



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MADAN, KNELLER & HANCOX JJA)

CRIMINAL APPEAL NO 12 & 112 OF 1982

BONIFACE MUTETI KIOKOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Willy Nzioka Nyumu was convicted of murder on October 16, 1980 of Nicholas Odanga Oyada. He was sentenced to death. Upon post-mortem examination the deceased was found to have several cut wounds over his forehead. His frontal skull was bruised. There was blood all over the brain. The cause of death was brain haemorrhage due to bruised skull due to injuries consistent with having been caused with a sharp instrument. The medical evidence was unable to tell whether the cut wounds were caused by one or more than one sharp instrument.

The appellant and a co-accused named Boniface Muteti Kioko were arraigned together at the trial. Kioko pleaded guilty to the reduced offence of manslaughter. He was convicted and sentenced to seven years' imprisonment by Chesoni J (as he then was). The appellant's trial proceeded full length on the original charge of murder against him before Brar J. The particulars of offence were that Kioko and the appellant on October 16, 1980 at Liatineni Sub-Location in Ndalani Location, Machakos District jointly murdered Oyada. The evidence was recorded, the submissions of the state counsel and the appellant's advocate were listened to, the learned judge addressed his summing up to the three assessors, and he recorded their unanimous advice that the appellant was guilty of murder. Before the learned judge delivered his judgment on the day appointed for it the appellant's advocate informed the court that the appellant wished to offer a plea to manslaughter, and that the state counsel had no objection. The learned judge remarked:

“This is an unusual application. I have already written my judgment. However, I will consider whether or not I should deliver the judgment.”

The learned judge returned to the court after a few minutes' adjournment. He said he must reject the defence application and proceeded to deliver his judgment. He found the appellant guilty, convicted and sentenced him as stated.

The procedure is that after a plea of not guilty the accused is taken in charge of the court, as he would be given in the charge of jury if we had trial by jury. It was open to the court to direct itself, as a judge sitting with a jury could direct the jury, not to deliver their verdict or to deliver verdict considered appropriate by the judge. When a judge has recorded the oral opinion of the assessors he should then give judgment –

section 322(2) of the Criminal Procedure Code - though not necessarily immediately but at some subsequent time of which notice should be given to the parties and their advocates' - section 168(1) (ibid).

The accused may, however, apply to change his plea from one of guilty to not guilty after the prosecution has opened its case - *Rex v Heyes* [1951] 1 KB 29, 30 CCA - and indeed at any time before sentence - *S (an infant) v Manchester City Recorder* [1969] 3 All ER 1230 (HL) - and it is for the court then to decide whether justice requires that that should be permitted.

It is also the right of an accused to change his plea from one of not guilty to guilty to the offence charged or to a lesser cognate one and then the court has to decide whether justice requires that he should be permitted to do so. It is also open to the court to refuse to reduce the charge notwithstanding the offer of a plea, and state counsel's acquiescence therein. The final decision rests with the court. It may not be a hard decision for the court to make in a case where there are two accused and the court has already accepted a plea on a reduced charge from one of them, in particular if the accused who is allowed to offer a plea was the prime mover and played a leading role in the commission of the offence, as we think Kioko was. The events of the evening of October 16 were supplied not by the prosecution evidence but wholly by the appellant himself in his charge and caution and unsworn statements.

Insofar as relevant he said in his two statements that he was drinking traditional liquor at the house of one Mutheini. Kioko came there with a bottle of *chang'aa*. He told Kioko he was going home as there was no more beer to be bought there. Kioko said they would go home together. As they reached near the deceased's house, Kioko told him the deceased owed him some money which he would like to collect from him. The appellant agreed. They went to the deceased's house. He stopped before reaching the house to urinate. Kioko went in. He came back and told him the deceased was not there. Kioko looked for him and found him lying drunk in the bush behind the house. The appellant rushed from where he had stopped to urinate to where the deceased was screaming because Kioko was attacking him with a *panga*. He begged Kioko not to kill the deceased. Kioko stopped. There was a variation in the charge and caution statement. The appellant said that Kioko told him he was going to accompany him until he met the deceased, and if the latter refused to pay his debt of Kshs 5 he would kill him.

Both Kioko and the appellant were seen assaulting the deceased together with *pangas* by prosecution witnesses whose evidence was trustworthy and to be accepted as the court properly did, made irrefutable as it was by the appellant's admission in his charge and caution statement that he was present when the deceased was killed by Kioko. It was therefore not necessary for the court to speculate conjecturally by itself alone that in checking the moon for the month of October, 1980 in the official diary the new moon was on the October 9, therefore it was "quite probable" that there was moon soon after 10 pm on the night of October 16.

The learned judge's note in his summing up to the assessors states that he explained to them common intention in terms of section 21 of the Penal Code. Also that although the two *pangas* were not tested for blood grouping, an inference could be drawn that the blood on them was that of the deceased because they were the same *pangas*. This was a misdirection although he had said at one point in his judgment that there was no positive evidence that the blood on the two *pangas* was that of the deceased. But he reverted to it further along in his judgment when he advised himself that there could be little doubt that it was the deceased's blood on the two *pangas*, that it could also be so inferred because the appellant himself was not injured. The learned judge also advised the assessors that the murder took place on the night of October 16/17, 1980. The weapons were hidden. The report made by the appellant and Kioko to the police was not of murder but arson as the police would not have allowed murder suspects to walk away.

The learned judge also said in his judgment that the appellant was present at the scene at the time the murder was committed, he himself showed the murder weapons with which the deceased was killed to the police; his defence was that he did not take part in the murder and that he had tried to prevent the commission of the offence. The learned judge once again used the expression "murder" in his judgement. He said:

“Now, during the commission of the crime and after the murder had been committed, was the conduct of the accused consistent with his innocence or guilt?”

With respect it was a misdirection each time the learned judge advised the assessors, and himself also, that the offence of murder had been committed. The learned judge’s prompting in this respect was unfortunate both as regards the assessors and himself. It was not to be assumed that murder had been committed. The important issue to be decided at the trial was whether the appellant was guilty of the murder of Oyada, or some other offence, or perhaps not at all. The foregoing passage from the judgment of the learned judge indicates that he had already decided in his mind that the appellant was guilty of murder while he had not yet expressly come to that conclusion. In pursuance thereof, he pointed out several acts done and omissions on the appellant’s part which he would not have committed or omitted if innocent. It was an unfortunate approach which was strongly suggestive of the burden being shifted onto the appellant to establish his innocence. In murder or manslaughter the burden never shifts from the prosecution. The learned judge said that he was convinced the appellant and Kioko formed a common intention to beat the deceased if the alleged debt of Kshs 5 was not repaid. They went to the deceased’s house together. They both took part in the attack on the deceased and they were acting in concert. The court having been informed by the appellant that he had been drinking traditional liquor the learned judge ought to have directed both the assessors and himself to deliberate whether the appellant was capable of forming the intention to kill. It is the duty of the trial judge to deal with such alternative defences as they clearly emerge from the evidence as fit for consideration even though they are not put forward by the defence. *Okeyo Kigeni v Republic* [1965] EA 188. The defence of intoxication or provocation, or both together, is a regular feature in a very large number of murder trials in Kenya. Kioko having been removed from the trial after his pleas, he should have been expressly acquitted of murder. Thereafter the particulars of the offence against the appellant ought to have been amended for he could no longer be charged with having murdered the deceased jointly and in the course of a common design with Kioko who was convicted only of manslaughter. *Nolle prosequi* should have been entered and fresh information filed. The appellant was seen assaulting the deceased together with Kioko with a *panga* as a result of which the deceased received several cut wounds which led to his death. In our opinion this constituted manslaughter, contrary to section 205 of the Penal Code. Accordingly we quash the appellant’s conviction for murder and set aside the sentence. We substitute a conviction for manslaughter contrary to section 205. In as much as he did not lead the assault, we pass a sentence of five years’ imprisonment to take effect from the date of conviction.

Kioko has appealed against his sentence of seven years’ imprisonment. We have related the severe injuries which were inflicted upon the deceased. In addition Kioko’s advocate told the court that Kioko struck the deceased with a *panga* occasioning injuries from which the deceased subsequently died. In our opinion, Kioko’s sentence was appropriate and we order his appeal to be dismissed.

Dated and Delivered at Nairobi this 18th Day of April, 1983

C.B. MADAN

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JUDGE OF APPEAL

A.A. KNELLER

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JUDGE OF APPEAL

A.R.W. HANCOX

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JUDGE OF APPEAL