IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, J.A., Gicheru & Kwach Ag. JJ.A.)

CRIMINAL APPEAL NO. 186 OF 1987

BETWEEN

JOHN KABERI NJOROGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence, judgment, order, or as the case may be of the

High Court of Kenya at Nairobi (Aragon, J.) dated 3rd November, 1987

in

H.CR. CASE NO. 17 OF 1986)

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JUDGMENT OF THE COURT:

The appellant, John Kaberi Njoroge, was convicted of the offence of manslaughter contrary to section 205 of the Penal Code by the High Court of Kenya sitting at Nairobi (Aragon, J.) and was sentenced to 7 years imprisonment. He now appeals tot his court against conviction and sentence.

The appellant, a District Officer in the Provincial Administration of the Office of the President and with a service of 5 years and stationed in Nakuru, was during the month of October, 1986 attending a course at the Kenya Institute of Administration, Lower Kabete on District Focus for Rural Development. He married in 1984 and during this period he had two children aged about 2 years and 7 months respectively.He had rented a single room from the deceased, James Kahuria Githu, at Ngara Railway Quarters, Nairobi where his wife and children were staying. A sister to his wife, Jedidah Wambui (P.W.9), and a maid, Monica Njeri (P.W.2), were living in the kitchen to the rented room aforementioned.

On 25-10-86 the appellant came home at about 7.30 p.m. According to P.W.2, the appellant "was somewhat drunk". At the gate to the compound of the house within which was the rented room referred to above, the appellant found Jonah Kariuki (P.W.5), a colleague at work of P.W.9 P.W.5 had twice before this date visited P.W.9 at this home. According to P.W.5, when the appellant found him at the gate aforesaid, he punched him several times and then knocked him into the compound. Inside the compound, the appellant continued to punch P.W.5 until P.W.5 called him from inside the house and asked him what he was doing. The appellant then stopped punching P.W.5 and went into the house. According to the appellant, however, when he came home on 25-10-86 at about 7.30 p.m. he found a stranger standing at the main gate. He asked him what he wanted and the stranger replied that he wanted P.W.9. The appellant then told him that it was a bad habit for a man to wait for his girl friend at the gate.

Holding the stranger's hand in a friendly manner, the appellant asked him to accompany him into the house. They both went towards the house. At the door of the house, they met P.W.9 whom the appellant asked whether she knew the man accompanying him. P.W.9 said that she knew the man as he was her workmate. The appellant then went into the house while P.W.9 escorted the stranger towards the gate mentioned above after warning her to desist from encouraging her boy friends to come to his house. The appellant denied having molested the stranger.

Inside the house, according tot he appellant, he told his wife to tell her sister not to bring her boy friends to his house. His wife, according to him, began to grumble alleging that he hated her sister and that he did not want her in the house. A quarrel developed between them but he remained firm on his instructions to her that P.W.9 was not to bring her boy friends to his house. His wife then brought him food which he ate and then went to bed.

On 16-10-86 the appellant woke up early in the morning and went to visit his parents at Komothai in Githunguri Division of Kiambu District. He left his parents' home at about 2.00 p.m. He was given a lift by Simon Kamau Gitau (D.W.2) and they drove to Clayworks Inn on Kamiti Road off the Thika/Nairobi Road. They arrived at this Inn between 3.00 p.m. and 3.30 p.m. Here they drunk beer - Tusker Exports - and between 5.00 p.m. and 6.00 p.m. they were joined by Stanley Njoroge Mbugua (D.W.3) with whom they continued drinking beer until about 8.00 p.m. when D.W.2 left them. The appellant and D.W.3 continued to drink beer until about 10.00 p.m. when D.W.3 realised that the appellant was beginning to differ with him on the subjects they were discussing. D.W. 3 then suggested that they should go home. They drove in D.W.3's car tot he appellant's house and according to D.W.3, the appellant missed the entrance to his house twice. When eventually they located the said entrance, the appellant pressed D.W.3 to come into the house. D.W.3 agreed. It was now above 10.30 p.m. Inside the house, D.W.3 met the appellant's wife and children. He had known the appellant's wife before she was married but did not know that she was married to the appellant. He greeted her but she did not reply. He thought that he was not welcomed in the house and he decided to leave. The appellant escorted him to his car and he drove away.

