IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MADAN, WAMBUZI AND LAW JJ A)

CRIMINAL APPEAL NO 26 OF 1977

BETWEEN

KONGU..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a Conviction and Sentence of the High Court at Nairobi, Chanan Singh J, in High Court Criminal Case No 95 of 1976 dated 30th March 1977)

February 20, 1978, the following Judgment of the Court was delivered:

The appellant was convicted in the High Court of the murder of one Vidya Sagar Nehra and was duly sentenced to death. He has appealed to this Court against that conviction.

The facts of the case are as follows:-

Mr Nehra (the deceased) lived alone in this house at Parklands. He was 65 years old. On the morning of 4th June, 1976, he was found dead in his house. The cause of death was manual strangulation. There was a hole in the ceiling, and money and other property had been stolen. The telephone wire outside the house had been cut. Finger and palm prints proved to have been made by the appellant were found on various articles in the house. The appellant was arrested on 11th July, 1976.

He was in possession of a cigarette lighter identified as having belonged to the deceased. As a result of what he told the police, a watch and a radio also the property of the deceased, were recovered from two persons who had acquired these articles from the appellant.

On 14th July, 1976, the appellant made a long and detailed “inquiry” statement, after caution, to inspector Wanjau. That this statement was voluntary was not challenged before this court; indeed Mr Hayanga for the appellant relied on it as being factually true, as well as voluntarily made, in support of his submissions that the appellant’s conviction for murder should be quashed, and a conviction for manslaughter substituted. According to that statement, the appellant was invited by one James Mutunga to break into a house occupied by an Asian who was old and weak. Mutunga had been employed by the Asian and had a dispute with him over wages. This man has not been traced, but there was evidence that one James Mutunga had at one time been employed by the deceased as a gardener.

On 3rd June, 1976, Mutunga and the appellant bought a rope and a *panga*, and at about 11 pm they went to the deceased's house. Mutunga cut the telephone wire. The appellant climbed on the roof, removed some tiles, made a hole in the ceiling and let himself down into the house by means of the rope. Mutunga went to the door of the house, and intercepted the deceased as he tried to leave. Mutunga pushed him back into the house, knocked him down, and held him by the throat. The appellant offered to help Mutunga, but Mutunga said he could manage on his own, and told the appellant to look for money, which he did.

According to the appellant, he found shs 1,800/- which he shared with Mutunga. He also stole the cigarette lighter, the watch and the radio to which reference has already been made. The appellant and Mutunga then left the house and went away, leaving the deceased lying on the floor where he had been knocked down.

The appellant elected not to give evidence at the trial, or to make an unsworn statement. He called no witnesses on his behalf. On the basis of the facts as related in the appellant's statement, corroborated as they were in many particulars by the evidence of the witnesses called by the prosecution, the learned judge held that the appellant was guilty of murder, and convicted him accordingly. In particular the learned judge found that the malice aforethought necessary to constitute murder had been established as against the appellant within the meaning of section 206 of the Penal Code, which reads so far as is material –

> "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances - ..... (c) an intent to commit felony."

Mr Hayanga submitted that the word "felony" in section 206 aforesaid must be interpreted as meaning a felony involving the use of violence. We agree, but we are satisfied that the common intention formed by the appellant and Mutunga envisaged the use of a degree of violence, sufficient at least to prevent the deceased from leaving the house and raising an alarm. That is why Mutunga took up his position at the door, while the appellant broke in through the roof; and that is why the appellant, having seen Mutunga knock down the deceased and hold him by the throat, did not object. Far from disassociating himself from what Mutunga had done, the appellant offered to help him, and then proceeded to steal as planned.

The learned judge also relied, in convicting the appellant, upon the proposition, laid down in section 21 of the Penal Code that the killing of the deceased was a probable consequence of the common intention formed by the appellant and Mutunga to prosecute the unlawful purpose of burglary in a house known to be occupied by a single person who would naturally seek to escape and raise an alarm and who would have to be forcibly prevented from so doing. Mr Hayanga submitted that it had neverbeen the appellant's intention that the deceased should be killed or seriously injured. That may be so, but the common intention, shared by the appellant, was that some degree of force should be used against the deceased, and we agree with the learned judge that the death of the deceased, in the circumstances of this case, was a probable consequence of the prosecution of the common unlawful purpose shared by the appellant and Mutunga, with the result that although the deceased probably died at Mutunga's hands, in circumstances constituting murder, the appellant must also be deemed to be guilty of that murder.

For these reasons, we are of the opinion that the appellant's conviction was right in law, and we order that his appeal be dismissed. The possibility that the appellant had not intended that the deceased should actually be killed is a matter to which consideration may be given in another place.

February 20, 1978

MADAN, WAMBUZI & LAW JJ A