Siele v Republic (Criminal Appeal 4 of 2015)
[2023] KECA 165 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 165 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 4 OF 2015

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 17, 2023

BETWEEN

BERNARD KIPKEMOI SIELE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court at Nakuru (J. Anyara. J) delivered on the 18th December, 2014 In Criminal Case No. 72 of 2009)

JUDGMENT

1. This is the first appeal against the conviction and sentence of the High Court at Nakuru by Anyara. J, delivered on the 18th December, 2014. Bernard Kipkemoi Siele the appellant, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the charge were that on the 28th August, 2009, at Chesirikwa Farm in Molo District of the Rift Valley Province, the appellant murdered Phillip Kipyegon Cheruiyot.

2. The case for the prosecution as was extracted from the 10 witnesses they presented, was that Irene Cherotich (PW1), was at home on the 28th August, 2009 at about 10:00 pm making dinner for her father (the deceased) in the company of David Rono (PW3) who come in earlier with Augustine Bett (PW4) and the deceased. She went into the sitting room to give the deceased water to wash his hands, and saw that the appellant was there too. A little while later one Richard Koech (PW2), the deceased and the appellant walked out of the house and proceeded towards the gate. Presently, PW1 heard her father screaming from the gate area. She ran towards the gate as did PW3 and came upon her father. She saw a cut on his forehead and other injuries in the abdomen. The appellant did not come back to the house.

3. Richard Koech (PW2), was one of the guests together with the appellant and the appellant's father that the deceased had invited on the material day, to join him in making merry with the two litres of chang'aa

that he had bought. They all trouped to the deceased's house where they found and joined other guests. Suddenly the deceased and the appellant differed over the drink and the appellant demanded that the deceased refund Kshs. 50 to him. The appellant, the deceased and 2 other guests went out of the house but the deceased asked those two other guests to return to the house and attend to the remaining guests. Shortly thereafter PW2 heard screams. He ran outside and found the deceased, the appellant and PW3 on the ground. He pushed them apart only to see blood on his hands. Then he noticed that the deceased had a cut on the face and stab wounds in the stomach. PW2 helped to move the deceased into the house and later took him to hospital. He did not see where the appellant went.

4. David Rono (PW3), was a brother to the deceased and was visiting the deceased on the fateful day. He recalled seeing someone snatch his brother's jerrycan of the chang'aa that they had bought earlier in the day. He saw the deceased follow the person out of the house and presently, he heard the deceased scream. He rushed outside and found that the deceased had been stabbed.

5. No. 61268 P.C Marea Chesang (PW7) the investigating officer, interviewed the deceased on 1st September 2009, at Valley hospital where he was admitted. The deceased told him that the appellant stabbed him on the head and on the right side of the abdomen. The deceased remembered none of what else had happened in the intervening period, until he found himself in the hospital the following day on 29th August, 2009. PW7 later learnt that the deceased died on 6th September, 2009.

6. The report of the postmortem conducted on the body of the deceased by Dr. Noah Oloo Kamidigu (PW5), indicated that the cause of death was hypovolaemic shock due to severe intra-abdominal haemorrhage, from several mesenteric vessels due to sharp force injuries to the intestine and mesenteric vessels.

7. The case for the defence was extracted solely from the sworn testimony of the appellant since he called no witnesses. The appellant's narrative was that on the fateful day the deceased came to his home at around 4p.m to buy chicken accompanied by two other men. He sold him the chicken for Kshs. 200 and the deceased left. At 6.30 p.m. the deceased returned with PW2 and invited the appellant for a drink in the town Centre. The deceased bought chang'aa, and they drank until 8.00 p.m when they departed to their respective homes. According to the appellant, it was the deceased who took a knife and started chasing the rest of them and stabbed the appellant on the thigh. The appellant ran in to a maize plantation and the deceased jumped over a barbed wire fence.

8. That was the last the appellant saw of the deceased on the material day. On 30th August, 2009 the area Chief summoned him to go to the police station to record a statement and was arrested when he presented himself. He was subsequently charged with the murder of the deceased on 10th October, 2009 a charge which he denies to date.

