REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 7 OF 2015

REPUBLIC.....PROSECUTOR

-versus-

KENNEDY CHACHA MASIAGA.....ACCUSED

JUDGMENT

1. **Thomas Masiaga Mang'ang'a**, (hereinafter referred to as '**the deceased'**), the father to the accused person herein, **Kennedy Chacha Masiaga**, sustained injuries in the early morning of 26/01/2015 and was rushed to hospital where he passed on. That was in Kibweye village, Tagara Location in Kuria West Sub-County within Migori County.

2. On completion of police investigations, the accused person was charged on 13/02/2015 with the murder of the deceased where he initially admitted the charge and the facts, but the defence contended that the charge of murder was not proved since the accused person was so drunk to know what happened at the time of the alleged incident. Parties were given time for plea bargaining but no consensus was reached and the hearing of the case followed.

3. In a bid to prove the information, the prosecution called a total of six witnesses. **PW1** was **Mathias Gesanda Zakari,** a neighbour to both the deceased and the accused person. An elder brother to the deceased one **Ezekiel Robi David Mang'ang'a** testified as **PW2.** Another neighbour to the deceased one **Julius Mwikwabe** testified as **PW4**. The Chief of Tagare Location one **Joannes Kuhuna Salati** testified as **PW5. Dr. K'Ogutu Vitalis Owuor** testified as **PW3** and one of the arresting officers **No. 2008077768 APC Susan Paul** testified as **PW6**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

4. The prosecution case was that in the early morning of 26/01/2015 the accused person went to his father's house and harassed him together with his grandmother, the mother of the deceased. That, sensing danger the mother to the accused person one **Susan** (not a witness) rushed to the homestead of PW4 and woke him up and requested him to assist as the accused person was threatening to assault his grandmother. PW4 rushed to the home of the deceased and found the door to the house of the father of the deceased locked from inside. He pushed the door open and entered. He found the accused person standing next to his grandmother holding a metal rod and was about to hit her. PW4 disarmed the accused person and threw the metal rod out of the house. He then pulled the accused person outside the house and locked the door from outside leaving the grandmother inside the house. The accused person who was not drunk by then left their homestead.

5. PW1 who had been woken up the screams from the homestead of the deceased rushed there and found PW4 already there with some other villagers. PW1 and PW4 then opened the locked door and went inside the house. They found the deceased lying on the floor bleeding profusely and the deceased did not respond when they called his name. PW4 called PW2.

6. PW2 had been called earlier that night by her mother, **Esther David Marwa** (not a witness) and informed that some people had passed near her house going towards the house of the deceased saying that they were going to finish the deceased. As PW2 had been operated on and could not walk he immediately called the Chief (PW5) and asked him to rush and rescue the deceased in his homestead which was about 50 metres from the homestead of PW5. Shortly thereafter PW5 was called by **Mwita Masiaga** (not a witness) a son to the deceased and told that the accused person was seriously assaulting the deceased.

7. While PW1, PW4 and the others were still at the homestead of the deceased, the accused person returned and with the assistance of those present they arrested the accused person, tied him and locked him inside his house. The people organized for a car and rushed the deceased to hospital who was pronounced dead on arrival. PW5 arrived at the homestead as the deceased was rushed to the hospital. He called the Administration police officers from Mabera Camp who collected the accused person in their company of PW6. PW5 also called the OCS Isebania Police Station and informed him of the incident. The police arrived at the scene shortly thereafter and after interrogating the people thereat they proceeded to and collected the accused person and took him to the police station.

8. A post mortem examination for the deceased was conducted on 30/01/2015 by PW3 at Pastor Machage Memorial Hospital Mortuary. The body had several injuries with swollen face, fractures of the occipital region on the head and the left mandible, several penetrating wounds and bruises. The cause of death was opined as cardiorespiratory arrest due to subdural hemorrhage due to assault. PW3 filled in the Post Mortem Form which he produced in evidence. The accused person was then arraigned and charged before Court.

9. With the foregone evidence, the prosecution closed its case. The accused person was placed on his defence and gave a sworn defence where he stated that he was drunk on the said day and only came to his senses in the afternoon of 26/01/2015 when he realized he was at Isebania Police Station and was told by the police that he had killed his father. That, he only recalled taking *chang'aa* after work on 25/01/2015 and nothing more. The accused person did not call any witness and closed his case and the matter was left to Court for judgment.

10. I have carefully considered the evidence on record as well as the exhibits. As the accused person was charged with the offence of murder, the prosecution must prove the following three ingredients:

> ***(a) Proof of the fact and the cause of death of the deceased;***
>
> ***(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the '****actus reus'* ***of the offence;***
>
> ***(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the*** *'mens rea'* ***of the offence.***

I will therefore consider each of the issues independently.

(a) <u>Proof of the fact and cause of death of the deceased:</u>

11. It is not in dispute that the deceased person in this matter died. That position was confirmed by several witnesses and also by the accused person. The first limb is hence answered in the affirmative.

12. As to the cause of the death of the deceased, PW3 who conducted the post mortem examination on the deceased revealed the injuries that led to the death of the deceased and also filled in and produced a Post Mortem Report. He opined that the likely cause of the death of the deceased was cardiorespiratory arrest due to subdural hemorrhage due to assault. Since there is no any other evidence contradicting that evidence on the cause of death of the deceased, this Court so concurs with that medical finding. The second limb is also answered in the affirmative.

(b) Proof that the death of the deceased was the direct consequence <u>of an unlawful act or omission on the part of the accused person:</u>

13. This issue is aimed at establishing whether the accused person caused the death of the deceased and if so, whether it was by an unlawful act or omission. The accused person while admitting that he caused the death of the deceased took refuge in the defence of intoxication.

14. As to whether the first accused person was so intoxicated to an extent of not knowing what happened, the starting point is the law. Intoxication has been provided for as a defence to a criminal charge under **Section 13** of the **Penal Code** Chapter 63 of the Laws of Kenya and provides that: -

> ***"13. (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) ……***
>
> ***(4) ……***
>
> ***(5) For the purposes of this section, "intoxication" includes a state produced by narcotics or drugs."***

15. From the reading of the entire section it appears that the defence of intoxication is very narrow in its application. The defence can be raised in two instances. **First**, under **sub-section 2(a**) in which case the burden of proof is on the accused person to satisfy the conditions therein. **Second**, under **sub-section 2(b)** in which case the burden remains on the prosecution. The Court of Appeal for Eastern Africa in the case of **<u>Kangaro s/o Mrisho vs. R (1956) 23 EACA 532</u>** referred to the case of **<u>Cheminingwa vs. R</u>**, in which it was stated: -

> ***'It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused."***
>
> *See:* ***<u>Joshua Matata Ndonye v R, [2001] eKLR,</u>*** *CR No. 122 OF 1991 (Kwach, Shah & O'Kubasu JJ. A).*

16. The Court of Appeal cases of **Manyara v. R (5) (1955) 22 EACA 502**, **Nyatike s/o Oyugi (1959) EA 322** among others remain very relevant on this issue.

17. In this case the accused person contended that because of the intoxication he did not know what he did and as such he did not even know that the deceased was injured. In that case the burden squarely remains on the prosecution. It is hence for this Court to ascertain, from the evidence, if the accused person was so drunk that he was driven to temporary insanity or that he did not know what he was doing.

18. PW1 stated that the accused person was drunk and smelt liquor and that he was so charged. PW1 further stated that he heard the accused person from a distance speaking in a loud voice saying in Kiswahili that *'make the phone calls you are always so fond of making…'* That, the people feared that the accused person could injure them and that is why they arrested and tied him. On his part PW4 who disarmed the accused person stated that he found the accused person not drunk at all. The other witnesses did not testify on whether the accused person was drunk.

19. The injuries inflicted on the deceased were serious and many. After injuring the deceased the accused person was heard by PW1 telling the deceased to make the phone calls he was so fond of making. The accused person definitely knew what he was talking about. Further, the accused person left their homestead and then returned while so charged that PW1 feared that the accused person would injure more people and they had to restrain him by tying him up and locking him inside his house. It was PW4 who had a very close encounter with the accused person including disarming him. PW4 however did not smell any alcohol on the accused person. Be that as it may, the actions of the accused person were far beyond those of a drunkard who knew nothing. They were so calculated and precise and the accused person knew that the deceased would not even be able to make any phone call as a result of what he had done to him hence the sarcasm.

20. This Court therefore finds and holds that the accused person was not intoxicated but even if he was he was, he was not so intoxicated not to know what he was doing. He remained so alive of what he did and he cannot attempt to hide under the umbrella of intoxication. The defence hereby fails and the second ingredient is answered in the affirmative.

(c) Proof that the said unlawful act or omission was committed with malice afterthought:

21. I will now consider the third limb as to whether there was malice aforethought on the part of the accused person in committing the offence at hand. The starting point is the law. **Section 206** of the Penal Code defines *'malice aforethought'* as follows:

> ***"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -***
>
> > ***(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
> >
> > ***(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.***
> >
> > ***(c) An intent to commit a felony.***
> >
> > ***(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.***

22. In the case of **Joseph Kimani Njau vs R (2014) eKLR,** the Court of Appeal in concurring with an earlier finding of that Court (but differently constituted) in the case of **Nzuki vs R (1993) KLR 171,** and in dealing with the issue of malice aforethought held as follows: -

> ***"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; The intention to cause death;***
>
> > ***i) The intention to cause grievous bodily harm;***
> >
> > ***ii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.***
>
> ***It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975) AC 55").*** (emphasis added).

23. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

> ***"There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him gracious harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."***

24. From the evidence in this case it is not clear why the accused person attacked the deceased and hence so difficult to impute malice. I am therefore unable to imply any malice aforethought in the circumstances of this case. I find the third ingredient in the negative.

25. As the foregone analysis does not therefore support a conviction in respect of the information of murder, the accused person is hence found not guilty of the murder of the deceased and he is hereby acquitted. However, it is clear that the deceased lost his life as a result of the actions of the accused person, but of course without any malice aforethought.

26. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analyzed hereinbefore, this Court finds the accused persons guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and each of them is accordingly convicted.

DELIVERED, DATED and **SIGNED at MIGORI this 11th day of October 2018.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Kisia, Counsel for the Accused person.

Mr. Kimanthi, Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant