IN THE COURT OF APPEAL

AT NYERI

(CORAM : GICHERU. KWACH & OMOLO, JJ.A.)

CRIMINAL APPEAL NO. 19 OF 1996

BETWEEN

ELIAS GITONGA M'BII……………….……1ST APPELLANT

JAMES MIRITI MUKINDIA…………………2ND APPELLANT

AND

REPUBLIC……………………...........…………..RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Meru (Justice Ong'undi) dated 15th December, 1995

IN

H.C.CR.C. NO. 6 OF 1995)

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JUDGMENT OF THE COURT

The thrust of the appellants' appeal to this Court is that the learned trial judge was wrong in law in convicting the first appellant who was the first accused in the superior court and the second appellant who was the third accused in the same court for the offence of murder contrary to section 204 of the Penal Code solely on the evidence of a single witness, Patrick Kiburugu (P.W.1), the reliability of which was suspect for the reason of this witness having been taking beer on the material date from about 4.00 p.m. to some time in the night. The appellants also complain of the learned trial judge having leaned too heavily towards the offence of murder against them notwithstanding their alcoholic intoxication which ought to have reduced the offence for which they were convicted to that of manslaughter contrary to section 205 of the Penal Code.

The submissions of their counsel, Mr. Kibera, before us on 13th May, 1996 was that P.W.1 having been under the influence of alcohol, his identification of the appellants as the perpetrators of the murder of Charles Murungi, the deceased, was unreliable notwithstanding the presence of bright moonlight when the offence was allegedly committed. In any event, according to counsel, the learned judge did not address himself to the possibility of the offence allegedly committed by the appellants being that of manslaughter on account of their being incapable of forming a specific intent to kill or do grievous harm to the deceased due to their having been under the influence of alcoholic drinks. This, according to him,

was not only manifest in the trial judge's summing up to assessors but also in his judgment both of which made no reference to the possibility of reducing the appellants' charge of murder to that of manslaughter.

Counsel for the respondent, Mr. Kabitu, however, was of the view that P.W.1's evidence was reliable and that it was properly acted upon by the learned trial judge. Indeed, according to him, the appellant's intoxication was not such that it incapacitated them from forming a specific intent to kill or do grievous harm to the deceased. To him therefore, the appellants had the requisite malice aforethought when they fatally assaulted the deceased.

The appellants, P.W.1, the deceased and others who included Geoffrey Mutungi M'bii who was the second accused in the superior court and one by the name Mutembei had been drinking beer at the bar of Francis Muriithi Muthuri (P.W.2) from about 4.00 p.m. on 25th July 1983. By about 7.00 p.m. these people were drunk and it would appear that at this time they were using one table. The deceased shook this table and in so doing the beer of the girl who sat with them at this table poured out into her dress. A fracas erupted and in the process the deceased was struck on the head with an iron by the first appellant. P.W.2 stopped the fight and took the deceased inside the bar counter from where he was selling beer and locked it with a padlock. He then chased away from his bar all those who were involved in the fight with the deceased. After awhile, the second accused in the superior court came back into P.W. 2's bar and told the deceased that the people who wanted to beat him had laid an ambush en route to his home and offered to show him an alternative route. Deceased accepted and accompanied by P.W. 1 they all three left P.W.2's bar.

Not long after leaving P.W.2's bar, the deceased, P.W.1 and the second accused in the superior court met Mutembei standing near a fence. Mutembei asked the deceased why he had poured beer on his sister's dress to which the deceased said that that problem had been resolved at P.W.2's bar. The first and second appellants then joined Mutembei and on their doing so, the second accused in the superior court went away. The first appellant, according to P.W.1 who was still with the deceased, took out the hammer he had with him and with it struck the deceased on the head after having told Mutembei not to delay. The deceased fell to the ground and the first appellant pressed him down and then sat on him. As the two were struggling with each other on the ground, the first appellant called Mutembei and told him not to let him kill the deceased alone. Mutembei then joined the first appellant and got hold of the deceased's throat. The second appellant joined them and held the deceased's legs. P.W.1 requested them to leave the deceased but they did not. Instead, the first appellant left the deceased and went to where P.W.1 was and knocked him down. When P.W.1 got an opportunity to escape, he ran away from the scene screaming. According to him, besides there being bright moonlight when the deceased was being assaulted by the appellants and Mutembei, he had known these assailants before. On the following morning, he found the deceased having been dragged from the main road to a footpath. He was unconscious and was taken to Chogoria Hospital where he was admitted with a depressed fracture of the skull at the back of his head resulting in a large sub-dural haematoma which was evacuated during an operation. He died of focal and global injury to the head.

