



**Issac v Republic (Criminal Appeal E005 of 2024)  
[2024] KEHC 13284 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13284 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E005 OF 2024  
JN ONYIEGO, J  
OCTOBER 24, 2024**

**BETWEEN**

**YUSSUF ADAN ISSAC ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence by Hon. R. Aganyo in  
Criminal Case No. 040 of 2022 at Wajir Law Court delivered on 03.10.2022)*

**JUDGMENT**

1. The appellant herein, Yussuf Adan Issac alias G.S.U was charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. Particulars of the offence were that on 14.01.2022 at Basabra Supermarket in Wajir Sub County within Wajir county he unlawfully killed Mohamed Kullow Ali.
2. The appellant pleaded not guilty to the charge and the matter proceeded for hearing. The trial magistrate after hearing seven prosecution witnesses and the unsworn testimony of the appellant found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict and sentence the appellant to life imprisonment.
3. Aggrieved by the said conviction and sentence, the appellant filed an undated amended petition of appeal on the following grounds:
  - i. That the trial magistrate erred in law and fact by meting out a sentence that was not only harsh, degrading, unconstitutional and in appropriate in the circumstances herein.
  - ii. That the trial magistrate erred in law and fact by not appreciating the fact that the appellant committed the offence under the influence of intoxication thereby contravening section 13(2) and (4) of the penal code.



- iii. That the trial magistrate erred in law and fact by failing to consider the mitigation on record before meting out the impugned sentence.
4. The appellant urged this court to quash the conviction and set aside the sentence and finally set him at liberty.
5. In support of the above grounds of appeal, the appellant relied on his filed but undated submissions while the respondent chose to submit orally.
6. The appellant urged that the sentence by the trial court disregarded his dignity pursuant to articles 27, 28 and 29 of *the constitution*. That the state cannot turn an offender into an object of crime prevention to the detriment of his constitutionally protected rights. It was averred that the said sentence was unconstitutional and degrading. Additionally, that the impugned sentence being indeterminate in nature, is inhuman. To buttress that argument, the court was referred to the case of R vs Bieber (2009)1 WLR 223, England court of appeal.
7. It was also his argument that the trial court failed to appreciate that he was under the influence of alcohol at the very time when the offence was allegedly committed. He contended that the court failed to ascertain the content of alcohol in his body before finding him guilty.
8. On mitigation, the court was faulted for having failed to consider the same at the time of rendering the sentence. That the trial court erred by failing to take notice of the fact that there was a purposeful meaning by the provision of section 216 and 329 of the Criminal Procedure Code in accordance with the principles of a fair trial. According to the appellant, his conviction was unsafe hence fit for quashing.
9. The respondent on the other hand submitted that the prosecution's evidence was cogent thus lending credence to the conviction and sentence imposed by the trial court. Counsel urged that the court did not err in view of the circumstances under which the offence was committed. That the appellant caused the death of the victim for no apparent reason and therefore, he was deserving of the said sentence. This court was therefore urged to dismiss the appeal as the same was devoid of merit.
10. In determining this appeal, this court being a first appellate court is alive to the principles laid down in the case of Okeno vs Republic (1972) EA 32 in which the court held that as a first appellate court, is duty bound to re-evaluate, re-assess and re-consider the evidence tendered before the trial court a fresh and make its own independent determination without losing sight of the fact that the trial court had the benefit of seeing and listening to the witnesses to enable it assess their general demeanour.
11. Brief facts of the case are that, PW1, Dr. Hassan conducted a postmortem examination on the deceased's body. He opined that the cause of death was internal brain injury (contusion). On cross examination, he stated that he relied on the CT scan which showed that there was internal bleeding on the head, in the brain.
12. PW2, Hussein Hassan, a clinician at Ladnan Hospital stated that while at the hospital, the deceased was brought in and when he went to attend him, he realized that he was unconscious and so, he directed that he be admitted in the ward. Noting that it was a Friday and people were rushing to the mosque for prayers, he tried to fetch more information regarding the deceased in vain. That he only managed to acquire little information from the good Samaritans who brought him to the hospital claiming that the deceased had been assaulted as he was walking near Basabra supermarket.
13. Noting that a CT scan was required but the said facility did not have one, he referred the deceased to Wajir County hospital for further checkup. It was his evidence that it took long before the deceased could be taken to Wajir County hospital since his relatives weren't around. That it was the good Samaritans who acted although belatedly.



14. He further stated that when he arrived at the Wajir County hospital, the consultant also took a long time before attending the deceased and in the process, he succumbed to his injuries. He stated that the person who attacked the deceased on his feet was one “G.S.U”. the appellant herein.
15. PW3, Abdi Adan Isack testified that on 14.01.2022 at around 10.30. a.m, Maalim Ali informed him that GSU had injured a fellow who had been rushed to Ladnan Hospital. It was his evidence that he proceeded to the hospital to see the deceased who was still alive at that time. That the deceased was a person well known to him as they were from one family besides worshipping in the same mosque. While at Ladnan, they were told to take him to Wajir County hospital for CT scan but unfortunately, he passed on and so, they returned him to Ladnan Hospital. He stated that GSU was a person well known to him as he was a son to his brother.
16. PW4, Ali Hassan Abdi, recalled that on the material day, he was in his car outside the Basabra Supermarket when he saw the deceased pass in front of his car. At that time, one “GSU”, the appellant herein, approached the deceased from behind and hit him on the legs using his left leg thereby making the deceased fall down thus hitting his head on the ground. It was his evidence that the deceased had a bakora and a bag which he assisted him pick up.
17. It was his testimony that the deceased was unconscious for some time but upon regaining consciousness, he assisted him with some drinking water and thereafter, guided him cross the road to Ladnan hospital. He proceeded to call the appellant’s parents and informed them of what the appellant had done. It was his case that the uncle to the appellant, one mzee Abdi responded by visiting the deceased at the hospital. It was his testimony that the said, mzee Abdi later on informed him that the deceased had passed on. On cross examination, he reiterated that he saw the appellant assault the deceased.
18. PW5, Jamaa Mohamed Bolo recalled that on the material day, he was near Basabra supermarket waiting for the would be clients since he operated a taxi. While there, he saw the appellant approach the deceased then hit his leg causing the deceased to fall on his back thus hitting his head down on a pavement. Upon the appellant leaving the scene, he joined others in trying to offer help to the deceased as he feared the appellant could also injure him. On cross examination, he stated that he saw the appellant sweep the deceased on his feet thus causing him the fall that made him hit his head on the ground.
19. PW6, No. 236242 PC Washington Okech Ouma testified that on 14-01-2021 while at his place of work, the OCS told him to accompany the DCIO to Ladnan Hospital and thereafter to go visit as scene of crime. Upon reaching the said hospital, they were welcomed by the hospital management who took them to where the deceased was lying dead. He stated that he was told that the deceased had been assaulted by the appellant. That while there, he received information that a mob had caught up with the suspect the appellant herein and were beating him at soko mjinga. They left the hospital for soko mjinga where they rescued the appellant who seemingly was drunk. He arrested him and took him to the police station. He thereafter took the appellant to Wajir County hospital for medical attention.
20. PW7, 54774 Ssgt. Peter Mutiso, the investigating officer stated that he was directed to take over the matter by one CI Kello Musyimi. That he took up the matter and together with PC Walubasi, they attended the hospital for the purposes of post mortem examination and thereafter, embarked on the process of recording statements from witnesses. He reiterated the evidence of the other prosecution witnesses noting that the appellant herein followed the deceased who was walking along the pavement near Basabra supermarket and then swept him on the ground thus occasioning the fall that caused the death herein.



21. He went further to state that the deceased was rushed to the hospital but unfortunately, he succumbed to his injuries. It was his evidence that he also interviewed the appellant to know why he assaulted the deceased but no answers were forthcoming. He stated that the appellant was checked and found to be mentally stable. Upon finishing his investigations, he charged the appellant with the offence in question.
22. Placed on his defence, the appellant gave unsworn testimony and called no witness. He stated that on the material day, he woke up and proceeded with his work at a construction site. That after work, he went for a drink. At 9.00. p.m., while leaving the bar, a security guard at Ladnan told him to change direction as people were looking for him. In obedience to the guard's advice, he headed to soko mjinga where people caught up with him and started beating him up.
23. He claimed that he was oblivious as to why people were beating him. That he was later informed that he had injured someone near Basabra supermarket. He denied committing the offence and claimed that people simply hate him because of his drunkenness.
24. I have carefully considered the appellant's grounds of appeal, the evidence adduced before the trial court and the submissions by the parties. In my considered view, the issues for determination are:
  - i. Whether the offence of manslaughter was proved beyond reasonable doubt.
  - ii. Whether the sentence imposed was harsh and excessive.
25. The appellant was charged with the offence of manslaughter. In his defence and basically in his grounds of appeal, he heavily relied on the defence of intoxication. He claimed that the trial court erred in law when it convicted him despite the fact that he was drunk hence he did not appreciate his actions at the time in question.
26. In Republic vs George Onyango & Another [2016] eKLR, Makau J expressed himself with regard to proof of manslaughter as follows: -

“In a case of manslaughter the prosecution is supposed to prove the primary ingredients of the offence namely: -

  - i. The death of the deceased and the cause of the death of the deceased.
  - ii. That the accused committed the unlawful act which caused the death of the deceased.”
27. In the present appeal, the prosecution did establish that the deceased met his death as a result of internal brain injury (contusion). The post mortem report was produced by Dr. Hassan, PW1. There is therefore no doubt that the deceased died.
28. On whether the death was caused by the appellant herein, the direct evidence of PW4 and PW5 clearly shows that it was the appellant who assaulted the deceased thus causing him the fall that claimed his life. It is trite that direct evidence establishes a particular fact without the need to make an inference in order to connect the evidence to the fact. In any event, the appellant does not deny the fact that he assaulted the deceased. His only argument is that the same happened when he was allegedly drunk and could therefore not appreciate his actions at that specific time. He therefore pleaded the defence of intoxication.
29. Section 13 of the penal code provides as follows with regard to intoxication.



1. Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
  2. Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—
    - a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
    - b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
  3. Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.
  4. Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
  5. For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs.
30. From the above provision, intoxication is only available if it renders one temporarily insane to the extent that he or she is incapable of appreciating what he or she is doing. This can be as a result of involuntary or voluntary intoxication. However, it is trite that a person who commits an offence when intoxicated is not automatically excused from the consequences of his act. This position was buttressed in the case of *Evans Mark Oongo vs Republic (2021)e KLR*. Similar position was held by the court of appeal in the case of *Bakari Magangha Juma v Republic (2016) eKLR* where the court said that a person who commits an offence while intoxicated is not ipso facto excused from the consequences of his act.
31. Whereas the appellant is claiming the element of intoxication, he did not lay any basis to convince the court that he was indeed drunk. In his defence he claimed that on the material day, he left for his place of work and that he went for a drink until 9.30 pm when he was arrested. With this kind of defence, he could not have been drunk at 7.30 am when the offence was committed. In any event, he did not state that he was drunk at that time.
32. The trial court found the defence of intoxication as an afterthought since the same was not built up during cross examination. Indeed, I do agree with the trial magistrate that the defence of intoxication was introduced late in the day. Although pw6 said that the appellant was drunk at the time of arrest at 9.30 pm, which was later in the day after the deceased had been attacked in the morning at 7.30 a.m as per pw4's evidence, that is not proof enough that at the time of the attack he was drunk.
33. It was incumbent upon the appellant to convince the court that he was drunk at the material time and that he didn't know what he was doing. He did not even tell the court the type of beer he drunk, how much he had taken, for how long and where. It is not enough for an accused person to merely state that he was drunk. Those who saw the appellant attack the deceased did not mention that he was drunk.
34. Taking into account the totality of the circumstances of this case, I do not find room to hold that the appellant did not know what he was doing due to drunkenness. The actus reus is clear hence not in dispute. As to the mensrea, he is deemed by inference to have known that his action was likely to cause injury to the deceased hence an unlawful act capable of attracting liability in this case death. It does not matter whether he desired the death of the deceased or not. He must be answerable to the



eventual consequence of his unlawful action in this case the charge of manslaughter. To that extent, I am convinced that the prosecution proved its case beyond reasonable doubt and the appeal against conviction is accordingly dismissed.

35. On sentence, the same is an act of discretion bestowed upon the trial court. The Court of Appeal in the case of *Ogolla s/o Owuor vs Republic*, [1954] EACA 270, pronounced itself on this issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

36. Section 205 of the Penal Code provides that any person who commits the felony of manslaughter is liable to imprisonment for life. The trial court sentenced the appellant to life imprisonment arguing that the appellant was liable to pay for his sins.

37. However, the Court of Appeal in *Malindi Criminal Appeal No.12 of 2021 Between Julius Kitsao Manyeso vs Republic* declared the sentence of life imprisonment to be unconstitutional. Justices Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be held behind bars indefinitely until they die. The three hon. justices held that to condemn an accused person to an indeterminate sentence is inhuman and degrading.

38. I do not agree with the learned magistrate’s holding that the sentence for manslaughter is mandatory. The word “is liable” does not connote mandatory sentence. The court has discretion to impose even a lesser sentence depending on the circumstances of the case. See *Republic v Isaac Wanjala Murumba (2021) eKLR* where the court imprisoned the accused to 3 years imprisonment for the offence of manslaughter.

39. In the case of *State v Jack Ooko Samo (2021) e KLR aburili J* sentenced the accused person to 5 years imprisonment for the offence of manslaughter. After considering the pre-sentence report, the appellant has two other previous convictions. He was described as a dangerous criminal. In the circumstances, I find a sentence of 12 years imprisonment appropriate. Accordingly, the sentence of life imprisonment is set aside and the same substituted with a sentence of 12 years imprisonment.

40. I have also noted that the appellant had stayed in remand custody for 9 months and 4 days pending his trial. Therefore, in computing sentence, the same period will be deducted from the 12 year sentence pursuant to Section 333(2) of the CPC.

ROA 14 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**J. N. ONYIEGO**

**JUDGE**