Bank into his house, the appellant, according to him, rebuked his wife for her negative attitude towards his friend, D.W.3, and told her that even if he and her had quarrelled the previous day, she should not show this to his friends. According to the appellant, his wife then started grumbling saying that he did not love her and that he did not want her sister, P.W.9, nor any of her relatives in his house. The appellant then told his wife that his instructions that P.W.9 should not bring boy-friends to his house were final and if she wanted to go with P.W.9 she should go for all he wanted were his children. According to him, he thereafter lay on his bed and fell asleep and was only awakened by a heavy blow from an object but as it was dark in the rook where he was sleeping, he was not able to see clearly who had hit him. He however, realised that he had been cut on the head and as he tried to repel the attack he was cut on his left hand. He then struggled with his assailant towards the door to the room in which he was sleeping and as they reached the doorway, he was hit and fell down and lost consciousness. He did not know what happened next until he was awakened by police.

According to P.W.2 and P.W.9, however, after the appellant's friend, D.W.3, had left as is mentioned above and the appellant had returned to his bed-sitter where his wife was, the latter joined P.W.2 and P.W.9 in the kitchen. This was at about 11.00 p.m. the appellant's wife had left her children in the bed-sitter where the appellant was. The appellant's wife, P.W.2 and P.W.9 stayed in the kitchen until about midnight when the deceased arrived with Joyce Wanjiku Maina (P.W.10) who was his girlfriend. The deceased was occupying the adjoining room to the appellant's bed-sitter and the two rooms had a connecting door which had bolts on both sides and was normally kept locked. On arrival as aforesaid, the deceased asked P.W.2 why they were still awake. P.W.2 replied to him that they were resting in the kitchen. The deceased then asked her whether the quarrel which had started the previous day was still going on and she told him that it was still going on. The deceased then went to his room together with his girlfriend, P.W.10. About two minutes later, the deceased went to the kitchen where P.W.2, P.W.9 and the appellant's wife were and told the latter that her child was crying. He then went away. About five minutes later, he came again to the kitchen and asked the appellant's wife to give him the key to the bed-sitter where the appellant was.The appellant's wife did not give him the key but she nonetheless accompanied him to the bed-sitter where she picked the child who had been crying and brought her to the kitchen where P.W.2 and P.W.9 were. Some five minutes later, P.W.2 and P.W.9 heard the noise of furniture being banged about in the bed-sitter where the applicant was.

P.W. 10's version of the events on her arrival with the deceased at the deceased's house was that the appellant's wife asked the deceased to go to the appellant's room to help her get out her child who was crying. The deceased obliged and knocked at the door of the appellant's room. The appellant opened the door and his wife went into the room alone and came out with the child that was crying. The appellant's wife locked the appellant from outside and then went with her child and sat near the kitchen to their room. Meanwhile, the deceased had gone to his kitchen which was at the verandah next to his room and then to the toilet which was on the left hand corner of the compound mentioned above and next to the main entrance into the said compound. On his way back from the toilet he heard the appellant knocking hard on the door to his room which was locked from outside. The deceased spoke to the appellant and asked him why he was knocking so hard on the door.The deceased then unlocked the door of the appellant's room and the appellant opened it. It is not clear from the evidence of P.W. 10 with what or how the deceased unlocked the door to the appellant's room. But on the appellant opening the said door, he grabbed the deceased and pulled him into this room and then locked the door behind him. Thereafter, there was commotion in that room and according to P.W.10, she heard the deceased tell the appellant repeatedly that he was James. About 1/2 an hour later, the deceased and the appellant came out of the room pulling at each other and with a spear blade which had no shaft, the appellant stabbed the deceased on the upper frontal part of his left thigh. The appellant then pulled out the spear blade and threw it aside. He then went into his room. The deceased staggered and then fell down on the step to the verandah of the house he shared with the appellant. He died shortly thereafter.

Post-mortem examination on the body of the deceased revealed a deep stab wound on the deceased's upper frontal part of the left thigh measuring 10 cm. x 4 cm. x 6 cm. This injury had raptured the deceased's left femoral artery which led to severe bleeding and which latter caused the death of the deceased.Medical examination of the appellant on 28th October, 1986 revealed that the appellant had a 4 cm. long laceration on his right parietal region and multiple lacerations on his left hand. These injuries which Dr. Francis Njoroge Ng'ang'a (P.W.14) thought were probably caused by a blunt weapon were, according to him, one day old from the date of the appellant's medical examination. He also classified them as harm.

In his judgment, the learned trial judge found that a fight had developed between the appellant and the deceased when the latter went into the appellant's room. He also found that in the course of that fight the appellant killed the deceased. He then observed:

> "However, bearing in mind the amount of beer of which the accused had partaken and the fact that he was under the influence of the quarrel which had taken place between himself and his wife, it seems to me, that when the deceased went into the accused's bedroom, the latter may not have entirely realised what was happening. No one has positively stated that when the deceased went into the accused's bedroom he turned on the light. Neither do I see any justification for inferring that he did so. In fact such evidence as there is would lead me to believe that he did not do so. I am referring to the fact that the deceased kept shouting that he was James."

The learned trial judge then went on to say:

> "If therefore the deceased went into the accused's bedroom whilst it was dark, it can then, I think be fairly inferred from the evidence adduced before me that the accused, whilst not fully intoxicated, but nevertheless not entirely sober, on being suddenly woken up from his sleep, lashed out at whatever was there. The accused on being suddenly woken up by something he did not know must have become frightened and in order to defend himself lashed out with a spear, which he must have picked up from near the bed."

We pause here and observe that in his entire judgment, the learned trial judge did not deal with the prosecution case relating to the circumstances that culminated in the deceased's presence in the appellant's room. Before inferring that on the appellant being suddenly woken up by something he did not know he must have become frightened and in order to defend himself lashed out with a spear which he must have picked up from near the bed, the learned trial judge should have considered the appellant's evidence together with the prosecution evidence in relation to the deceased's presence in the appellant's room and then make a finding in this regard. His treatment of this aspect of the case before him was wrong. He then said:

> "In his turn, for the purpose of defending himself, the deceased must have picked up the panga which was also lying there and tried to avert the thrust of the spear. We know that there was a considerable struggle between the two men. The prosecution witnesses agree that there was considerable noise of furniture being thrown about. I feel that in his partially befuddled state the accused may not have appreciated entirely that using a spear against someone else may well result in that someone else being seriously injured and dying in consequence of those injuries. That means that I have a doubt as to whether the accused sufficiently formed the intent required for sustaining a charge of murder."

Dealing with the appellant's defences of self-defence, provocation, and involuntary action, the learned trial judge found no evidence to support them. He therefore rejected them. However, having doubted whether the appellant had the intent necessary to sustain a charge of murder, the learned trial judge in agreement with the assessors found him guilty of the offence of manslaughter.

The appellant in his appeal to this court put forward 9 grounds of appeal. His counsel, Mr. Muguku, argued the 1st and 2nd grounds of appeal together and submitted that with the evidence available before the learned trial judge, his summing up to the assessors was biased against the appellant and had this not been so, the assessors may very well have found the appellant not only not guilty of the offence of murder but also not guilty of the offence of manslaughter. Mr. Muguku particularly took exception to passage in the learned trial judge's summing up to the assessors which read as follows:

> "If you consider the evidence as a whole objectively you may well come to the conclusion that the only fair inference that can be drawn therefrom is that the accused killed the deceased wilfully, intentionally and with malice aforethought."

This according to Mr. Muguku, displayed the attitude of the learned trial judge towards the case against the appellant. According to Mr. Muguku, this was a misdirection on the part of the learned trial judge.

We note that the passage complained of is the last piece of advice to the assessors by the learned trial judge before he directed them on the three possible verdicts that were open to them. Looked at in isolation, this passage gives the impression that the learned trial judge was intent on having the assessors find the appellant guilty of the offence of murder. A summing up to the assessors that gives an impression that the trial judge is intent on certain result(s) is to be deprecated for in some cases it may lead to a miscarriage of justice. No doubt this kind of summing up to the assessors was a misdirection on the part of the learned trial judge. But looking at the entire evidence available before him and the final result of the case before him, we are, however, satisfied that this misdirection did not occasion a failure of justice.

Mr. Muguku then argued the 3rd, 4th, 5th, 6th, 7th and 8th grounds of appeal together. All these grounds of appeal concerned the learned trial judge's failure to uphold the appellant's defences of intoxication, self-defence and provocation. In so doing, according to Mr. Muguku, the learned trial judge misdirected himself and erred in law.

Regarding the appellant's defence of intoxication, the learned trial judge correctly and quite properly directed his mind to the provisions of section 13 of the Penal Code. After considering the law applicable in this aspect of the appellant's defence, the learned trial judge came to the conclusion that on the evidence available before him, the appellant's degree of intoxication was not such as to amount to insanity. He, however, doubted whether in consequence of the appellant's partial intoxication accompanied by other factors, the appellant sufficiently formed the intent necessary to sustain a charge of murder. Accordingly, he gave the appellant the benefit of that doubt. In the case of Michael Sheehan and George Alan Moore, (1975) 60 Cr. App. R. 308 at page 312 Geoffrey Lane, L.J. observed:

> "In cases where drunkenness and its possible effect upon the defendant's mens rea is in issue,.....the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done

had be been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."

Here, having regard to all the evidence available before the learned trial judge, including that relating to drink, it cannot be said that the learned trial judge misdirected himself and erred in law in relation to the appellant's defence of intoxication. Indeed, the appellant has no cause to complain in this regard. As relates to the appellant's defence of self-defence, the learned trial judge in his judgment made the following observation:

"So far as self-defence is concerned there is no evidence that when the deceased went into the accused's bedroom he carried any weapon or that he attacked the accused. In my view the position is the other way. The accused's blood found on the panga was due to the deceased picking up the panga and striking at the accused in an effort to defend himself against the attack of the accused with a spear."

As we have observed above, the circumstances culminating in the deceased's presence in the appellant's room were not dealt with by the learned trial judge in his judgment. Considering his earlier observations as are set out above, the foregoing passage is clouded with uncertainty as to who between the deceased and the appellant was the aggressor.

Dealing with the defence of self-defence in the case of Palmer v. R., (1971) 55 Cr. App. R. 223 at pages 242 and 243 Lord Morris of Borth-y-Gest said:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances.

It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence.If there has been no attack, then clearly there will have been no need for defence. If there has been attack so that defence is necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.

If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that any reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where evidence makes its raising possible, will fail only if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider that if the prosecution have shown that what was done was not done in self-defence, then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this, then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

The defence of self-defence therefore is a matter of evidence.

The evidence relating to the circumstances leading to the deceased's presence in the appellant's room were narrated by P.W.10. That evidence was that as the deceased was returning to his room from the toilet as is set out above, he heard the appellant knocking very hard on the door to his room. The deceased unlocked this door which was locked from outside. The appellant opened the said door and on so doing he grabbed the deceased and pulled him into the room and then locked the door behind him. Soon thereafter, there was commotion in the appellant's room. The appellant's version was that he was awakened by a heavy blow which hit him. He was cut on the head and on his left hand. He was dragged to the wall and at the doorway to his room he was struck by his attacker and he fell down and lost his consciousness. He was later awakened by the police. He did not recognise his assailant as the room was dark.

From the proceeding events of the material night, there was no cause why the deceased should have gone into the appellant's room and attacked him while he was asleep. The deceased's presence in the appellant's room was therefore as narrated by P.W.10. It follows that as between the deceased and the appellant, the appellant was the aggressor. The appellant could not therefore avail himself the defence of self-defence. This defence was properly rejected by the learned trial judge.

Concerning the appellant's defence of provocation, the learned trial judge rejected the same as none of the elements of provocation as are set out in section 208 of the Penal Code were present in the evidence available before him. At any rate, considering the end result of the case against the appellant, this defence may not have been of any assistance to him. We consider that this defence was properly rejected by the learned trial judge.

Finally, Mr. Muguku argued ground 9 of appeal separately and submitted that considering all the circumstances of the case against the appellant, the sentence of 7 years imprisonment passed on him was manifestly excessive. As we have observed above, the appellant was the aggressor. Considering the weapon used and the manner it was used by the appellant on the deceased, the sentence of 7 years imprisonment was neither harsh nor manifestly excessive. It was well deserved. We will not interfere with it.

The upshot of the appellant's appeal against conviction and sentence is that the same is dismissed in its entirety.

Dated and delivered at Nairobi this 9th day of October, 1988.

J.M. GACHUHI

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JUDGE OF APPEAL

J.E. GICHERU

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AG. JUDGE OF APPEAL

R.O. KWACH

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR