REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

CORAM: MASIME, COCKAR, JJ.A & OMOLO, AG. J.A.

CRIMINAL APPEAL NO. 39 OF 1991

BETWEEN

NATHAN MUHANGA .....

APPELLANT

AND

REPUBLIC .....

RESPONDENT

Appeal from conviction and sentence of the High Court of Kenya at Nakuru (Justice B.K. Tanui) dated 1st March, 1991 in H.C.CR.C. NO. 9 OF 1990)

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JUDGMENT OF THE COURT

The appellant Nathan Muhanga was tried and convicted on an information charging him with murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged against the appellant that on the 7th day of March, 1989, at 3p.m. at Eldume village of Marigat Location, Baringo District, he murdered Nolmae Lelkisio, the deceased. Upon his conviction, the appellant was sentenced to death as is the mandatory requirement of the law. He now appeals to this Court against the conviction.The appellant himself filed his own memorandum of appeal containing three grounds but a separate memorandum of appeal containing four grounds was filed on his behalf by his advocates and it is the latter grounds which were argued before us by Mr. Onduso who has represented the appellant throughout the proceedings.

On the material brought before the Superior Court, there was no dispute that the deceased died at the Nakuru Provincial Hospital and that the cause of her death was a stab wound on the stomach resulting in cardio-pulmonary arrest due to haemorrhage. The stab wound perforated the stomach. There was also no dispute on the evidence that that wound was caused during a fracas on the 7th of March, 1989 and that fracas occurred inside a house which was then occupied by the deceased and the appellant.It does not matter in the least whether or not the appellant was married to the deceased; it is clear to us from the recorded evidence that at the time of the incident, the two were occupying one house in Eldume village. It

is also clear to us from the recorded evidence that the fracas involved the deceased, the appellant, Thomas Lekeso (PW 2) and Samuel Lengitel (PW 3). The Republic's contention was that it was the appellant who inflicted the stab wound which caused the death of the deceased and that the appellant did so deliberately. The appellant, on the other hand contended that it was PW 2, who in an attempt to stab him (appellant) inflicted the wound on the deceased who was in between him and PW 2, trying to separate them. The learned trial judge and the assessors believed the version given by the Republic and rejected that of the appellant. The appellant challenges that finding in four grounds stated in his memorandum of appeal and those grounds are that:-

"1.The learned trial judge erred in law in convicting the appellant on contradictory evidence.

2.The learned trial judge erred in law in holding that the contradictions in evidence did not affect the prosecution's case. 3.The learned trial judge erred in accepting the evidence of PW 2 and PW 3.

4.The learned trial judge erred in rejecting the evidence of the accused."

These grounds are closely inter-related and were really argued all together.

The learned trial judge correctly appreciated and directed the assessors that the burden of proving the charge lay squarely upon the prosecution. In that connection the prosecution relied particularly on the evidence of PW 2 and PW 3 who were Kanu youthwingers in the area. The effect of the evidence of these witnesses was that having been informed by Dorcas Lelkisi (PW 1) the eight-year old daughter of the PW 2, that there was a fight between the appellant and the deceased, the two (PW 2 and PW 3) proceeded to the house occupied by the appellant and the deceased. They found the appellant seated on a bed while the deceased was sitting near the fire-place.The appellant and the deceased were quarrelling over some money and PW 2 and PW 3 said they saw the deceased had an injury on the left side of her face. The judge, rightly in our view, did not place any reliance on the evidence of PW 1 who was a very young girl and who made an unsworn statement. PW 1 in fact told the judge that earlier on she had seen the appellant and the deceased fighting and that the appellant had cut the deceased on the left side of the head, and that it was this fight that had made her go and report the matter to her father (PW 2). As we have said, not much reliance could be placed on the unsworn statement of PW 1 because she being a child of tender years, the appellant:

- "..... shall not be liable to be convicted on such evidence unless it is

corroborated by other material evidence in support thereof implicating

him" - section 124 Evidence Act

The evidence of PW 2 and PW 3, however, was that they were in the same house with the appellant and the deceased, that the appellant had been quarrelling with the deceased over some money, that they say the appellant walk from the bed upon which he was sitting to the place where the deceased was and that they saw the appellant stab the deceased. PW 2 intervened and was also stabbed or cut with the same knife and when PW 3 saw that the appellant was nearly over-powering PW2, PW3 hit the appellant with a stick on his ribs. The medical examination report (P3) on the appellant in fact disclosed a broken rib.

The appellant's sworn contention before the trial judge was that PW 2 or PW 3 were fighting him that the deceased intervened to separate them and PW 2 stabbed the deceased while trying to stab him (appellant). Neither the assessors nor the learned trial judge believed that story and in our view, they were entitled to reject it. The prosecution's case was attacked before us and in the superior Court on the ground that it was riddle with contradictions and inconsistencies and the matters pointed out by counsel for the appellant were whether the deceased had a wound on her face as testified to by PW 1, PW 2, PW 3 and PW 4; who led the appellant to the police station and what was taken with the appellant, whether there was or there was no liquor in the house and so on. We agree, as the learned judge also did, that there were inconsistencies in the prosecution's case on these points, but they were minor and did not affect the substance of the case.

On the issue of whether or not there was a wound on the face, the prosecution's case was not that the death of the deceased was caused by such a wound; their case was that the deceased died of a stab wound on the stomach and that contention was clearly proved by the evidence of PW 8 who produced the post-mortem report (Exh. 3). The other matters complained about were, with respect, of little substance. Our attention was drawn to the remarks of this Court in NDUNGU KIMANYI V THE REPUBLIC [1979] K.L.R. 282 in which the Court attempted to lay down the minimum standard required of a witness on whose evidence a court is to rely. Such a witness

> "..... should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a persons of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

We have carefully gone through the evidence on record, particularly that of PW 2 and PW 3, and we can find nothing in that evidence that would "create an impression in the mind of the court" that PW 2 and PW 3 are not straightforward persons or that would raise a suspicion about their trustworthiness and so on. KIMANYI's case was cited to the judge and he had these principles in mind; he and the assessors still believed PW 2 and PW 3. There is no basis upon which this Court can interfere with the learned judge's finding on this point. We are satisfied on the recorded evidence that it was the appellant who stabbed the deceased in the manner narrated by PW 2 and PW 3.

We are, however, very uneasy about one point and it is this. Right from the time the appellant was arrested, he raised the issue of liquor having been available in the house occupied by him and the deceased. He raised that issue in his charge and caution statement recorded by him before Chief Inspector Mutuku (PW 6) and which was produced as Exh. 2 after a trial within the trial.That statement was recorded on 12th March, 1989, some few days after the appellant had been arrested. Again the appellant raised the liquor issue on 25th October, 1990 before the magistrate who conducted the committal proceedings. Lastly the appellant raised that issue in his sworn evidence during the trial. On the prosecution's side PW 3 conceded that he saw some liquor in the house which would support the appellant's contention that he might have consumed the liquor. Neither in his summing-up notes to the assessors nor in his lengthy and well considered judgment does the learned judge ever refer to the possibility of the appellant having consumed liquor which in turn might have resulted in his inability to form the specific intent to kill - necessary in a charge of murder. Since the judge did not direct the assessors on this point, we do not have the benefit of their opinion on it.It is possible that had they been given directions on the point, they might have thought that the appellant, because of liquor, was incapable of forming the specific intent to kill and if the assessors had thought so, they might have found the appellant guilty of manslaughter and not murder as they did. We also do not have the opinion of the judge himself on the point. However, the possibility that the appellant had consumed alcohol is very real on the recorded evidence and we think the trial court ought to have dealt with the matter and made a finding on it one way or the other. In these circumstances, we ought not to allow the conviction for murder to stand. We set aside the conviction for murder under sections 203 and 205 of the Penal Code. We consequently set aside the sentence of death and substitute it with one of imprisonment for 10 years to run from the date of the original sentence. To that extent the appeal succeeds and there will be orders accordingly.

Dated and delivered at Nakuru this 5th day of March, 1992.

J. R. O. MASIME

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JUDGE OF APPEAL

A. M. COCKAR

JUDGE OF APPEAL

R. S. C. OMOLO

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AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR