IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Apaloo CJ, Gachuhi & Cockar JJ A)

CRIMINAL APPEAL NO 63 OF 1992

MUGWIKA……..……. APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Meru (Oguk, J) dated 24th February, 1989 in HCCR Case No 23 of 1987)

JUDGMENT

The appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) and sentenced to death by the High Court at Meru. He has appealed to this Court on three grounds namely:

1. The learned judge erred in that he overlooked that the respondent not only had to dispose of the defence set up but had also to prove that the evidence adduced by the prosecution was consistent only with murder;

2. The learned judge erred in that he did not take into account that the inability of medical evidence to speak with precision about the cause of death or to conclusively identify the fatal injury, together with other circumstances to be referred to in submissions, opened up alternative possibilities requiring consideration;

3. The learned judge erred in not holding that the evidence did not eliminate as a reason hypothesis that the accused killed the deceased by an unlawful assault but without the intent necessary to constitute legal malice and therefore a conviction of manslaughter would have been the correct one, but not the conviction of murder.

The facts of the charge are that on 13th August, 1986 the deceased accompanied by other people went to demand the repayment of Shs 500/- owed to him by the appellant. The deceased left his home at about 5.30 pm in the company of another (PW3) and were joined by (PW2) later. They met the appellant on the way and all of them proceeded to the appellant's home. The appellant's home was in a homestead where his parents and brother lived. It happened that the appellant's sister-in-law had prepared liquor. The appellant asked the sister-in-law to serve them with liquor. They all drank talking and joking quite happily. After they had stayed there for sometime, at about 7.30 pm the appellant asked to be excused to proceed to his home so that he could get the deceased his property. The deceased is said to have told the appellant to get him half of the money only and remain with the balance. He did not take long but returned immediately armed with a bow and arrows. He went to the corner of the house and without

saying a word aimed at the deceased who was seated on a chair where they were still drinking outside in the open. He released the arrow and hit the deceased on his upper right side jaw below the right eye. The arrow got stuck in the jaw. PW2 and PW3 on seeing what had happened ran away. The deceased also ran with the arrow still stuck in the jaw and went to a neighbouring home to seek for help in having the arrow removed. The neighbour declined to remove the arrow but told him to go back to the place where he had been shot. The neighbour went to the deceased's house and alerted the deceased's brothers of what had happened.

On returning to where they were drinking the deceased asked the appellant's sister-in-law to remove the arrow but the sister-in-law saw the appellant approaching carrying a knife. The appellant then set upon removing the arrow by widening the place where it got stuck. After removing the arrow, the appellant ran away with it together with the knife he had used and left the deceased bleeding. The sister-in-law (PW1) then took a piece of cloth and tied it around the wound to stop bleeding. As soon as she finished bandaging the wound the deceased died.

The postmortem examination revealed that the deceased had a cut wound on the right side of the face and neck in front of the right ear about 41/2 x 2". It was deep severing the right facial artery and the jugular veins on the neck. The doctor's opinion was that the cause of death was due to cardio-respiratory failure due to haemorrhage from the severed blood vessels.

In his unsworn statement in Court the appellant stated that he had been visited by cattle thieves previously and when he heard his dogs barking he thought that thieves had come again. He woke and went out armed with a bow and arrow when he saw a figure of a person behind the cattle boma. He shot at that figure and then went back to sleep. The following morning he saw a dead person whom he knew as the deceased at his sister-in-law's compound.

Mr Kariuki who appeared for the appellant argued that there was a drinking party which the appellant, the deceased and the witnesses who gave evidence partook. There was no evidence of how much drink they all took but it was upto the prosecution to prove the extent of alcohol the appellant had taken. He further argued that, taking that evidence together with the other available evidence the result would not have been only one of murder. This was not done and the possibility of the killing being attributed to alcohol was not excluded. Mr Kariuki also complained that although the trial judge referred to the fact that the deceased and the appellant were drinking in his judgment, the effect of that had not been put to the assessors for their consideration.

On the medical evidence, Mr Kariuki submitted that there was evidence of the removal of the arrow by the use of the knife. Though this was dangerous, the removal was at the request of the deceased and the appellant was only trying to assist the deceased. The cut of the artery and the vein could have been caused by the arrow or at the time of the removal of the arrow. This he submitted that the cause of death was not intentional.

The principal state counsel in supporting the conviction and the sentence, submitted that the trial judge considered the issue of manslaughter but if there was misdirection by omission, this was not fatal.

The submission by Mr Kairuki has substance. In support of his submission that the appellant's conviction could not have been of murder but of manslaughter he relied on *Mancini v Director of Public Prosecutions,* [1941] 3 ALL ER 272 and *R v Sharmphal Singh s/o Pritam Singh, Sharmpal Singh s/o Pritam Singh v R* (1962) EA 13.

We have considered the evidence and find that taking into account all the circumstances of the case before the trial judge and considering what took place where the deceased and the appellant were drinking, it seems that the appellant's mind was affected by drink as to negative the inference of intentional killing. The judge omitted to address his mind on this and equally failed to draw the attention of the assessors to the legal consequences of drunkenness. In omitting to direct his mind to a possible verdict of manslaughter, the judge misdirected himself by non-direction. Had he directed himself and the assessors on the effect of drink and its possible effect on the appellant, he may in all probability, have

returned a verdict of manslaughter. We feel that the verdict of murder pronounced by the judge was not appropriate. For this reason, we quash the conviction of murder and set aside the sentence imposed thereon and substitute therefore a conviction of manslaughter and sentence the appellant to a term of 8 years imprisonment from the 24th February, 1989.

Dated and Delivered at Nairobi this 22nd day of July, 1993

F.K. APALOO

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CHIEF JUSTICE

J.M. GACHUHI

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL