IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KOOME & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 109 OF 2016

BETWEEN

JOSEPH WANJOHI NDUNGU.....APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court at Kitui (Mutende, J.) dated 9th December, 2015

in

H.C.CR.C No.72 OF 2015)

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JUDGMENT OF THE COURT

In these circumstances, is an unusual controversy that turned out to be a storm in a teacup which turned fatal. Joshua Nkuruna, (the deceased) was the caretaker of certain premises within Bisil trading center in Kajiado County where the appellant resided as a tenant. On the night of 11th and 12th of January, 2012 at around 10.30 p.m. the appellant and his two co-accused persons, who had been drinking alcohol left the bar for the appellant's house for dinner. Upon dinner being served, the appellant realized that they did not have spoons for everyone. It is at that point that he remembered that he had previously given the deceased his spoon.

It was the prosecution's case that the appellant went to the deceased person's door and demanded for his spoon in a provocative manner. He hurled insults at the deceased while throwing stones at the deceased's house. According to PW6, a cousin to the deceased who was spending the night at the deceased's house, the deceased who had been asleep woke up and opened the door to return the spoon to the appellant. Shortly, PW6 heard a scuffle and decided to find out what was the matter. He came out of the house and saw the appellant perched on top of the deceased while holding a knife. PW6 saw the appellant's co-accused running away as the appellant also fled and locked himself in his house. PW 6 confirmed that the scuffle had left the deceased with a knife wound on the neck. He was pronounced dead on arrival at the hospital. The doctor attributed the cause of death to this single stab wound on the neck.

Defending himself of the murder charge before the High Court, the appellant admitted that he had been drinking at a bar in Bisil where he estimated to have consumed about 9 bottles of beer; that at around 10.30p.m, he went home with his co-accused persons for dinner; that he and the deceased disagreed when the latter demanded that he should reduce the volume of his radio and when he too demanded from the deceased his spoon; that the deceased told him to forget about the spoon and instead reminded him that he had not paid his rent and threatened to rent out his house to another tenant; and that he informed the deceased that he had paid his rent to the landlord and that he would not move out unless the landlord was aware. After the brief exchange, the appellant told the trial court that he and his co-accused persons finished their meal and the two left. Afterwards, the deceased and his brother, (Dan) called the appellant to collect his spoon outside the deceased's house. When he did so, he found the deceased outside and realized he had a knife instead of a spoon; that he held the deceased's hand and pushed him down and they both fell down; that he managed to take the knife from the deceased; that, at this point, he saw Dan carrying a panga. Fearing for his life, he ran and locked himself in his house; that while in the house, he heard the deceased ask to be taken to the hospital as he had been stabbed; and that about 30 minutes after the incident, the police officers came to his house and arrested him. Later, his two co-accused were also arrested and jointly charged with him.

Mutende, J. in her consideration of the evidence by both sides observed that, while the appellant had been drinking on the material night, he did not raise a defence of intoxication. In the learned Judge's opinion, the appellant's actions proved that he was fully aware of the sequence of events, from the point he aggressively demanded for his spoon, followed by a commotion as soon as the deceased opened the door, and the fatal stabbing of the deceased in the process. From the chain of events, the learned Judge was satisfied that the appellant acted with homicidal

intent and rejected his defence. She however found no evidence linking the appellant's co-accused persons with the death of the deceased and acquitted them. The appellant was not as lucky and was sentenced to death.

In this first appeal, the appellant has urged us to find that the learned Judge erred by: placing reliance on the evidence of PW6 to the effect that he witnessed the incident; failing to observe that the ingredients of murder were not proved; failing to take into account the provisions of s**ection 13(4)** of the Penal Code that enjoins courts to enquire whether the suspect was intoxicated for the purpose of determining whether he was capable of forming the intention to commit the offence charged; failing to properly re-evaluate the evidence on record and; passing a mandatory death sentence contrary to the Constitution, harsh and excessive.

For these reasons, Mr. Onsongo who argued this appeal on behalf of Mr. Amutallah learned counsel for the appellant, submitted that the learned Judge ought to have acquitted the appellant; that PW6 who was presented by the prosecution as the only eyewitness was not at the scene of the incident; that his evidence was inconsistent and untrustworthy, leaving only circumstantial evidence in the case.

Counsel submitted that there was evidence of intoxication, self defence and provocation which the trial court erroneously failed to consider as the appellant's plausible defence; that the doctor corroborated the defence, in that the deceased suffered only one injury on the back of his neck which was consistent with the appellant's defence that the deceased had a knife in his hand on which he fell; that had it been true, as claimed by PW6 that the appellant was on top of the deceased with a knife, then the injuries would have been on the deceased's upper body. Similarly, the fact that the appellant was arrested in his house as he slept after the incident instead of fleeing the scene, was itself an indication that he might have been completely inebriated due the alcohol he had taken.

Lastly, on the sentence, counsel urged us to apply the Supreme Court case of **Francis Karioko Muruatetu & Anor V. Republic** (2017) eKLR, and direct the release of the appellant having been in prison since 9th December, 2015.

By the provisions of **Section 379** (1) of the Criminal Procedure Code, a person convicted on a trial held by the High Court and sentenced to death may appeal to this Court against the conviction and sentence, on grounds of law or of fact, or of mixed law and fact;

In our estimation, the only issues which falls for our consideration and determination is whether the case was proved beyond reasonable doubt in view of the defence presented by the appellant.

To prove a charge of murder against the appellant, the prosecution was duty-bound to establish three elements: the death and cause of death of the deceased; that death was caused by the appellant through an unlawful act or omission; and that, if he did so, he had malice aforethought.

Out of the 12 witnesses called by the prosecution, the evidence of PW6 was central in that he claimed to have witnessed the occurrence first hand. A cousin of the deceased, PW6, testified how at about midnight on the night in question, the deceased was woken up by the noise and insults from the appellant demanding a spoon. From the window he could see the appellant with his 2 co-accused persons with the help of moonlight; that he watched as the appellant picked stones and threw them at the deceased's house; that at this point he told the deceased to return the spoon in order to avoid the drama. The deceased heeded and took the spoon to the appellant at the entrance of his (the appellant's) house. Immediately the door was opened he heard some commotion from that direction, which prompted him to go outside where he found the appellant on top of the deceased with a knife in his hand; that the latter was already injured and bleeding. The appellant and his co-accused persons, on seeing this, ran away. The deceased then told PW6 to take him to the hospital. He reported and led the police officers to the appellant's house, identified him before he was arrested.

That is the only evidence incriminating the appellant. It is evidence of a single identifying witness. Such evidence as this Court has consistently warned in **Abdala bin Wendo & Another V. R.** (1953) 20 EACA 166, **Cleophas Otieno Wamunga V. R** (1989) eKLR and **Paul Etole & Reuben Ombima V. R,** (2001) eKLR, in a long line of others, must be received with the greatest care, especially when the conditions favouring a correct identification are confirmed to be difficult. The court must look for some other corroborating evidence, pointing to the guilt of the accused person, so as to minimize the errors that may result from a mistaken identification.

The evidence on record that places PW6 at the *locus in quo* is overwhelming, and the trial Judge correctly found as much. The witness' account of events was not different from the appellant's. The common denominator was the spoon. The police recovered it at the scene. The appellant conceded he was at the scene. His account of the immediate events was that the deceased had a knife and not a spoon; that he pushed the deceased and they both fell down. Though PW6 did not see the actual stabbing, he saw the appellant holding a knife, sitting on the deceased who was bleeding. The foregoing evidence taken together with the medical evidence on the nature of injury and the presence of moonlight and security light at the scene, we, like the learned Judge, are persuaded that the only inference to be drawn from the surrounding circumstances, is that it was the appellant who stabbed the deceased to death.

We now turn to consider the appellant's intention in stabbing the deceased. **"The thought of man is not triable, for the devil himself knoweth not the intendment of man"**, Brian CJ is quoted in a 1468 case of **Greene vs Queen**, to have said with regard to human intentions.

Through judicial innovation, certain principles have been laid down to assist in the discernment of a person's intention. The Eastern Africa Court of Appeal, for example, in the **Republic V. Tumbere S/O Ochen** (1945) 12 EACA 63 identified five things to be looked for in order to infer malice aforethought in a given situation;

(1) The nature of the weapon used.

(2) The manner in which it was used.

(3) The part of the body targeted.

(4) The nature of the injuries inflicted either a single stab-wound or multiple injuries.

(5) The conduct of the accused before, during and after the incident.

We can add that this list, drawn over 70 years ago was not intended to be exhaustive. The question of malice aforethought goes hand in hand with the state of mind of the suspect at the point the offence is committed.

Guided by that list, and bearing in mind the caveat, it is clear from the evidence that prior to the incident, the appellant had been chaotic. His conduct was inconsistent with that of a person in control of his faculties. The drama with which he sought to get a mere spoon should have called for closer scrutiny of the surrounding circumstances. Those circumstances were explained by the appellant himself. He had been drinking. He consumed 9 bottles of beer before he retreated home. Shortly upon reaching home the incident occurred. Apart from the spoon the deceased was unarmed but the appellant pushed him down, got on top of him and then delivered the fatal stab. We reject the appellant's claim that he acted in self-defense.

Though the appellant, apart from admitting that he had drunk, did not specifically raise the defence of intoxication, it was obvious that he was intoxicated and the trial court was duty bound to consider the question of his drinking in order to determine whether he was capable of forming the intention requisite for murder. **Section 13(4)** of the Penal Code reads as follows:

> **"(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."**

The learned Judge considered the defence of intoxication but missed the point when she limited herself thus:

> **"This is a case where the accused did not put up a defence of intoxication. Although all along he wished to plead to the lesser charge of manslaughter as correctly submitted, an offer that was accepted by one state counsel and later declined by another, in his defence he changed his mind and denied having even caused the death of the deceased."**

The appellant did not have to specifically plead intoxication when there was evidence that would have led the trial court to that conclusion. In addition to what the appellant himself told the court, the investigating officer found out through his investigations that, indeed the appellant and his co- accused had been drunk.

In **Said Karisa Kimunzu v. Republic,** CR App No. 266 of 2006 where, like here, the defence of intoxication was not raised and where the witnesses were in agreement that, though the appellant had been on a drinking spree, he did not appear drunk, the Court found that from the appellant's conduct before committing the murder of his young son, pointed to a person who was not sober and whose thinking ability appeared to have been impaired. The Court said;

> **"So there was some evidence from the prosecution witnesses themselves that when the appellant was away from home, he had been drinking.**
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> **…**
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> **Did the appellant kill the deceased with malice aforethought? That now brings us back to the issue of drunkenness or intoxication.**
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> **…**
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> **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."**

We come to the conclusion that the appellant before us was not capable of forming malice aforethought due to drunkenness. The noise, insults, stone throwing, then stabbing over a spoon, all pointed to an impaired mind. After he stabbed the deceased, he simply retired to his bed and slept as if nothing had happened.

For these reasons, we allow the appeal, quash the conviction for murder and set aside the sentence of death. In lieu thereof, we substitute a conviction for manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and sentence of 15 years imprisonment with effect from the date of the appellant's conviction and sentence by the High Court.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR