REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 174 of 2004

DAVID MBAU NJOROGE …….…..…….. APPELLANT

VERSUS

REPUBLIC ……...……...…… RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Principal Magistrate's

Court at Murang'a in Criminal Case No. 1077 of 2003 dated 9th June

2004 by Mr. G. K. Mwaura – P.M.)

J U D G M E N T

David Mbau Njoroge, the appellant herein was arraigned before the principal magistrate's court at Murang'a on the count of manslaughter contrary to section 202 of the Penal code. He was successfully prosecuted, convicted and sentenced to serve 10 years imprisonment. That conviction and sentence triggered this appeal as the appellant was aggrieved by the same.

In a home made petition of appeal, the appellant faults the learned magistrate for convicting him on the grounds that: he failed to consider that the consent from the Attorney General for his prosecution had not been obtained, contradictions in the prosecution evidence, that witnesses recorded their statements after the death of the deceased, there was no medical evidence, failure to call the investigation officer, none of the witnesses saw the object used to assault the deceased and finally that the learned magistrate failed to consider that he was a mental patient at Mathare mental hospital. At the hearing of the appeal, the appellant reiterated the issue of the court's failure to consider that section 206 of the penal code had not been complied with.

The brief facts of the prosecution case were that on 21st April 2002, the appellant came to a kiosk run by the deceased and his wife (P.W.1). In that kiosk P.W.1 and his deceased husband used to sell cowheads. The appellant in the presence of P.W.1 asked the deceased to sell him some cowhead meat. The deceased refused and a quarrel ensued between the two. P.W.1 then intervened and asked the appellant why he was quarrelling and abusing her husband. The appellant then walked away. Shortly thereafter the deceased also left for a certain bar at the shopping centre owned by one, Gachine. At the bar, the deceased met **Ndungu Njoroge** (P.W.2) and he joined him at a table. As they were in a discussion the appellant appeared and entered the same bar. Suddenly the deceased rose from where he was seated and went straight for the appellant. He attacked him using his hands presumably either boxing or slapping him. P.W.2 and other bar patrons intervened in the fight in a bid to separate the combatants.

It is then that the deceased turned round holding his stomach and told them that he had been stabbed by the appellant. P.W.2 saw the stab wound. It was on the stomach. Immediately after stabbing the deceased the appellant left the bar without talking to any one. The deceased also left for his house where he found his wife. The wife saw him holding his stomach with both hands but was bleeding profusely. The deceased told her that he had been stabbed by the appellant with a knife at the bar. The wife (P.W.1) then called neighbours to assist her take the deceased to hospital. A vehicle was hired and the deceased was taken to Maragua District hospital where first aid was administered on the deceased before he was referred to Murang'a District hospital for further management of his condition. The deceased however passed on upon arrival at the hospital. The matter was reported to Saba Saba police station.

The accused was arrested on the same day that the deceased was stabbed (P.W.5) and taken to Kahugo Chief's camp. He was later re-arrested by **Washington Mwangi** (P.W.4) who transferred him to Murang'a police station.

A post mortem was carried out on the deceased on 30th April, 2002 by **Dr. Macharia** at Murang'a District hospital mortuary. The Doctor formed the opinion tht the deceased's death was as a result of massive internal bleeding due to stab wounds. The post mortem report was however produced by **Dr. Julius Kimani Mugo** (P.W.10) as the **Dr. Macharia** was said to have gone overseas for further studies.

The appellant gave a sworn statement of defence in which he denied stabbing the deceased. He stated that on 21st April 2004 he attended church at 10 a.m. 3 hours later he left church and went to play pool at a bar known as Hollywood in the same shopping centre. He never went to the bar where the deceased was stabbed. He played pool and thereafter left for home. Later at 9 p.m. some people came to his house, arrested him and beat him up knocking out 2 of his teeth. He was taken to the chief's camp and was later charged with the offence.

In support of his petition of appeal, the appellant submitted that the sentence imposed was harsh, he never committed the offence, the case was not properly investigated, he was in another bar, nobody saw him with a knife that he is alleged to have stabbed the deceased with, there was no evidence of bad blood between him and the deceased and finally that the learned magistrate shifted the burden of proof to appellant.

Ms Ngalyuka, learned state counsel opposed the appeal. Counsel submitted that P.W.1 had talked of the events leading to the attack which showed that the appellant had differed with the deceased. That P.W.2 and 6 saw the appellant in the bar in which the deceased was and also saw the fight between the two and shortly thereafter the deceased claimed that he had been stabbed by the appellant. Counsel further submitted that the deceased was consistent all along that he had been stabbed by the appellant. To counsel therefore all the circumstances pointed to the appellant in the commission of the offence. Finally counsel submitted that the offence was committed in broad daylight and accordingly the issue of mistaken identity cannot arise.

I have analysed afresh the evidence that was adduced in the subordinate court and evaluated it independently as I must do, this being a first appeal. See **Okeno v/s Republic (1972) E.A. 32**.

In convicting the appellant, the learned magistrate delivered herself thus:

"…… **The testimonies of these witnesses are clear and consistent and I have no doubt that the accused and the deceased met at the bar. The deceased went to attack the accused. The witnesses saw the two men quarrel and fight. The deceased then emerged from the fight while stabbed. He told his people who were there and also his wife and neighbours who visited him that he was stabbed by the accused. This dying declaration is fully and sufficiently corroborated by the evidence of the quarrel and the fight and the deceased coming off when stabbed……. I find that the accused stabbed the deceased when they were fighting ……."**

I have no reason to depart and or disagree with the learned magistrate's conclusions. It should be recalled that the offence was committed in broad daylight. It was in fact slightly after 4 p.m. So that the question

of mistaken identity does not arise. It would appear that both the deceased and the appellant had been spoiling for a fight all day long. It all started earlier in the day when the appellant had quarrelled with the deceased calling him a bad man. At about 4 p.m. the appellant again came to the deceased's kiosk and demanded to be sold cowhead meat. When the deceased refused, another quarrel ensued and when P.W.1 intervened, the appellant walked away. Shortly thereafter the deceased left for the bar at the same shopping centre i.e. Githembe. Whilst in the bar P.W.2 and P.W.6 saw the appellant enter the same bar. Immediately he entered the deceased went for him with his hands. When P.W.2 and other bar patrons separated them, the deceased turned to them and informed them that he had been stabbed by the appellant. At this juncture the appellant was still in the bar. The appellant was a person well known to both P.W.2 and P.W.1. Soon thereafter, the deceased left for his house and when he met his wife he immediately informed her that he had been stabbed by none other than the appellant. Both P.W.1 and P.W.2 saw the stab wound on the deceased. It is quite evident that the appellant was not in another bar playing pool at the time that the deceased was stabbed as he alleged. P.W.2 and P.W.6 could not have made up the story of seeing the appellant in the bar for no apparent reason. In any event if indeed he was in Hollywood bar playing pool, he was not playing pool alone. There must have been other patrons and or pool players in that bar. Why could he have not called any one of them to support and or back up his claim. I am aware that in criminal jurisprudence an accused need not prove anything. However in cases such as this it would be prudent and in the interest of the accused to have his story supported. Soon after the deceased was stabbed virtually everybody at the shopping centre got wind of the incident and the name of the appellant kept popping up as the person responsible. P.W.3, P.W.5, P.W.7 and P.W.8 all got to know from members of the public that the appellant had stabbed the deceased. Why should members of the public Zero in on the appellant and no one else as the person responsible for stabbing the deceased if it was not true. They could have picked on someone else if indeed the appellant was innocent as he claimed. The appellant seems to be suggesting that the case was framed against him. However he does not give any reasons. He never raised the issue when he cross-examined the prosecution witnesses. He claims that the witnesses who testified had a grudge against him but does not state the essence of the grudge. There were various witnesses and it is difficult to imagine that all would have had grudge against him for no apparent reason. There is however evidence that there was no grudge at all between the deceased and the appellant. The appellant even agrees that much in his own testimony. And even if there was I do not think that the deceased would have stabbed himself fatally so as to frame and settle scores with the appellant in death.

The deceased once stabbed immediately informed those who cared to listen that he had been stabbed by none other than the appellant. He repeated the same message to his wife immediately he came across her. It should be remembered that 10 minutes earlier the deceased's wife had witnessed the quarrel between her deceased's husband and the appellant. I would hold just like the learned magistrate did that what the deceased told the people in the bar, his wife and neighbours who visited him that he was stabbed by the appellant was in the nature of dying declaration. After all he was staring death in his eyes. He had no reason therefore to lie. A statement by a dead person as to the cause of his death or as to the circumstances of the transaction which resulted in his death in cases in which the cause of death of the person comes in question is admissible under section 33(a) of the evidence Act. Although the court can in law solely rely on such evidence there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction. (See **Choge v/s Republic (1984) KLR 1, Kihara v/s Republic (1986) KLR 473, Aluta v/s Republic KLR 543**. In the Aluta case (supra) the court of appeal relying on **Olale and others v/s Republic (1965) EA 555** said at page **547** paragraph 10 as follows:-

"**A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is, generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of accused and not subject to cross-examination unless there is satisfactory corroboration ….."**

I have no doubt that the dying declaration was sufficiently corroborated by the evidence of P.W.1, P.W.2 and P.W.6. They testified as to the quarrel, the ensuring fight and the deceased being seen stabbed in the presence of the appellant who then casually walked away. There is also evidence that when the appellant went away, he went home and armed himself with a panga. What was he afraid of? Your guess is just as good as mine.

There is no doubt at all that it is the appellant who stabbed the deceased. All the circumstances point to the appellant's involvement in the crime. It is clear to me that in stabbing the deceased the appellant used more force than was absolutely necessary. As correctly observed by the learned magistrate, the deceased in attacking the appellant was using his bare hands. However the appellant hit back with a knife. Also the attack was at the door of the bar and it was open to the appellant to retreat. He did not. He should never have responded to the deceased's attack with a knife at all. His act was premeditated and reckless and resulted in the loss of a life.

The appellant in a bid to disentangle himself from the crime has claimed that nobody saw him with the knife or as he stabbed the deceased. Yes no one saw him with the knife. It is possible that he was not carrying it in a manner that anybody would have seen. Be that as it may there is the dying declaration by the deceased that he had been stabbed by the appellant. The evidence of Dr. Julius Kimani Mugo (P.W.10) who tendered in evidence the post-mortem report confirmed that the deceased had been stabbed. The appellant must have had the knife hidden somewhere which he used to stab the deceased.

The appellant has also referred this court to section 206 of the penal code. That section deals with malice aforethought. Malice aforethought is relevant for purposes of a charge of murder. The appellant is presumably saying that there was no malice aforethought in his actions. However the appellant was not charged with murder but manslaughter so that the issue of malice aforethought is irrelevant. But if it was required, one could easily have established the same by the appellant's conduct. He quarrelled with the deceased, went away and 10 minutes later stabbed the appellant. It is possible that he walked to pick the knife if he did not have it and prepare to attack the deceased in the bar. By stabbing the deceased fatally, the appellant must have intended the death of the deceased. There then is the malice aforethought.

The appellant also claims that the learned magistrate shifted the burden of prove to him in the cause of his judgment. Having carefully read and considered the judgment I discern no such shifting of the burden of proof.

From what I have stated herein above, it must be obvious that the grounds of appeal raised by the appellant in his petition of appeal lacks merit. Things like who recorded the statement, time when the crime was committed, the activities of the deceased before he met his death, the medical officer who attended the deceased after the assault and why all the statements were recorded after the death of the deceased are all irrelevant matters which could not have advanced the appellant's defence any further. The appellant did in his petition of appeal allude to the fact that he was mentally sick and had been admitted previously at Mathare mental hospital. The record however does not show that he raised the issue during the trial. He did not even pursue the issue before this court. If indeed his allegation was true, certainly it was worth of consideration. Further when he appeared before me during the hearing of the appeal, he did not strike me as a person who was mentally sick. In my view the issue is a mere red herring and an afterthought.

Upon my consideration of the entire evidence on record, I am satisfied that the appellant was properly convicted and I uphold the conviction and sentence. I note that the appellant was sentenced to 10 years imprisonment. The offence committed carries a maximum sentence of life imprisonment. That being the case, it cannot be heard from the appellant's mouth that the sentence imposed was manifestly harsh and excessive. To my mind it was even lenient.

In the result, the appeal is hereby ordered dismissed in its entirety. I so order.

Dated and delivered at Nyeri this 26th day of October 2007

M. S. A. MAKHANDIA

JUDGE