IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Cockar & Muli JJ A)

CRIMINAL APPEAL NO 70 OF 1991

NZUKI…… APPELLANT

VERSUS

REPUBLIC……..…… RESPONDENT

(Appeal from the conviction and sentence of the High Court of Nairobi

(Mr Justice JA Mango) dated 5th July 1991 in

Criminal Case No 6 of 1990)

JUDGMENT

On 7th March, 1989 at about 5.00 pm Simon Muiruri Karaba, the deceased, together with three of this colleagues, Peter Ngige Sila (PW1), Paul Mburu Muiruri (PW2), and James Kihoro Kinguri (PW5) went to Beehive Bar in Eastleigh section 1 Nairobi. According to PW1, at about 8.00 pm while they were drinking and seated on a form inside the bar, the appellant walked therein and pulled the deceased from where he was seated on this form. Outside the bar, the appellant stabbed the deceased twice with a knife. The deceased fell down and PW1 who had followed them behind ran to Pangani Police Station to make a report of the incident but the police told him that he was drunk. He therefore returned to the scene and on finding the deceased not there, he went away to sleep. According to PW 2, however, when the appellant came into the bar, he pulled the deceased outside without any argument whatsoever and as he and his other colleagues followed together with one Kamwai, the appellant stabbed the deceased. He also stabbed Kamwai on the thigh. Kamwai did not testify at the trial of the appellant.

The testimony of PW5 was that when the appellant came into Beehive Bar, he found the deceased dancing to the music from the juke box. He then held the deceased and violently pulled him out of the bar. Outside this bar, this witness found the deceased lying on his back bleeding from his abdomen and on one of his sides. Regarding where the deceased was pulled from by the appellant, PW5 was supported by two bar-tenders, Damaris Ndungwa Kyalo (PW3) and Beatrice Nzula Kivilu (PW4) whose evidence was that the deceased was dancing to the music from the juke box when he was pulled out of the bar by the appellant.

Neither of the five witnesses mentioned above testified nor was there any other evidence of there having been any exchange of words between the deceased and the appellant before the latter or in the course of his pulling the deceased outside Beehive Bar. Indeed, it is not apparent why this happened at all.

After the deceased was stabbed by the appellant, he was taken to Kenyatta National Hospital where he died while undergoing medical treatment. Post-mortem examination on his body which was carried out on 17th March, 1989 established that he had sustained a deep wound in the mid-abdomen measuring 6 cm x 6 cm x 10 cm. This wound had penetrated into the abdominal cavity tearing the liver and the large intestine with the resultant haemperitoneum leading to his death.

The appellant's defence was that at the material date at 7.00 pm he was drinking beer at Beehive Bar when someone came into the bar saying "come out come out". Thinking that policemen had arrived at the bar as the same was unlicensed, all those in it came out. According to him, outside the bar he saw policemen. He then went to his father's bar and helped him to sell beer. Thereafter he went home to sleep. On the following day he learnt that someone had been killed at Beehive Bar but he did not know who had killed him. He was later arrested by the police and charged with the offence of murder contrary to section 204 of the Penal Code.

For the offence above mentioned, the appellant was convicted and on 5th July, 1991 he was sentenced to be detained at the President's pleasure in terms of section 25 (2) of the Penal Code. He now appeals to this Court against conviction and sentence and has put forward two grounds of appeal the first of which concerns his identification while the second is a complaint against the trial judge's finding that the deceased was stabbed by him.

At the hearing of this appeal, counsel for the appellant, Mr Mogikoyo, submitted that the appellant's identification was not free from error since the so called eye-witnesses had been drinking beer from about 4.00 pm to 8.00 pm at which latter time the appellant is alleged to have assaulted the deceased.

According to counsel, because of that, their ability to perceive was impaired. This, he contended, was borne out by the discrepancy regarding where the deceased was then he was pulled out of Beehive Bar by the appellant. Besides, the allegation by PW2 that one Kamwai was also stabbed on the thigh by the appellant at the time of the latter's assault on the deceased required that the said Kamwai should have testified to confirm or disown that allegation and possibly throw some light relating to the circumstances of the assault on him and on the deceased by the appellant. Failure to call his evidence, counsel concluded, must be taken adversely against the prosecution: and therein lay the trial judge's error in finding that it was the appellant who stabbed the deceased.

In opposing the appellant's appeal, counsel for the respondent, Mr Etyang, said that although the eye-witnesses were at Beehive Bar, they were not drunk and in any event, not all of them were drinking beer. According to him, however, the issue of lights inside the bar was not brought out clearly nor was the certainty whether the offence committed by the appellant was murder or manslaughter.

In a Spartan judgment of about one and half typed pages, the trial judge had this to say:

"The Beehive Bar is said to have been well lit and five witnesses who were in it all identified the accused whom they say is the one who dragged out the deceased and stabbed him. These witnesses say the accused was not a stranger to them as much also as the deceased was not. I have considered the evidence in this respect fully and I don't see that I can waste time debating as to whether there was or there wasn't mistaken identification. There wasn't. Accused has been overwhelmingly identified as the person who pulled out the deceased and as soon as he pulled him out, there was a scream and the deceased was found to have been viciously stabbed. I also have no doubt that the person who inflicted the unkind and heartless cut was the accused person. This has been proved beyond reasonable doubt. The cut was such that whoever inflicted it intended to kill or at least to cause grievous harm. I, like the assessors, have no doubt, after considering thoroughly the evidence, the defence and all submissions that the charge of murder against the accused is proved beyond reasonable doubt. I find him guity of that charge and accordingly convict him of it."

For the purposes of the present appeal, murder is the unlawful killing of a human being with malice aforethought. "Malice aforethought" is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his

victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result. See the case of *Regina v Vickers*, [1957] 2 QB 664 at page 670. An intention connnotes a state of affairs which the person intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. See the case of *Conliffe v Goodman*, [1950] 2 KB 237.

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:

(i) The intention to cause death;

(ii) The intention to cause grievious bodily harm;

(iii) Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.

It does not mater in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed.

Without an intention of one of these three types, 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 the crime of murder. See the case of *Hyam v Director of Public Prosecutions*, [1975] AC 55.

In an appeal such as the present one, any one of the intentions set out above is a necessary constituent of the offence of murder contrary to section 204 of the Penal Code and the burden of proving any such intention is throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequence of which should be a certain result and no evidence or explanation is given, then the Court may, on a proper direction, find that the accused is guilty of doing the act with the necessary intent, but if on the totality of evidence there is room for more than one view as to the intent of the accused, the Court should direct itself that it is for the prosecution to prove the necessary intent to its satisfaction, and if, on a review of the whole evidence, it either thinks that that intent did not exist or it is left in doubt in respect thereof, the accused should be given the benefit of that doubt. Thus, where on a charge of murder the evidence does not exclude the reasonable possibility that an accused person killed the deceased by an unlawful act but without the intent necessary to constitute legal malice requisite to the proof of that offence, that killing would only amount to manslaughter. See *Rex v Steane,* [1947] 1 KB 997; and *Sharmpal Singh s/o Pritam Singh v R* [1960] EA 762.

In this appeal, notwithstanding the appellant's protestation that he did not know who killed the deceased and despite his counsel's contention that his identification as the deceased's assailant was not free from error, from the evidence available before the trial judge which we have attempted to outline above, the inculpatory facts irresistibly pointed to him as the person who pulled the deceased out of Beehive Bar and fatally stabbed him with a knife on the mid-abdomen inflicting the injuries outlined above. The discrepancy as to whether the appellant pulled the deceased from where he was seated on a form or from where he was dancing to the music from the juke box inside that bar was so trivial to be of any consequence since all the five eye-witnesses saw him pulling, the deceased from inside the said bar and immediately outside it, some of these witnesses who had followed him as he pulled away the deceased found the latter laying on his back bleeding from the stab wound mentioned above. What, however, is unnerving is that there was no evidence as to there having been any exchange of words between the appellant and the deceased nor was there any indication as to why the appellant came into this bar and straight away pulled the deceased out of it and then stabbed him as is above mentioned.

No doubt the prosecution is not obliged to prove motive, but just as its presence can greatly strengthen the

case for the prosecution, so its absence can weaken it. See the case of *R v Sharmpal Singh s/o Pritam Singh: Sharmpal Singh s/o Pritam Singh v R (PC)*, [1962] EA 13 at page 17 letter C. In the instant appeal, there was a complete absence of motive. The offence with which the appellant was charged, tried and convicted was committed in an environment of beer drinking and dancing to the music from a juke box. Except for the appellant's bare statement in his unsworn testimony that on the material date at 7.00 pm he was drinking beer at Beehive Bar, there is absolutely nothing on the record of the superior court from which it can be implied that the appellant had any one of the intentions outlined above when he unlawfully assaulted the deceasd as is set out above with fatal consequence. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the superior court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and that the same had been discharged to its satisfaction in view of the circumstances under which the offence in question was committed. Having not done so, and having regard to the environment in which the offence preferred against the appellant was committed as is mentioned above, we are uncertain whether or not malice aforethought, a necessary ingredient of the offence of murder, 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 was unstainable. His killing of the deceased amounted only to manslaughter.

Section 25 (2) of the Penal Code prohibits the pronouncement or recording of a sentence of death on or against any person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years but in *lieu* thereof provides that such person shall be sentenced to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody. After the trial judge convicted the appellant as is mentioned above, he expressed doubts whether or not the appellant was eighteen years when he committed the offence with which he was charged. It was for this reason that he dealt with him under this section. If the appellant was not convicted of an offence whose penalty was not a mandatory death sentence, no doubt the trial judge would have inflicted upon him any of the other punishments authorized by section 24 of the Penal Code. The appellant's conviction for the offence of murder having been unsound as we have indicated above, it follows that his sentence under section 25 (2), *supra*, was wrong.

In the result, we think that the appellant would have been properly convicted and sentenced for the offence of manslaughter contrary to section 205 of the Penal Code. Accordingly, we allow the appellant's appeal, quash his conviction of murder and set aside the sentence in respect thereof and substitute therefore a conviction for the offence of manslaughter contrary to section 205 of the Penal Code and taking into account all the circumstances of the case against the appellant we sentence him to eight (8) years imprisonment with effect from 5th July, 1991.

As Cockar JA has declined to sign this judgement, the same has therefore been delivered under the relevant provisions of rule 32 (2) of the Rules of this Court.

Dated and Deliveredat Nairobi this 30th day of July, 1993

J.E. GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

M.G. MULI

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JUDGE OF APPEAL