pinned down the deceased as he saw him now escorting him to Makongeni Police Station and they were both walking like drunkards who were staggering.

That the Accused was the one who had escorted the deceased to the Police Station was confirmed by P.C Felix Leboo (PW4) who was then on duty at the report office together with P.C Sammy Nzau {now deceased). It was then 1.30 a.m. He testified that as the Accused brought the deceased, he reported that he had come across him while drunk. Since he had known him by appearance had decided to bring him to the police station. The police officer testified that he noticed that the deceased was quite drunk, incoherent and could only mumble the name "Grace, Grace." He observed that the deceased had a small bruise on his eye brow where there was some dry blood stain. The deceased then started vomiting and after he finished vomiting, he and his colleague took him to the cells where there were other prisoners.

On the following morning at 7.50 a.m, while P.C Felix Leboo (PW4) and P.C Sammy Nzau were handing over the prisoners to P.C 4W) Sera Kibet (PW9) and P.C Mureithi (PW16) and were calling out the prisoners by name, they noticed that one, Peter Mutinda Munyoki (deceased), was lying in the floor on his stomach was not responding. PW9 and PW 16 sought explanation from their colleagues and P.C Leboo told them that he had been brought in the night while very drunk. There was the O.B entry to that effect an extract of which was produced in evidence (ex.2). He had difficulties in breathing. He was then escorted to Kenyatta National Hospital by PW16 where he died later on the same day while undergoing

treatment.

Post mortem examination on the body of the deceased was subsequently conducted by Dr. Geoffrey Zambezi Mutuma (PW2) on the 28th of February, 1997 after the same had been identified to him by Francis Kisyula Munyoki (PW13) and Musembi Mwoka Masaku (PW5) who were the brothers of the deceased.

According to the testimony of the doctor, he observed that there was blood oozing out of the nose, mouth and left ear of the deceased. There was a bruise over the left temporal region. On opening up the body, he noticed that the head showed a defused scalp haematoma with a fracture on the left temporal region and sub-dural haematoma. There bleeding around the brain. The rest of the system were normal As a result of his examination, he formed the opinion that the cause of death was due to the head injury which could have been caused by a blunt injury or trauma. He produced the post mortem form in evidence (ex.1).

After the death of the deceased, investigations were conducted by the police officers and on the 17th of February, 1997, barely two days of the death of the deceased, the Accused who had escorted him to the police station was arrested by P.C Mutali Namunyu (PW 6) on the instructions of the OCS of Makongeni police station. He was then charged with the murder of the deceased.

In his defence, the Accused gave a sworn testimony in which he stated that on the 14th of February, 1997, he left his residence at Kaloleni Estate to the house of the deceased, GODWIN KADU where there was a funeral ceremony for raising funds. This was at 10 p.m.

There were many people as there was music being played from a radio cassette and various plays were being conducted to raise funds. He took part like anyone else till around 1 a.m when he heard Jimmy Okuku {PW11) asking: "who is this person seated by the door and yet people were morning". The music was then tuned down by Michael Okola (DWI) who was acting as the D.J to enable him hear what Okuku was saying. Both the Accused and Okola testified that they then observed the deceased seated at the entrance to the house of the bereaved family. He was seated on the ground and bent his head downwards. There was a small wound on the left side of his head from where there was a clot of blood which was drying up.

The Accused testified that he walked to where the said man was and when he looked at him, he recognised him as their parents used to work with the Railways before retirement. Their parents used to stay at Makongeni Estate. Parezi Atieno who was then bereaved then asked him to tell the deceased (Mutinda) to move out of the doorway if he knew him. He bent down to Mutinda and asked him what was wrong with him and told him in a very low tone to escort him home to sleep. He then left with the deceased and this was confirmed by Michael Okola (DWI).

As they walked into the darkness beyond the funeral gathering where there was some light, the Accused testified that the deceased could hardly walk as he was too drunk and he had to support him. He also realised that the deceased could not even speak or tell him that she saw the Accused hitting the deceased with his walking stick from the funeral gathering towards the police station, it is now clear that the injury leading to the death of the deceased was caused before the deceased went to the said funeral gathering. Indeed the evidence of Alice Nduku regarding the alleged beating cannot be believed since no injury had been observed anywhere on the body of the deceased immediately on arrival at the police station other than the one on the left side of his forehead.

How the deceased sustained the fatal injury on the left side of his forehead was un-resolved on the evidence. This was particularly so because the movements of the deceased like that of Alice Nduku (PW17) on the evening of 14th February, 1997 till later in the night ,could not accurately be stated. On that night, they were variously out on a drinking spree. Alice started sampling drinks as early as 1 p.m and she continued mixing beer, Chibuku, Miti ni Dawa and Chagaa with a lot of ease. By the time she allegedly saw the Accused hitting the deceased with his walking stick and pinning him, down she was proceeding to another drinking den and this was between 1 a.m and 1.30 a.m. Clearly the amount of alcohol which this lady had taken on the material day could possibly impair her memory of the events of

the material day. That she and no one else saw the Accused with a walking stick on the material night. Her evidence, to say the least, could not be safely be relied upon in the absence of any corroboration.

If as was stated by the girlfriend of the deceased, Petronina Kanini (PW3) and her room mate, Winfred Mbeti (PW1), the deceased was already drunk by 9 p.m and was staggering, it cannot accurately be stated that at no time between 9 p.m and 1.30 p.m when the Accused escorted him to the police station he had not fallen down. Any kind of trauma according to the findings of the doctor, could have inflicted upon him the kind of head injury from which he later died. There was evidence that the deceased was alone for part of the night as he walked from one bar to the other within the generally un-lit area. For example, there was evidence that he had requested his girlfriend, Petronina as early as 9 A.m to escort him to his house and she refused despite the fact that he had even kept his shs 900/- with her. If it as early as 9 p.m, he was already drunk, staggering and looking for someone to escort him to his house, I cannot find any reason to fault the conduct of the Accused when he volunteered much later at about 1 a.m to escort him from the funeral gathering. Indeed the assessors found that he was then acting as a good Samaritan only to find that the man (deceased) could not talk or show him the direction to his house.

Upon my own consideration and evaluation of the recorded evidence, I am satisfied that the charge that was laid against the Accused was far from proved beyond reasonable doubt. I doubt whether there was any form of investigation conducted by the police officers into this case. It would appear that they just preferred the charge against the Accused to overcome any possible suspicion that the deceased could have been injured while in police custody.

I find that neither the police officers at Makongeni police station nor the Accused were responsible for the injuries from which the deceased later died. He was his own worst enemy by his bad drinking habit in going for a drinking spree without a reliable companion..

For reasons stated, I do not find the Accused guilty of the offence charged. I acquit him of the offence and order that he be released forthwith.

I wish to commend both counsel for the Accused Mrs. Onyango and learned state counsel Mr. Omirera for the excellent manner in which they conducted this case.

Dated and delivered at Nairobi this 30th day of November, 1998.

S.O OGUK

JUDGE