



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Case 160 of 2004**

**REPUBLIC.....APPLICANT**

**-VS-**

**JOAKIM KAGUNYU NJOKI & LAWRENCE MUTUGU NJOKI.....RESPONDENT**

**JUDGMENT**

Both accused have been charged for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap.63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:

“On the night of 22<sup>nd</sup> and 23<sup>rd</sup> October, 2004 at Kanyoni Trading Centre in Thika District within Central Province, jointly murdered John Njenga Njaruba.”

In his evidence, the PW1 Joseph Kariuki Njoroge testified that on 22<sup>nd</sup> October, 2004 at around 11.00 a.m. while he was selling alcohol at Blue Bar, the following six people entered: Njenga (the deceased), Mutugu, Kuria, Kiragu, Kamoyi, Kinyanjui and Paul Ndung’u. On arrival Njenga bought them alcohol – and thereafter he was only left with Mutugu and Kuria. After about thirty minutes, the latter group also left. According to the PW1 when he passed Thingira Bar, he heard Njenga boasting that he will drink a lot. In response the PW1 entered the bar where he joined Njenga, Kagunyu – A1, Mutugu and Rose who were all seated on the same table. After the PW1 had drunk about seven beers that had been bought for him by Njenga – they decided to go and sit on a different table. Subsequently, Wachuka told Rose to stop Kagunyu - A1 from stealing from the pocket of Njenga. The PW1 also observed that Njenga had grabbed Kagunyu – A1 by the neck while demanding back KShs.4,000/-. Thereafter, the two started fighting and the PW1 saw Njenga boxing Kagunyu A1 on the nose before the latter started bleeding. In response, Kagunyu- A1 turned and laid on top of Njenga before assaulting him with fists on the head. Consequently, the PW1 separated them and when the protagonists went outside, Kagunyu - A1 dared Njenga to a fight claiming that he never feared him even if he had a knife. When the PW1 went outside he heard Kagunyu -A1 and Njenga saying the following words:

“Tunaulizana nini and sisi ni marafiki”.

Though the PW1 offered Njenga accommodation, the latter replied that he had money for alcohol and accommodation. Eventually, the PW1 went to sleep, leaving behind Njenga, Kagunyu and Mutugu (Accused 1 and 2). On the following day, the PW1 went to the scene and found the naked body of Njenga inside a trough. He observed that the jacket was on one hand, while the trouser was on one leg. He also observed a hat that had been worn by Kagunyu – A1 on the previous night. In her evidence, the PW2 Jacinta Wachuka Kamau testified that on 22<sup>nd</sup> October, 2004 at around 10.00 p.m. while operating Thingira Bar she had four customers viz, Njenga, Kagunyu- A1, Mutugu – A2 and Kariuki. While the customers were drinking alcohol, the PW2 saw Kagunyu – A1 putting his hands in the shirt of Njenga – and hence she called the bar-maid viz, Rose and explained to her what was happening. When Rose

directed them to leave the bar, Njenga responded by grabbing Kagunyu- A1 and wrestled him to the ground. On seeing the fight, the PW2 ordered them to get out of her bar. The PW2 later heard Kagunyu – A1 telling Njenga that they should meet outside. Immediately it started raining and the PW2 and Rose put off the lights to the bar. On the following day the PW2 went to the scene and saw the body of Njenga which was naked with the exception of a jacket on the left hand. On the other hand, the PW3 Rose Warocho Mwangi confirmed and corroborated the story of the PW2 in details. When the PW3 went to the scene, she saw a khaki hat that was being worn by Kagunyu on the previous evening. In his evidence, the PW4 – Michael Njanjui Njaruba introduced himself as the brother to the deceased. He recalled that on 23<sup>rd</sup> October, 2004 at around 7.00 a.m. he went to see the deceased but found that he was not there. From there, he went to Blue Bar and met Kariuki who explained that he had been with the deceased upto 11.00 p.m. The PW4 was later rung to go and view a dead body. Unfortunately on reaching the scene, he identified the body of the brother. On the other hand, the PW5 Dr. Nimrod Ngala Garama testified that on 1<sup>st</sup> November, 2004, he carried out a post-mortem on the deceased. During the same, he observed that the deceased had multiple bruises on the anterior abdominal wall and also bruises on the neck and scalp. In addition to the above, he observed a perforated duodenum with gastric contents in the abdominal cavity. Apart from the above, he also observed that the deceased had epicranial haematoma. On conclusion of the examination, the PW5 formed the opinion that the cause of death was due to severe head injury. In his evidence, the PW6 CPL Moses Githaiga testified that on 23<sup>rd</sup> October, 2004 while in Gakoe Patrol Base, the PW4 reported to him that his brother had been killed at Kanyoni Trading Centre. After booking the report, the PW6 and PC Kihara proceeded to the scene where they saw the body of the deceased next to a trough. While there, the PW6 recovered a “khaki hat” and observed that the deceased was bleeding from the mouth and nose. On his part, the investigating officer, PW7 Sgt Joseph Gichuki recalled that on 24<sup>th</sup> October, 2004, he was instructed to proceed to Gakoe Police Post where he found that three suspects had been arrested. These were Joakim Kagunyu – A1, Lawrence Mutugu- A2 and John Kariuki. Later on, the PW7 received the hat that belonged to Kagunyu- A1 and visited the scene where he drew a sketch-plan before commencing investigations.