The first appellant's defence to the case against him was that P.W.2 had a grudge against him over a girl he intended to marry while that of the second appellant was that he had a land dispute with P.W.2 and according to each of the appellants, these were the respective reasons why P.W.2 gave evidence against them. The appellants seem to have had no quarrel with the evidence of P.W.1 against them.

After warning himself of the dangers of relying on the evidence of identification of the appellants by P.W.1 on account of their assault on the deceased having taken place in a moon-lit night and the fact of P.W.1 having been drinking for several hours, the learned trial judge in his judgment had this to say:-

"I accept the evidence that the accused persons were at Jossy Bar together with Kiburugu (P.W.1) and the deceased from the time Accused 1 and Accused 3 were chased from the bar and the time the deceased and Accused 2 left the bar was a short time. As there was bright moonlight and Kiburugu (P.W.1) knew them before and had shortly been with them, I am satisfied he recognized them. The conversation about spilt beer satisfy me there was no question of mistaken identity."

The learned trial judge then proceeded to say that:-

> "There is no doubt Accused 1 intended to cause the death of the deceased. He pleaded with Mutembei not to delay and immediately struck the deceased with a hammer. According to Muthuri (P.W.2) Accused 1 had both a hammer and iron-bar at the bar. As soon as the deceased fell down he pressed him down and sat on him. Accused 1 then called his partner and pleaded with him not to let him kill the deceased alone. These were the actions of a person with a clear vision of what he had intended to do. It is the blow to the head that resulted in the death of the deceased. I find the charge against Accused 1 proved beyond reasonable doubt and find him guilty of the murder and convict him accordingly."

The learned trial judge then went on to say that:-

> "When Accused 3 joined Accused 1 in the ambush of the deceased to harm him, they all had a common intention……………………………………………….
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> The evidence show that when Accused 1 called out the others to help him murder the deceased, Accused 3 joined and held the legs of the deceased as the others held his throat. To my mind all had a common intention. I find Accused 3 also guilty of the murder and convict him accordingly."

The learned trial judge then proceeded to sentence each of the appellants to suffer death in a manner authorized by law. It is against their respective convictions and sentence that the appellants now appeal to this Court.

As we have indicated above, it appears to us that the appellants had no quarrel with the evidence of P.W.1. After the learned trial judge quite properly warned himself over that evidence as we have outlined above and subsequent thereto accepted it, the same became the linchpin to the appellants conviction of the offence for which they were charged. Notwithstanding his conclusion that from this evidence the appellants had a clear vision of what they intended to do when they inflicted the fatal blow on the deceased's head, it is plainly obvious that the learned trial judge made no reference to the effect of their intoxication despite clear evidence of their having been drinking beer at least from about 4.00 p.m. on the material day. Had he directed himself on this aspect of the case before him, we are unable to say what conclusion he would have arrived at. In the circumstances, we are uncertain that the prosecution discharged its onus of proof to the satisfaction of the learned trial judge that the appellants had the necessary intent to kill or do grievous harm to the deceased when they killed him. We note that while the assessors found each appellant guilty of murder, they also specifically stated that each appellant was drunk at the time the offence was committed. That ambiguous verdict of each assessor was clearly occasioned by the learned judge's failure to direct them that if they thought the appellants were so drunk that they could not form a specific intent to kill, they (assessors) could return a verdict of guilty to a charge of manslaughter. In the result, the appellants' killing of the deceased amounted only to manslaughter for which they should have been convicted. Consequently, we allow the appellants' appeal, quash their conviction of murder and set aside their sentence in respect thereof and substitute therefor a conviction for the offence of manslaughter contrary to section 205 of the Penal Code and taking into consideration all the circumstances of the case against the appellants, we sentence each one of them to 8 years imprisonment with effect from 15th December, 1995.

Dated and delivered at Nyeri this 17th day of May, 1996.

J. E.GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR