



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Criminal Case 194 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

SIMON MUTUGI MUKUI alias MURIITHI.....ACCUSED

JUDGMENT

The accused Simon Mutugi Mukui is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the charge are that on the 30th day of March 2003 at Kasarani Situn Estate within Nairobi Province, murdered Jonnah Reberia Kabiru [hereinafter referred to as the deceased and Jonnah interchangeably].

The prosecution called ten witnesses in support of the state case.

Peter Macharia (PW1) reached home at 8.00 pm and found the deceased sleeping in the veranda. A few minutes later he heard the accused asking the deceased for the keys to the house. He heard the two quarrelling. His wife went out to intercede on behalf of the deceased in vain. His wife and Mama Patty, a fellow tenant, then tried to intercede on behalf of the deceased once again but the accused ignored their pleas. The noise subsided about 3.00 am.

The following day, in company of his wife, they visited deceased and found him sleeping. From that day the deceased became sickly. He constantly complained of headache and malaria.

On 13th April 2003 the deceased went to Gatundu District Hospital in the company of PW1 and his wife and was admitted. On 14th April 2003 the landlord of both accused and deceased went to Gatundu Hospital and was informed of the demise of the deceased.

In cross-examination he had this to say: “I know Jonah and Muriithi by voice. I heard the fight going in the house the deceased and accused were sharing”

Andrew Kori Gathara (PW2), facilitated the employment of the deceased and the accused at his brother’s construction site at Kasarani in Nairobi.

On 21st March 2003, he returned to the construction site and found Muriithi, Nazario and Kinyua working. He was told the deceased was sleeping. According to Nazario and Kinyua, the deceased was having malaria. He went to the house of deceased and pleaded with him to go to hospital in vain. He

then bought medicine for him. The following day the deceased said he was improving.

On 12th April 2003 he came back to the construction site at Kasarani and found Nazario, Kinyua and the deceased working. He paid them wages and went to Githurai.

He came back to the site on 14th April 2003 and found Nazario and Kinyua working. He asked for the deceased and was told that he had been taken back to Gatundu hospital on 13th April 2003. He went to the said hospital at 10.00 am and was told that the deceased had passed on. On 15th of April 2003 he took the report to the next of kin. After the burial he heard through Peter, a tenant, at the flat where the deceased was staying that accused had beaten the deceased earlier on.

Nazario Kinyua (PW3), left Kirinyaga for home on 19th January 2003. He was in company of nine people, one of whom was, the deceased. They were helping hand in construction site at Kasarani. He went home on 29th March 2003. He came back on 31st March 2003 and he heard from Mama Peter that there had been a fight on 30th March 2003 between the deceased and the accused. On 14th April 2003 Macharia (PW1) informed him that the deceased passed on.

Patrick Entahiu Wangai (PW4) was doing taxi business on 13th April 2003 at 12.00 noon. His vehicle was No. KMX 431 Toyota. Two men hired him to ferry a patient at Kasarani. He took the patient to Gatundu District Hospital. The patient was admitted in a comma. Later on he heard that the patient had died.

Peter Njoki Kabiru (PW5), a brother to the deceased reached home on 13th April 2003. He got information that his brother was admitted at Gatundu District Hospital where he had died. He visited the residence of the deceased and was told by Lucy Mwiki, a neighbour, that his brother had been beaten by accused.

On 18th April 2003 he went to Gatundu Hospital where he viewed the body of the deceased. On 23rd April 2003 he identified the body for post-mortem.

Ephraim Karani Waruhiu (PW6), got information from his younger brother Naphtaly Waruhiu of the demise of the deceased.

On 22nd April 2003 he went back to Kasarani police station in company of Peter Machuki Kabiro. On 23rd April 2001 the post-mortem was done after identification of the body by Peter Njoki. (PW5) they transferred the body to City Mortuary on 22nd April 2003. The body was later on released for burial.

Anne Waithera Mwaura (PW7) was asked by accused to part with *ugali* cooking stick. A few minutes later Mama Peter, a neighbouring tenant, told him that the deceased and the accused were fighting. She personally did not witness the fight. He knew that the two were staying in the same premises. Later on he heard that the deceased had passed on.

Lucy Wangu Macharia (PW8), recalled that on 30th March 2003 at about 7.00 pm the deceased and accused came to his plot while drunk. They sat at the gate for sometime. Then accused asked the deceased for door keys. The deceased said he had no keys. Then he saw accused hitting the deceased against the wall several times. Her husband intervened. The following day the met deceased who complained of malaria. He gave deceased Kshs.20/= to purchase malaria medicine. Then on 13th April 2003 the deceased went to Gatundu District Hospital where he was admitted. On 14th April 2003, Wachira, the landlord of the premises where both the accused and deceased were residing brought the news of the demise of the deceased.

Dr. Jane Wasike Simiyu (PW9), a pathologist working with National Public Health Laboratories deployed at City Mortuary produced the post-mortem report as Exhibit 1 on behalf of Dr. Maundu in terms of the

provisions of section 33 as read together with section 77 of the Evidence Act (Cap 80) Laws of Kenya.

As a result of the autopsy she opined that the cause of death was subdura hematoma, head injury following blunt trauma.

In cross-examination she was categorical that Dr. Maundu did not indicate the age of the injury. She was equally categorical that the injury could have been as a result of a fall.

No.62004 P.C Joseph Toroitich (PW10) recalled 21st April 2003. Three people came in the murder and inquest officer with a report of assault. The victim was admitted at District Hospital. He accompanied two of the relatives to Gatundu District Hospital and was met with the news that the victim had died on the same night of the admission. He transferred the body from Gatundu District Hospital to City Mortuary. The post-mortem was conducted by Dr. Maundu in his presence. He visited the place where the victim and the assailant were residing and arrested the assailant who he identified as the accused in court.

When put on his defence, the accused testified that on 30th March 2003 he came to the residence they shared with deceased at about 8.30 pm. He met Mama Patty and the deceased. Mama Patty was checking the pocket of the deceased for keys to the house. He told Mama Patty to leave the issue alone. He would handle it. They both went to bed. The following morning the deceased left after breakfast and came back around 10.30 am. Deceased did not report on duty on that day. Finally deceased reported on duty on 2nd April 2003. They worked until 12th April 2003. On 13th April 2003 the deceased fell sick again and was admitted at Gatundu District Hospital on 13th April 2003. The following day (14th April 2003) the deceased passed on. Before this his major problem was headache and fever arising from malaria.

From the evidence on record it is clear to me that the deceased and the accused were very drunk on the 30th day of March 2003. The deceased had misplaced the keys for the door of the premises they were residing at. Wangui Macharia (PW8), a neighbour, testified that on that day, he heard the two quarrelling. The accused assaulted the deceased. The two were separated through the efforts of Mama Patty. They retired to bed about 3.00 am.

The following day, he met the deceased who complained of malaria. He bought him (deceased) medicine. The deceased went back to work for some time. On 13th April 2003 the deceased was admitted at Gatundu District Hospital where he passed on the same night. Post-mortem report by Dr. Maundu disclosed the cause of death as subdural hematoma, head injury consistent with a trauma. However, it was admitted by Dr. Wasike in cross-examination that Dr. Maundu did not indicate the age of the injury. Dr. Wasike admitted in cross-examination that the injury could be as result of a fall.

Against that backdrop of medical evidence, there is evidence that the accused assaulted the deceased. However, there is no direct evidence that it was the assault of the accused by the deceased that caused the head injury as opined by the doctor. This is by reason of the fact that the doctor did not fix the age of injury. It is quite possible that the deceased died as a result of injury sustained as a result of drunken stupor or other injuries caused by a third party before the assault by the accused on 30th April 2003 or any other natural causes of death. In effect the cause of death was not clearly established hence the charge of murder was not proved by medical evidence as enjoined by law.

Having considered the evidence, on its totality and the submissions of both counsels appearing, I am of the considered view that the offence the appellant could be convicted of is assault since it is not proved beyond any reasonable doubt that it was the accused who by assaulting the deceased caused the deceased's the injury that resulted in his demise.

Accordingly, I record a finding of NOT GUILTY in respect of the charge of murder. However, I substitute the conviction with that of assault contrary to section 251 of the Penal Code and sentence the appellant to serve one (1) year imprisonment.

Dated and delivered at Nairobi this 30th day of November 2007.

N.R.O. OMBIJA

JUDGE