

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A)

CRIMINAL APPEAL NO. 122 OF

2020 BETWEEN

IAN KIBET KONES.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (Riechi, J.) dated 30th January, 2020,

in

HCCRA No. 24 of 2018)

JUDGMENT OF THE COURT

1. The appellant, **Ian Kibet Kones**, was charged and convicted of the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on 15th June, 2018, at Kapkara "A" Village Namubila Location in Bungoma West Sub-County within Bungoma County, the appellant murdered **Leah Neema Kamama** (the deceased).
2. It was the prosecution's case that the appellant lured the deceased into his house, where he killed and then

sexually

assaulted her. The deceased was seven years of age at the material time. PW1, **Rose Nelima Wamalwa**, told the court that on 15th June, 2018, at about 4.00 p.m., she was at her house when the appellant, who is her brother-in-law, sent the deceased, and another child named Junior, to her house to fetch some food for him. The deceased went to the appellant's house. When the deceased failed to return home after sometime, PW1, together with the deceased's mother, **Joan Mutende** (PW2) and one **Mildred**, went to the appellant's house. They did not find the appellant. However, they found the deceased lying on a mattress. She had white discharge emanating from her private parts, and had excreted on herself. They raised alarm. Members of the public came and rushed the deceased to Cheptais Hospital, where she was pronounced dead on arrival. PW8, who was a clinical officer at Cheptais Hospital, told the court that the deceased had marks on her neck, and bruises on her legs.

3. The deceased's mother (PW2) and the deceased's brother (PW7) testified that on 10th August, 2018, they were at Country Bus Station in Nairobi when they spotted the appellant. They raised

an alarm, and members of the public started pursuing the appellant. The appellant surrendered himself at a police station.

4. PW4, **Dr. Nyongesa Akere**, from Bungoma Referral Hospital, conducted a post mortem of the deceased's body on 20th June, 2018. It was his evidence that the deceased had bruises around her eye, left side of the neck and on her right foot and left big toe. Internally, the deceased had bloody fluid in her bronchi, injuries on her chest, and bleeding in both lungs. Genital examination revealed that the deceased had fresh tears on her vaginal hymen, which PW4 stated was an indication of sexual activity. It was his conclusion that the deceased died due to shortness of breath caused by strangulation.
5. **Cpl. Bernard Mulubi** (PW5), investigated this case. It was his testimony that he visited the scene of crime on 15th June, 2018. He found the deceased had been taken to Cheptais Hospital. He went to the said hospital and observed bruises on the deceased's neck, right leg and left toe. The appellant was no where to be found. He recorded witness statements. He also recovered a pink skirt which the deceased was

wearing on the material day. It was blood-stained. On 10th
August, 2018, he
was informed by the DCIO, Chief Inspector **Lilian Otieno**,
that

the appellant had been arrested and was being held at Kamukunji Police Station. He re-arrested the appellant and charged him with the offence for which he was convicted. He further forwarded vaginal swab samples from the deceased, and a blood sample of the appellant, to the Government Chemist at Kisumu for forensic examination. He stated that the report from the Government Chemist, which he produced in evidence, indicated that the appellant's DNA matched that found from the deceased's vaginal swab.

6. PW9, **Joseph Bahati Kenga**, was the Assistant Commissioner of Police and DCIO Bungoma West. It was his evidence that he recorded a confession from the appellant on 12th August, 2018, at the DCIO's office Bungoma West, at Sirisia. The appellant was already in custody. He stated that he informed the appellant of his right to have a witness during the confession. The appellant elected to have his uncle, **Benson Chesoi Wandiemba**, present. PW9 produced the said confession in evidence as *prosecution exhibit 5*.

7. The appellant was placed on his defence. He gave sworn evidence. He told the trial court that on 15th June, 2018, he

went to work, left at 1.00 p.m., and went to drink *chang'aa*.
He

went home at 4.00 p.m. When he got home, he called the deceased and sent her to fetch some food for him. It was his evidence that the deceased came back without the food, and spoke rudely to him. He hit her, then left, and boarded a vehicle to Nairobi. Two months later, while in Nairobi, he bumped into the deceased's mother, who started shouting, saying that he had killed the deceased. The appellant stated that he took refuge at Morobo Police Station, from where he was re-arrested and charged in this case. He stated that he was not sure whether he defiled the deceased as he was drunk. Upon cross-examination, the appellant admitted that he indeed recorded a confession with the police, and that the confession was voluntary.

8. After full trial, the appellant was convicted as charged, and sentenced to serve twenty-five years imprisonment.
9. The appellant, aggrieved by this decision, lodged this first appeal. He proffered four grounds of appeal. He faulted the learned Judge for: finding that the appellant had malice aforethought, without considering the chain of events leading to the offence; failing to factor in the appellant's state of mind at

the time of commission of the offense; and for imposing a

sentence that was harsh, unreasonable and excessive, without due regard to his mitigating factors.

10. The appeal was heard by way of written submissions. Counsel for the appellant. **Mr. Menezes**, submitted that the prosecution failed to sufficiently establish that the element of malice aforethought existed in the circumstances of the case. It was his contention that the appellant suffered temporary insanity during the commission of the offence, as a result of his drunkenness, since he killed the deceased, then tried to defile her. He urged that a sane person would first defile his victim, then kill them, and that a sane person would also try and cover up his/her crime. Counsel stated that other than leaving the scene, the appellant did not try to cover up his crime or hide the deceased's body. He instead covered the deceased with a blanket. He asserted that the appellant maintained throughout the trial that he was drunk on the material day, and did not know what he was doing. On sentence, counsel submitted that the appellant's mitigation was not considered by the trial court. He urged that the appellant was remorseful, a first offender, and that he had undertaken self-improvement courses

while in

prison. Counsel further urged this Court to also take into

consideration the period spent by the appellant in remand custody prior to his conviction.

11. The appeal was opposed. **Ms. Karani**, learned prosecution counsel, appeared for the Respondent. It was her submission that the appellant, in his confession recorded on 12th August, 2018, narrated how he grabbed the deceased's neck, closed her mouth to prevent her from shouting, then squeezed her neck and suffocated her to death. After she died, he removed her trouser and underwear, and defiled her. **Ms. Karani** reiterated that the appellant's confession was voluntary and uncontested. She contended that the appellant's action of strangling the deceased was indicative of his intention to kill her, or cause grievous harm. It was her submission that the trial court properly evaluated the appellant's defence of intoxication, and dismissed the same. On sentence, counsel stated that the Penal Code prescribed a maximum sentence of death for persons convicted of the offence of murder, and that the appellant's custodial sentence of twenty-five years was lenient. She urged us to uphold the conviction and sentence imposed by the trial court.

12. We have carefully considered the record of appeal, submissions by both parties, and the applicable law. The duty of the first appellate court was stated by this Court in **Gabriel Kamau Njoroge v Republic [1987] eKLR** as follows:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect. (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

13. The issues falling for determination by this Court can be summed up as follows:

- i. Whether malice aforethought was sufficiently proved by the prosecution;***
- ii. Whether the defence of intoxication was available to the appellant; and,***
- iii. Whether the sentence imposed by the trial court was harsh and excessive.***

14. To establish the charge of murder, the prosecution was

required to prove the death of the deceased, that the death of the deceased was caused by the appellant, and that the appellant

had malice aforethought in killing the deceased. The fact that the deceased died at the hands of the appellant is not contested. The appellant however claims that he had no intention of killing the deceased.

15. Malice aforethought is defined by **Section 206** of the **Penal Code** as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
- b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- c. an intent to commit a felony;***
- d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

16. This Court in **Bonaya Tutu Ipu & another v Republic** **[2015] eKLR** held that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of CHESAKIT V. UGANDA, CR. APP. NO. 95 OF 2004, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.”

17. In this case, the appellant, recorded a confession with the police where he explained his version of events of the material day. The confession is not disputed. In the confession, the appellant narrated as follows:

“...I wish to recall and state that on Friday 15th June, 2018, I left my house and went to Busereri in Uganda. I went there just to take alcohol and I came back at around 3.00 p.m. I came direct to my house and called Kamama (the deceased) to my house because I wanted to send her to go and bring me food from my cousin Amos within the same homestead. She came alone and I sent her and she went. She came back after a short while and told me that there was no food till evening because whatever had been prepared had all been eaten. I called her to where I was and she came. When she was near me I grabbed her by the neck. As she wanted to shout, I grabbed her mouth

to prevent her from shouting and I squeezed her neck and suffocated her. I held her down while holding her mouth and neck till she died. That is when she passed

faeces and she was still. I removed her long trouser, then the pant. I forced my penis into her vagina and I penetrated her. I then lost my erection because of the human faeces and I stopped and covered her body with a blanket. I then zipped up and left. I decided to run away because what I had done was bad and I feared for my life. When I was doing all this, the deceased's mother was not at home, she had gone to a funeral at the neighboring home. I went on foot up to Kitale. At Kitale I met Kamau whom I used to work with in a bus company called mwanake and he gave me a lift to Nairobi the same evening...."

18. Counsel for the appellant submitted that the evidence on record showed that the appellant was intoxicated at the time of commission of the offence, and that he suffered temporary insanity as a result of the intoxication, and was therefore not aware of his actions, so as to form the intent to commit murder.

19. **Section 13** of the **Penal Code**, which provides for the defence of intoxication, is couched in the following terms:

- 1. "Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.***
- 2. Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not***

know what he was doing and:

- a. *the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
- b. *the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.*

3. *Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.*

4. *Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*

5. *For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."*

20. This Court in **Bakari Magangha Juma v Republic [2016]**

KECA 162 (KLR) interpreted this provision as follows:

"Under section 13 of the Penal Code, intoxication is not a general defence to a criminal offence, except in the circumstances set out in the section. A person who commits an offence while intoxicated is not ipso facto excused from the consequences of his act. In our view the section affords a defence of intoxication in

three situations as follows.

The first situation is in what is called involuntary intoxication, where at the time of commission of the act complained of, the accused person does not know that it is wrong or does not know what he is doing, because of intoxication caused without his consent by the malicious or negligent act of another person. In such a case, the court is required to discharge the accused person.

The second situation is where the accused person, by reason of intoxication is insane, temporarily or otherwise, so that at the time of commission of the act complained of, he does not know that it is wrong, or does not know what he is doing. This situation brings the case within the M’Naghten Rules, and the court is required to deal with the accused person in the manner prescribed by the Criminal Procedure Code, for accused persons who were insane at the time of commission of the offence, culminating in a special finding of guilty but insane and the detention of the accused person in a mental hospital at the pleasure of the President.

In Rex v. Retief [1940-1943] EA 71, the former Court of Appeal for Eastern Africa explained this aspect of the defence of intoxication as follows:

“The insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The law takes no note of the cause of insanity and, if actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. It is immaterial whether the insanity so

***induced was permanent or temporary
and if a man's intoxication were***

such as to induce insanity so that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity and the verdict should be as laid down in section 159 of the Criminal Procedure Code 'guilty of the act charged but insane when he did the act. "

The third situation, contemplated by section 13(4), arises where by reason of intoxication the accused person is incapable of forming a specific intent, which is an element of the offence charged. Sometimes this situation is referred to as "intoxication or drunkenness negating mens rea". In Said Karisa Kimunzu v. Republic, CR App No. 266 of 2006 (Msa), this Court stated thus regarding intoxication or drunkenness negating mens rea:

"But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty

of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant's drinking spree of the previous

night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son.”

21. In light of the above, it is our considered view that malice aforethought was sufficiently established by the prosecution in the instant case. The appellant's own words from his confession statement paint a picture of a person who was in control of his mental faculties and was situationally aware. He narrated how he intentionally seized the deceased by the neck, restrained her attempts to raise alarm by covering her mouth, and continued to apply force until she suffocated and died. His conduct was deliberate, sustained, and directed at a vulnerable victim, who was only seven years old, and who had not provoked him. The appellant further admitted that after ensuring the deceased was motionless, he sexually assaulted her, and immediately fled the scene to avoid arrest and being held accountable. These acts, taken cumulatively, demonstrate a calculated and unlawful design to cause death or grievous harm, thereby proving malice aforethought within the meaning of the law.
22. The appellant's claim that he was so intoxicated as to suffer

temporary insanity, pursuant to **Section 13(2)(b)** of the **Penal Code**, is inconsistent with his conduct immediately before,

during and after the offence. Upon realizing the consequences of his actions, he promptly covered the deceased's body, left the homestead, and fled on foot for a considerable distance, before securing transport to Nairobi. Such deliberate flight, involving coherent decision-making and planning, demonstrated that he was fully conscious of his actions and their sheer deviousness. The appellant proceeded to nonchalantly go on with his life until his arrest several weeks later, exhibiting no remorse or behaviour suggestive of mental impairment. These circumstances strongly negate any suggestion of temporary insanity or incapacitation by intoxication within the meaning of **Section 13** of the Penal Code, and instead indicate that the appellant was of sound mind at the time of the offence. We find that even though there was evidence of intoxication, the prosecution discharged the burden of proving that the appellant was capable of forming the intent necessary to commit the offence of murder.

23. The final issue relates to the appellant's sentence. It was his submission that the custodial sentence of twenty-five (25) years imposed by the trial court was harsh and excessive,

and that

the trial court failed to consider his mitigating circumstances.

A perusal of the trial court's sentencing notes show that the appellant was given a chance to present his mitigating circumstances, where he urged that he was a first offender, that he was remorseful and prayed for leniency. The trial court called for a victim impact statement before imposing the sentence. The trial court while taking into account the appellant's mitigation, as well as the victim impact statement, noted that the offence was serious, and deliberately led to the loss of life.

24. We are in full agreement with the learned trial Judge's assessment that the offence committed by the appellant was of the utmost gravity and resulted in the tragic and unnecessary loss of a young life. The circumstances disclosed were brutal and demonstrated a profound disregard for the sanctity of human life. In light of the seriousness of the offence, the vulnerability of the victim, and the appellant's conduct after the commission of the crime, we find no basis to interfere with the sentence imposed. Indeed, considering that **Section 204** of the **Penal Code** prescribes the maximum sentence of death for the offence of murder, the term of twenty-five (25) years'

imprisonment remains both lawful and proportionate, in
the
circumstances of this case.

25. From the foregoing, we hold that the appellant was properly convicted and sentenced by the trial court. The appellant's appeal on both conviction and sentence is hereby dismissed.

Dated and delivered at Kisumu this 19th day of December, 2025.

ASIKE-MAKHANDIA

.....
**... JUDGE OF
APPEAL**

H.A. OMONDI

.....
**... JUDGE OF
APPEAL**

L. KIMARU

.....
**.... JUDGE OF
APPEAL**

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

DEPUTY REGISTRAR.