In their defence both accused persons have denied committing the offence for which they have been charged for. On his part, Joakim Kagunyu Njoki (hereinafter referred to as the 1<sup>st</sup> accused) testified that on 10<sup>th</sup> October, 2004 he went to Garofa Bar where he started drinking. From there, he went to Thingira Bar where he found his brother viz, Lawrence Mutugu Njoki who was accompanied by John Njenga and Kuria. According to the 1<sup>st</sup> accused, on arrival, the deceased bought him four beers and cautioned him not to buy any drinks. Further to the above, he also explained that when Joseph Kariuki came, the deceased bought him beers. That apart, the 1<sup>st</sup> accused also explained that they drank beer till 9.00 p.m. when Rose took his hat and gave the same to the deceased. The 1<sup>st</sup> accused observed that since the deceased was drunk, he started sleeping on the table. Though he tried to wake him up, the deceased went back to sleep. Seeing the above, he tried to wake him up for the second time and the deceased slapped him. It was the evidence of the 1<sup>st</sup> accused that when the deceased tried to slap him again, he held his hands and both of them fell down as they were drunk. The 1<sup>st</sup> accused conceded that the PW2 later separated them before throwing them out of the bar. At that stage, the 1<sup>st</sup> accused and his brother went home. On the following day, the Accused 1 was informed by the mother that the deceased had been found behind a bar while dead. On going to the scene, the 1<sup>st</sup> accused found the deceased lying inside a trench. Later, the 1<sup>st</sup> accused was arrested by police officers who were accompanied by the brother of the deceased.

On the other hand, Lawrence Mutugu Njoki (hereinafter referred to as the 2<sup>nd</sup> accused) recalled that on 22<sup>nd</sup> October, 2004, Njenga (the deceased) requested for his company for a drink at the home of Joseph Kamoi whom they found with his brother viz, Kuria. From there, the 2<sup>nd</sup> accused went to Blue Bar where the deceased bought lots of beers before proceedings to Thingira Bar. Apart from the above, the 2<sup>nd</sup> accused explained that the deceased continued buying beer and they were later joined by his brother – the Accused 1. From that point to the end, the 2<sup>nd</sup> accused corroborated and confirmed the story of the brother.

This Court has carefully perused the evidence on record. From the above, it is apparent that both the accused were with the deceased on the night of 22<sup>nd</sup> and 23<sup>rd</sup> October, 2004 at Thingira Bar. Apparently, it is the deceased who seemed to have bought most beers on that particular night. While the group was drinking, it was apparent that the Joakim Kagunyu – the A1 was seen putting his hands into the packet of the deceased. According to the PW1, it was the above action that angered the deceased who later grabbed the neck of the A1 and demanded back his cash – KShs.4,000/=. It was due to the above that a fight ensued and the deceased boxed the A1 on the nose which resulted in him bleeding. Subsequently, the A1 assaulted the deceased on the head using his fists. When the two accused persons, the deceased and the PW1 were ejected from the bar, the PW2 heard the Accused 1 saying that they should meet outside. Eventually, the PW1 left the accused persons with the deceased before he proceeded home. It is also apparent that when the body of the deceased was recovered on the following day, the hat that the Accused 1 was wearing was found about ten metres away. The above facts clearly show that the accused were the last persons who were seen with the deceased before he died. Secondly, it was crystal-clear that the Accused 1 told the deceased that they should meet outside. Those words were uttered after the two had earlier fought in the bar. The context under which they were uttered clearly show that the Accused 1 had wanted to deal with the deceased. Or in other words wanted to teach him a lesson.

Thirdly, when the body of the deceased was recovered, the hat of the Accused 1 was also found nearby at the scene. It is apparent from the above that the prosecution relied heavily on circumstantial evidence to prove their case. In the celebrated case of

SIMONI MUSOKE –VS – REPUBLIC (1958) E.A. pg 718

it was held as follows:

.....“ In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis than that of guilt. Teper V. R., (1952) 2 ALL ER 477, followed in addition to the above

TAYLOR ON EVIDENCE (11<sup>th</sup> Edition pg.74)

States as follows:

“The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt.

In this case ,the court has explicitly shown above, how the two accused were involved in the commission of the offence. It is significant to note that though the A2 is a brother to the A1 he never at any stage intervened to separate the fight in the bar. Nor did he dissuade his brother in any way from threatening the deceased. The total circumstances of the case clearly point to the fact that they acted in concert to kill the deceased. Having considered the defence of the accused persons, I find that the same has no merits at all. Both the accused never impressed the court to be truthful persons. Right from the outset, it was evident that the deceased had been extremely generous on that particular night. The evidence clearly showed that it was the deceased who bought all the beers and even meat (refer to the cross-examination of the PW3). Despite the above, the A1 still wanted to steal from him. The behaviour of the A1 clearly show that he was dishonest and greedy. The A2 who was nearby never cautioned his brother in any way. It had to take the intervention of the PW1 to alert the deceased about the conduct of the A1. Given their behaviour, this court cannot trust the two accused persons in any manner.

In view of the above evidence, I hereby find that the prosecution have proved their case beyond any reasonable doubt. Given the above cogent reasons, I hereby find that the verdict of “Not Guilty” by the three assessors is not consonant with the facts. The upshot is that both accused are found “guilty” of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Having stated the above, I hereby sentence both accused to death as provided by

the law.

Right of appeal explained.

MUGA APONDI,

JUDGE.

Judgment read signed and delivered in open Court in the presence of the accused, M/S Odembo, Advocate and Mr. Ong'ondo State Counsel.

Order:

Assessors to be paid allowances for two days.

MUGA APONDI,

JUDGE.

8<sup>TH</sup> November, 2006.