9. Upon considering the sum total of the foregoing evidence, the trial Judge found that there was sufficient evidence to prove that the appellant killed the deceased and that he did so with malice aforethought. The appellant was therefore, found guilty and convicted of the offence of murder contrary to section 203 of the *Penal code*. He was sentenced to 45 years imprisonment without the option of parole for the first 25 years.

10. The appellant's dissatisfaction with the above judgment and sentence sparked the appeal before us. The appellant filed the main grounds of appeal and subsequently filed supplementary grounds of appeal faulting the evidence and the judgement which convicted him as follows:

> " a. That there was no credible or reliable eye witness and as such the prosecution had not discharged the burden of proof that it was the appellant who inflicted injuries upon the deceased, thus the part of actus reus was not established.

b. That the prosecution had not established any circumstances and / or presented circumstantial evidence that would have led to the belief that the appellant committed the act of stabbing the deceased.

c. That the prosecution did not prove any motive on the part of the appellant to have caused the death of the deceased.

d. That the prosecution case was marred and/ or shrouded in inconsistencies and contradiction that cast doubt on the genuineness of what transpired at the scene and the appellant's involvement in the infliction of injuries upon the deceased.

e. That the prosecution had all in all not proved their case to the required standard.

f. That the sentence meted against the appellant was excessive and the mitigating factors were not considered.

g. That the Judge improperly shifted the burden of proof to the defence.

h. That the appellant was convicted on the basis of flimsy evidence.

i. That the conviction was upheld despite evidential irregularities by the prosecution.

j. That the conviction was upheld in oblivion of the appellant's firm defence."

11. This appeal was disposed of by way of written submissions. The said submissions were highlighted orally in the virtual Court.

12. Mr. Maragia learned counsel appearing for the appellant, filed written submissions dated 14th October, 2022 in which he argued that no one saw the appellant stabbing the deceased. As such, he urged the Court to find that the prosecution did not tender direct evidence linking the appellant to the murder. Further, that the witnesses placed the appellant in two different places immediately before the attack. Therefore, the circumstantial evidence was not sufficient to hold a conviction.

13. Counsel also contended that the prosecution did not establish malice aforethought on the part of the appellant, that could have motivated him to kill the deceased and that no single prosecution witness brought out the element of malice aforethought.

14. Counsel urged that, in the unlikely event that this Court upholds the conviction, it should set aside the sentence imposed for reasons that: the appellant is a first offender who regrets the act of causing the death of the deceased; the circumstances leading to the death of the deceased were due to intoxication; the evidence of PW10 also indicates that the appellant had sustained injuries meaning that there is a possibility of an act of self defence; and that the appellant is a family man whose children depend on.

15. Learned Principal Prosecution Counsel, Mr. Ondimu appearing for the respondent, filed his submissions on 19th of October 2022, and partially opposed the appeal. It was his submission that the element of death was confirmed by PW1, PW4 and PW5. Further, that the evidence presented in the trial court, especially the findings in the post-mortem report, clearly reveals that the deceased person's death did not result from a natural cause and there is no doubt that it was an unlawful death.

16. On the culpability of the appellant, counsel submitted that indeed, no one actually witnessed the stabbing of the deceased and the evidence tendered by the prosecution against the appellant is mainly

circumstantial. Counsel contended however, that the trial court was alive to the principles governing circumstantial evidence.

17. Mr. Ondimu relied on this Court's decision in *Isaac Muiruri Wairimi & another v R* Crim. App. No. 64A & 64B of 2016, where it was held that circumstantial evidence must be such as to be incompatible with any other explanation but the appellant's guilt. He also submitted that the law on proof of circumstantial evidence is as was articulated by the Court of Appeal for East Africa in *Simoni Musoke v R* (1958) EA 715 at p. 718. He urged this Court to find that there were no other co-existing circumstances which would weaken or destroy the inference that it was the appellant who stabbed the deceased leading to his death.

18. Counsel further contended that in determining whether there was malice aforethought, this Court must consider all the surrounding circumstances of the events that led to the death of the deceased. He referred as to the decision in *Naftaly Mukundi Waweru v R*Crim. Appeal No. 15 of 2015, where this Court faulted the High Court for concluding that the appellant had malice aforethought without considering the surrounding circumstances.

19. Counsel pointed out that the aspect of intoxication was not given due consideration by the trial court. He relied on this Court's decision in *Bakari Magangha Juma v Republic* (2016) eKLR where the question of intoxication was discussed at length. It was his view that the appellant was not possessed of malice aforethought when he stabbed the deceased. Hence should not have been convicted for the offence of murder but rather, for the offence of manslaughter contrary to section 202 of the *Penal Code*.

20. On contradictions and inconsistencies, he submitted that there were none, and if they were there, they were minor and did not go to the root of the prosecution case, hence this Court should ignore them.

21. This is a first appeal on conviction and sentence by the High Court and our duty as the first appellate court is stipulated in Section 379(1) of the *Criminal Procedure Act* and Rule 31(1)(a) of the *Court of Appeal Rules*, 2022. Section 379 of the *Criminal Procedure Code* provides as follows:

> "(1) A person convicted on a trial held by the High Court and sentenced to death, or to imprisonment for a term exceeding twelve months, or to a fine exceeding two thousand shilling, may appeal to the Court of Appeal-
>
> a. Against the conviction, on grounds of law or fact, or mixed law and fact;
>
> b. With the leave of the Court of Appeal, against the sentence, unless the sentence is one fixed by law"

22. This court in *Dickson Mwangi Munene & Another v Republic* [2014] eKLR, articulated the manner in which the Court ought to exercise its jurisdiction as a first appellate court as follows;

> "This being a first appeal, this Court is obliged to re- evaluate the evidence on record to determine if the trial court's decision was based on evidence and is legally sound. On matters of fact, as an appellate court we have to bear in mind the caution that having heard and seen the witnesses testify, the trial court was better placed to assess their demeanor. We should therefore be slow to reverse the trial judge's finding of fact unless it is not supported by the evidence on record. See *Okeno v. Republic* [1972] EA 32 and *Mwangi v. Republic* [2002] 2 KLR 28."

23. In *Okeno v. R* (1972) EA. 32 cited in the foregoing case the role of the first appellate court was set forth as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.* [1957] E.A. 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R*., [1957] EA 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] EA 424."

24. With the foregoing principles in mind, we have considered the record and memorandum of appeal, the rival arguments and the law. As admitted by both sides, the case for the prosecution rests on circumstantial evidence there being no eye witness to the murder. We have distilled three issues for consideration.

I. The first issue is whether the circumstantial evidence was sufficient to sustain a finding that it was the appellant and no one else who inflicted the fatal blows upon the deceased.

II. The second issue flows from the first. Should we find in the affirmative then we must proceed to determine whether he did so with malice aforethought.

III. The third issue is whether we should interfere with the sentence imposed by the trial Court.

25. The appellant was charged with murder contrary to Section 203 of the *Penal Code*. The said section reads:

> " any person of malice aforethought causes death of another by unlawful act or omission is guilty of murder"

From the grounds of appeal and the submissions, the appellant continues to deny having played any part in the slaying of the deceased but, that per chance, should this Court confirm the conviction then it should be reduced to manslaughter and not murder. The respondent on the other hand asserts that there is sufficient evidence to establish that the appellant caused the death of the deceased but agrees with the appellant that he should have been charged or convicted for the offence of manslaughter.

26. We have therefore, analyzed the record before us to establish whether the evidence adduced by the prosecution was sufficient to prove the offence of murder and that it was the appellant who committed it. We refer to the decision in *Joseph Kimani Njau v R* (2014) eKLR, where this Court outlined the ingredients of murder as follows:

> " Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual subject;
>
> i. The intention to cause death;

ii. The intention to cause grievous bodily harm;

iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and the intention were aimed at a potential victim than the one succumbed..."

27. It is incumbent upon the prosecution to prove the following elements to sustain a conviction for the offence of murder under Section 203 of the *Penal Code*: first, that the deceased died; second, that the death was caused unlawfully; third, that in committing the offence, there was malice aforethought; and lastly, that the action of the accused directly or indirectly caused the death of the deceased.

28. The state bears the responsibility of the burden of proof at all times. This responsibility can be traced way back to the cases of *Woolmington Versus DPP* 1935 AC 462 and also *Miller versus Minister of Pension* 1942 AC In the later case Lord Denning stated in his phrase on beyond reasonable doubt as follows:

> "it need not reach certainty but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt."

29. Further, in comparative jurisdiction, in Nigeria Lord Oputa of the Supreme Court of Nigeria in the decision of *Bakare versus State* 1985 2 NWLR held as follows:

> "proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

30. In the instant case it is not disputed that the death of the deceased was as a result of being stabbed in the abdomen during the incident that took place on the 28th August, 2009. It is also a common ground that none of the witnesses who testified saw the appellant stabbing the deceased. The State relied on circumstantial evidence to prove its case and the trial Judge concluded as follows:

> "the question then becomes, who inflicted those fatal injuries upon the deceased? PW1 -PW3 did not see the accused inflict those injuries upon the deceased! Is there however any doubt as to who inflicted those injuries?
>
> In *Kariuki Karanja vs. Republic* (1986) KLR 190, at 193 the court stated inter alia-
>
> "circumstantial evidence, to sustain a conviction must point irresistibly to the accused in order to justify, on circumstantial evidence, the inference the inculpatory facts must be

incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts. Rex vs Kipkering Arap Koskei 16 EACA 135. An aggregate of separate facts are inconclusive because they are consistent with innocence as with guilt and is not good enough evidence"

In this case, the facts are not separate, they are a consistent aggregate of the actual circumstances that lead to the killing of the deceased by the appellant"

31. The appellant contends that the prosecution evidence placed the appellant in two different places and therefore, the circumstantial evidence was not sufficient to hold a conviction. On the other hand, the prosecution argues that the circumstantial evidence directly points to the appellant as the perpetrator of the offence, and there was no other inference that could be drawn on the circumstances.

32. In *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, when this Court was grappling with this issue, it held that:

> " However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21:
>
> "It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

33. In the same case, the Court of Appeal set out the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The Court stated:

> " Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Subject person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:
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> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
>
> (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
>
> (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject;
>
> (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

34. We have applied the conditions set out in *Ahamad Abolfathi Mohammed* (*supra*) in the surrounding circumstances of the case at hand. PW1- PW4 who were present at the deceased's house at the time of the incident, all witnessed the appellant and the deceased get in to an altercation over a drink and then step out of the house together. PW2 also testified to the fact that two other guests who followed the appellant and the deceased outside the house, were asked by the deceased to go back to the house to attend to the other guest.

35. At that point it was clear that the appellant and the deceased were the only ones who were outside the house and within a short time, the deceased was heard screaming, and both PW2 and PW3 who were the first to respond found him already stabbed. The appellant was still the only person with him. It is noteworthy that the appellant fled the scene and did not tarry to assist in moving the deceased back in to the house, or to hospital and no one else seems to have seen the injury he says the deceased inflicted upon him at that point.

36. From the foregoing we are satisfied that the circumstances from which an inference of guilt is sought to be drawn in this case have been cogently and firmly established and that those circumstances as narrated above are definite and unerringly point towards the guilt of the appellant. We further find that the circumstances taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability the crime surrounding this case points irresistibly to the appellant as the perpetrator. As such, we make a finding that the conclusion of the learned Judge of the Superior Court that the appellant stabbed the deceased was sound.

37. Having so found we turn to assess the evidence in regard to the presence or absence of malice aforethought. The appellant argues that it was in evidence that he and the deceased were taking illicit alcohol and that this impaired their mental faculties. The respondent agrees that the issue of intoxication was not given due consideration in the judgement, while it was clear that the appellant had taken alcohol and therefore it was conceded that the malice aforethought was not proved.

38. The learned Judge had this to say on this issue:

> "PW5 described the injuries as having been caused by heavy sharp force. In other words, the injuries were such that they were deliberately inflicted with all the force so as to cause such grievous harm which could only lead to death, unless you are St. Pope Paul II who survived such attack and became a saint. The accused did not care about the grievous harm and eventual death of the deceased. He had worn a greatcoat to hide away any weapon he had. His only care was to pay the deceased for daring to take away his precious litre or so of chang'aa. The accused did not plead drunkenness, that defence is not open to him. His was a reckless act of malevolence, and knew no bounds"

39. Section 206 of the *Penal Code* provides that malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

> "(a) an intention to cause 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 fight or escape from custody of any person who has committed or attempted to commit a felony."

40. Asquith LJ in *Cunliffe v Goodman* 1950 1 ALL ER 724 defined intention in homicide offences as:

> " An intention, to my mind, connotes a state of affairs which the party intending does more than merely contemplate, it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition."

41. The prosecution did not lead sufficient evidence to prove malice aforethought. What is clear from the evidence is that, the deceased and his guests including the appellant were partaking of illicit alcohol (chang'aa). In John *Kaberi Njoroge v Republic* [1988] eKLR this Court quoted with approval *Michael Sheehan and George Alan Moore*, (1975) 60 Cr App. R 308, where Geoffrey Lane LJ delivered himself at page 312 as follows regarding intoxication and mens rea:

> " In a case 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 he been sober does not assist him at all, provided that the necessary intent was there. For a drunken intent is nevertheless an intent...the jury should be instructed to have regard to all the evidence, including the evidence 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".

42. In *Nzuki – v- Republic* (1993) KLR 171, this Court had the following to say on malice aforethought:

> " There was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."

43. Bearing the two cases of *Michael Sheehan* and *Nzuki* (supra), we are of the view that the prosecution did not prove beyond reasonable doubt that the appellant had malice aforethought in the commission of the act that lead to the deceased's death. We bear in mind that these two individuals were mates of some sort and it is the deceased who invited the appellant into his home to come and share a drink with him. We therefore, respectfully disagree with the trial Judge on his finding that malice had been proved.

44. Lastly, the appellant has urged that the sentence meted against him was excessive and the mitigating factors were not considered. We suppose that the appellant is referring inter alia to their drunken state at the time of committing the offence by alluding to mitigating factors that were ignored by the trial court, since he has not enumerated them. The respondent agrees with him.

45. Both the appellant and respondent have invited this Court to consider the appropriateness of the sentence that was imposed upon the appellant when he was convicted. Rule 33 of the *Court of Appeal Rules*, 2022 confers upon this Court powers as set out below:

46.

> "On any appeal from a decision of a superior court, the Court shall have power, so far as its jurisdiction permits—
>
> a. to confirm, reverse or vary the decision of the superior court;
>
> b. to remit the proceedings to the superior court with such directions as may be appropriate; or
>
> c. to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs."

47. The power in Rule 33 of the *Court of Appeal Rules*, 2022 is to be exercised judiciously. In *Ahamad Abolfathi Mohammed & another vs Republic* [2018] eKLR, this Court stated in reference to the sentencing jurisdiction of an appellate court that:

> "...as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive."

The presentencing report availed before sentencing the appellant did not paint the appellant in good light. To quote the Learned Judge; "The Report POR/14 filed in court on 19th December 2014 of which a copy was availed to the accused's Advocate, was not flattering at all. The accused is described as an unruly, Rowdy and troublesome character"

48. We are careful not to interfere with the sentence merely because we think we would have imposed a different one If we were sitting in the trial court. We have considered the unflattering pre-sentencing report and the barbaric manner in which the appellant butchered a man who, by his own confession, had kept him well supplied with the illicit brew the whole evening. On the other hand, we note the submissions of both parties that he was intoxicated, that he has a family that depended on him.

49. Ultimately, the appeal succeeds on both conviction and sentence. We set aside the conviction of murder contrary to section 203 as read with section 204 of the *Penal Code* and substitute it with manslaughter contrary to section 202 of the *Penal Code*. Further, we hereby set aside the sentence of 45 years' imprisonment imposed upon him and substitute it with a sentence of 21years imprisonment.

The sentence shall be computed to take account the period the appellant spent in custody if he was in remand during trial.

It is so ordered

DELIVERED AND DATED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2023

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR