IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), OKWENGU & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 130 OF 2015

BETWEEN

SAMMY MULAI .....APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Garissa (**Mutuku, J**) dated 11th *March, 2014* in **H.C.CR.C NO. 14 of 2012)**

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JUDGMENT OF THE COURT

[**1**] This is a first appeal lodged by **Sammy Mulai** (**appellant**) against his conviction and sentence by the High Court (**Mutuku, J**) for the offence of murder, contrary to section 203 as read with section 204 of the Penal Code. The information against him alleged that on the 9th of February 2012 at Nzalae sub location of Migwani District within Kitui County, he murdered **Mwanzia Nyeki** (the **deceased**).

[**2**] During the trial, 12 witnesses testified for the prosecution, while the appellant gave a sworn statement in his defence and called no witness.

[**3**] According to the prosecution evidence, on 9th February 2012, the deceased was at a club known as Club House located within Nzalae Shopping Centre in Kitui County. He was in the company of his brother Munyoki Nyeki (Munyoki), Peter Sila (Peter), Alexander Kambu Kitali (Alexander) and one Paul Kavisi (Paul). At about 7.00 pm the appellant arrived at the club and proceeded to sit at the counter, while the others continued drinking where they were sitting. Mbithe Kitonyi (Mbithe), a waiter was on duty serving the patrons.

[**4**] At about 10.30 p.m. there was an altercation that arose when the appellant went to the table where the deceased and his colleagues were sitting, and poured beer on Paul. The deceased and his brother Munyoki confronted the appellant, questioning his behavior. A quarrel ensued but the same was quelled. The appellant then walked out of the bar. Moments later, the deceased also went outside. What followed was testified to by Mbithe and Munyoki who apparently both went outside the club when they heard the commotion.

[**5**] It was Munyoki's evidence that after the deceased walked out, he heard him shout. Munyoki went outside to find out what was going on. He found that the deceased had been stabbed on the chest by the appellant. The appellant was still standing there. Munyoki asked the appellant why he had stabbed the deceased. At that stage, the appellant attacked Munyoki and as the two struggled, he stabbed Munyoki on his left arm. The appellant then dropped the knife and fled from the scene.

[**6**] Mbithe's evidence was that the appellant left the Club and went outside. He was followed out by the deceased. Shortly thereafter, Mbithe heard a commotion and on going out, found the deceased lying on the ground and the appellant walking around the deceased holding a knife, asking where the other person was. Munyoki, who had come out earlier to find out what was going on, asked the appellant why he had stabbed the deceased. Munyoki then tried to get the knife that the appellant had and during the struggle, Munyoki was cut on his hand forcing him to let go of the knife, and the appellant then ran away. In the meantime, the deceased who was not talking, was lying on the ground bleeding. Mbithe testified that the incident occurred around 9.00 p.m., and that there was a very bright moonlight. The appellant was a regular customer in the bar. She had known him for about 10 years.

[**7**] Neither Peter nor Alexander witnessed what went on outside the bar as both remained inside and immediately left the bar. Dominic Nzove Kilai (Dominic) the Assistant Chief, Nzalae Location received a report of the incident from the Chairman of community policing. He went to the scene and confirmed that Mwanzia Nyeki had already died. He reported the matter to the OCS Migwani Police station. Officers from the station, including Cpl. Mutiso Nyamai (Cpl. Nyamai) proceeded to the scene. Cpl. Nyamai took photographs of the scene after which the body of the deceased was taken to Migwani mortuary.

[**8**] On the 10th February 2012 at 7.00 a.m. the appellant surrendered himself to Simeon Kavive, the Assistant Chief of Kakulo Sub location. The Assistant Chief, Kakulo instructed Sergeant Adan Abdullahi Adan, who arrested the appellant and took possession of a yellow apron and blood stained boots that the appellant was wearing. Sergeant Adan later handed over the appellant to the OCS Migwani Police station, together with the blood stained items. Later, Cpl. Nyamai escorted the items to the Government Analyst where the exhibits were examined by Lawrence Kinyua Muthuni, a government analyst.

[**9**] Dr. Edward Indumwa who carried out the post mortem examination on the body of the deceased observed that the deceased had a long deep penetrating wound on the left side of his chest, and that the deceased died as a result of collapse of the lungs due to excessive bleeding.

[**10**] The appellant in his defence gave sworn evidence. He testified that he had known the deceased for about 20 years and that he did to not have any issue with him. On the material night, he was at a bar called Atlantic drinking. The deceased was in the same bar sitting with others on one table. The appellant testified that he was drunk and that he disagreed with the others over alcohol as the deceased was telling him to buy him beer and he did not want to do so. He went to relieve himself at the back of the bar, and on coming back met the deceased at the corridor behind the bar and the deceased demanded to know why he did not buy him beer. The appellant told him he did not have money but the deceased held his shirt as he thought the appellant had money. A fight ensued and the deceased was injured on the forehead. They fell on the ground and continued struggling, rolling on the ground. The appellant then stood up and ran away. Later he learnt that the deceased had been injured. He was surprised because during the fight, he did not see any weapon, nor did he stab the deceased. He claimed that he was bleeding from his face after he was injured and that the deceased also had blood. He was surprised to learn that the deceased was injured, as in his view, the fight was not one that resulted in an injury. He denied stabbing the deceased and maintained that he had no reason to kill the deceased.

[**11**] Under cross-examination the appellant stated that he went to the Club House at 9.00 pm. and that by the time of the altercation which happened between 9.30 p.m. and 10.00 p.m., he had taken five bottles of the alcoholic drink. He explained that there was moonlight and that he saw the deceased well because he knew him before. They were both drunk and held each other blocking the corridor. Both the deceased and himself, were each bleeding from the head. The deceased was also injured from the back and shoulder. The appellant explained that he ran to the AP camp when he realized that he was being followed by 5 people. [**12**] The learned Judge while analyzing the evidence that was adduced before him, found: that there was no eye witness to the stabbing of the deceased; that the evidence implicating the appellant with the stabbing was circumstantial evidence; that the appellant's act of surrendering himself to the Assistant Chief and the confession he made in his defence were voluntary; that the prosecution evidence showed that there was a scuffle between the appellant and the deceased; and that the appellant had a knife. The learned Judge concluded as follows:

> **"There is also the evidence of Mbithe who said that when she went out after hearing the deceased shout she found the accused holding a knife going around the deceased. All this evidence confirms one thing, that the accused had a knife and had used it to stab the deceased and Munyoki. Deceased suffered deep wounds and bled excessively internally. From the evidence of the doctor, this court can comfortably draw an inference that the deceased fell down before his blood reached the accused.**
>
> **All this evidence confirms the accused's involvement. This gives this court comfort that the confession by the accused when giving his testimony and his surrendering to Simeon was voluntary. The evidence proves without a doubt that the accused inflicted those fatal wounds on the deceased and also on Munyoki. I note however that the P3 form in respect of Munyoki was not produced in evidence. This court can therefore say without doubt that there are no other co-existing circumstances which would weaken or destroy the inference that the accused is the offender."**

[**13**] As regards malice aforethought, the learned Judge found that although the appellant had taken some alcohol and was drunk, his conduct revealed that he knew the gravity of what he had done. Moreover, his action of stabbing the deceased with a knife was that of someone who had an intention of causing death or grievous harm to the deceased, such that malice aforethought could be inferred under section 206 (a) and (b) of the Penal Code. The learned Judge therefore convicted the appellant with the offence of murder.

[**14**] The appellant was represented in the appeal by learned Counsel, **Mr. Ndiritu**. In his memorandum of appeal, the appellant listed four grounds of appeal, which can be collapsed into one main ground, that is, that the learned Judge erred in finding the offence of murder proved and imposing a sentence that was too harsh. In arguing the appeal, Mr. Ndiritu relied on written submissions which he had filed.

[**15**] In the submissions, three issues were identified for determination. First, whether the prosecution proved its case against the appellant beyond reasonable doubt, such as to justify the finding of the trial judge, that the evidence supported the charge of murder. Secondly, whether the trial judge erred in law by finding that the prosecution had proved the element of *mens rea*, and thirdly, whether the trial Judge erred in law and fact by arriving at a conviction without the prosecution establishing all the elements of the offence as required by law.

[**16**] **Joan Chebichii Sawe vs Republic, [2006] eKLR**, was relied on for the proposition that the burden was on the prosecution to prove that the circumstantial evidence that was adduced, justified the drawing of the inference of guilt against the appellant; that the evidence against the appellant was based on suspicion and was not consistent with the guilt of the appellant; that there was no evidence that the appellant was seen stabbing the deceased with a knife; that the death of the deceased was not linked to any act or omission on the part of the appellant; and that the prosecution failed to rebut the presumption of innocence on the part of the appellant.

[**17**] In addition, it was argued, the prosecution failed to produce the alleged murder weapon, and only traces of Munyoki's blood were found on the appellant's clothing which were examined. Further, the evidence as presented before the trial court failed to prove that the appellant had motive or intention to cause death or grievous harm to the deceased; and that neither the appellant nor the prosecution witnesses were able to discern their action or the consequences thereof as they were all intoxicated. Referring to section 13 of the Penal Code and this Court's decision in **Antony Ndegwa Ngari vs Republic [2014] eKLR**, counsel for the appellant submitted that the court should have considered the defence of intoxication in favour of the appellant, as the actions of the appellant on the material night including pouring alcohol on the deceased, the fight with the deceased, and his sleeping at the police divisional headquarters, indicated that his mental capacity had been impaired by intoxication from the liquor that he had consumed, and was therefore incapable of forming the necessary *mens rea* to

commit the offence.

[**18**] In regard to the alleged confession made by the appellant, counsel pointed out that the statement made by the appellant in court was not a confession but only an expression of the appellant's apprehension and understanding of the events that culminated into his arrest and trial. **Sango Mohammed Sango & Anor vs Republic [2015] eKLR** was cited for the argument that under section 25 of the Evidence Act, a confession must clearly admit all the elements of the offence or substantially all the facts which constitute the offence, and that the appellant neither admitted the elements of the offence or the facts. The Court was therefore urged to allow the appeal.

[**19**] **Mr. Omirera**, Senior Assistant Director of Public Prosecution who appeared for the respondent also filed written submissions in which he opposed the appeal, and urged the Court to uphold the appellant's conviction and sentence. Mr. Omirera identified three issues for determination by the Court. These were: whether the prosecution case against the appellant was proved beyond reasonable doubt; whether malice aforethought was proved; and whether the appellant's defence of intoxication was plausible.

[**20**] Mr. Omirera submitted that the evidence of the prosecution witnesses clearly established that the deceased sustained a fatal stab wound from which he succumbed, and that although there was no direct evidence on how the fatal wound was inflicted on the deceased, there was sufficient circumstantial evidence that unerringly pointed to the appellant as the person who stabbed the deceased. The incriminating evidence included: the evidence of Mbithe, Munyoki and Simeon; the fact that the appellant had provoked a quarrel in the club by pouring beer on Paul; the fact that Mbithe found the appellant standing over the deceased holding a knife; and the fact that the appellant fled from the scene after injuring Munyoki. Mr. Omirera urged that the appellant's defence of intoxication should be rejected as it was not raised as a substantive ground in the appeal nor was there evidence to show that the appellant was drunk to the point of being mentally incapable of understanding the consequences of his action. Counsel maintained that the appellant knew what he was doing.

[**21**] This being a first appeal, this Court is obligated to re-evaluate and analyse the facts and evidence that was presented before the High Court, and draw its own findings and conclusion. In **OKENO V R, [1972] E.A**. **32** the obligation was stated as follows:

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion (***SHANTITLAL M* RUWALA V R, [1957] EA 57**). 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 courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."**

[**22**] It is in the above spirit that we have set out the evidence as adduced and analysed by the trial court. We now proceed to consider and analyse the evidence as revealed from the record of appeal, and the submissions made before us by both parties, in order to make our own findings and determine whether the charge of murder was proved against the appellant to the required standard. To prove the charge of murder, the prosecution had to prove the three elements of the charge of murder. That is, that the deceased died; that the death was caused by the appellant through an unlawful act or omission; and that the appellant had malice aforethought.

[**23**] It is not disputed that the deceased and the appellant knew each other very well and were both at the Club house on the material night when the stabbing incident occurred. It is also not disputed that before the stabbing incident, there was an altercation involving the appellant and the deceased when the appellant moved from the counter where he was drinking to the table where the deceased and his colleagues were seated, and poured alcohol on one Paul. The appellant has also not denied that after the altercation, when he was coming from a short call outside the club house, he had a second altercation with the deceased when they met along the corridor, leading to a fight. It was shortly thereafter that the deceased was found lying down with the fatal injury.

[**24**] The appellant was essentially convicted on circumstantial evidence as there was no eye witness who saw how the deceased sustained his injury. In **Abanga alias Onyango vs Republic, Cr. Appeal No. 32 of 1990 (UR)** this Court set out the following threshold in circumstantial evidence:

> **"When a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (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 no one else."**

[**25**] In the more recent case of **Sango Mohamed Sango & another v Republic [2015] eKLR** this Court had this to say on circumstantial evidence:

> **"There is no dispute that the evidence against the appellants was circumstantial evidence to the extent that the prosecution did not adduce any direct evidence regarding the murder of the deceased. But as has been stated time and again, that in itself does not render circumstantial evidence valueless, because, subject to satisfying well-known conditions, circumstantial evidence is as good as any other evidence and can prove a case with the accuracy of mathematics. At times, its deemed the best evidence ever. (See MUSILI TULO V. REPUBLIC, CR. APP. NO. 30 OF 2013). In SAWE V. REPUBLIC (2003) KLR 364, this Court stated that to pass muster, circumstantial evidence must be incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of his guilt and further that for circumstantial evidence to form the basis of a conviction, there must be no other existing circumstances which would weaken the chain of circumstances"**

[**26**] The question is whether the circumstantial evidence that was adduced against the appellant met the required threshold. The evidence of Mbithe and Munyoki is significant in this regard as they both testified that they went out immediately they heard the commotion and found

the deceased lying down on the ground with the appellant standing over him. According to Mbithe, the appellant was holding a knife. This was consistent with the evidence of Munyoki who was injured as he tried to wrestle the knife from the appellant. By this time, the deceased had already been injured and was not talking. Although the knife was not recovered, it is clear from the evidence of Dr. Indumwa Edward who performed the postmortem examination on the body of the deceased, that the deceased suffered a six-centimeter-long deep penetrating wound at the second and third ribs on the left side of the chest, and a seven-centimeter-long cut wound on the wrist, and that the injuries, which in his opinion were caused by a knife, led to excessive bleeding and collapse of the lungs, resulting in the deceased's death.

[**27**] As the appellant was the only person who was outside with the deceased, and it being admitted that the two were engaged in a fight, there is no doubt that the deceased suffered his injuries as a result of or during the combat with the appellant. Even though the appellant denied having had a knife and having stabbed the deceased, the evidence of Mbithe and Munyoki that the appellant had a knife was sufficient to dislodge that denial. It was also corroborated by the doctor's evidence. The chain of evidence is such that the incriminating evidence against the appellant leads irresistibly to the conclusion that it is the appellant who stabbed the deceased and not any other person. We find that the learned Judge was right in holding that the circumstantial evidence pointed irresistibly to the appellant as the person who caused the deceased the injury that led to his death, and that there were no other circumstances that could weaken this inference. The *actus reus* was therefore established.

[**28**] As regards *mens rea*, in **Republic V. Tumbere S/O Ochen** (1945) 12 EACA 63, the Court identified five things to be looked for in order to infer malice aforethought in a given situation. These are: the nature of the weapon used; the manner in which it was used; the part of the body targeted; the nature of the injuries inflicted either a single stab-wound or multiple injuries; and the conduct of the accused before, during and after the incident.

[**29**] The evidence prior to the death of the deceased shows that the appellant had been confrontational and provoked a scuffle when he poured alcohol on Paul. It was after this altercation that the appellant walked out and shortly thereafter, the deceased also went out. In his defence the appellant explained that he had an exchange of words with the deceased leading to a fight because the deceased was demanding that he buys him alcohol. Even assuming that this was so, it would not justify the appellant stabbing the deceased with a knife.

[**30**] The appellant argued that he was not capable of forming the necessary *mens rea*, due to intoxication. **Section 13** of the **Penal Code** states as follows regarding the defence of intoxication:

> **"13.(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.**
>
> **……**
>
> **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."**

[**31**] It is clear that prior to the incident, both the appellant and the deceased had been drinking in the bar. However, there is no evidence that the appellant was so inebriated, as not to know what he was doing. He could clearly recall in court what happened during his confrontation with the deceased. He also went and explained to the assistant chief Simeon, what had happened. Clearly, the appellant was not intoxicated to the point of insanity or not knowing what he was doing. The appellant knew exactly what he was doing, and the defence of intoxication under section 13 of the Penal Code is therefore not applicable.

[**32**] In her judgment, the learned Judge stated as follows:

> **"It is relevant at this stage to introduce the confession by the accused. This is how he introduced his testimony under oath in court.**
>
> 'I am Sammy Mulai from Nzalae sub-location in Kitui County. I am a businessman buying and selling cattle and farming. I am married with children, five in number. I am 53 years old.
>
> I am aware I killed someone'….
>
> **Simon told the court that the accused informed him that he has been involved in killing someone and he was surrendering himself."** (underlining added).

[**33**] Although the learned Judge took note of section 25(A) of the Evidence Act and noted that confessions are generally inadmissible unless they are made in the manner specified in that section, the learned Judge made a finding as follows:

> **"Taking into account the behavior of the accused after the stabbing, his surrendering to the Assistant Chief Simeon, and <u>what he told the court under oath,</u> I have no doubt that the accused and the deceased were involved in a physical combat. It is noteworthy that the stabbing happened in Nzalae sub-location …."**
>
> (emphasis added)

[**34**] It is apparent from the above extract of the judgment that the learned Judge construed what the appellant stated in court as a confession. Clearly, this was a misapprehension of the facts and the law. The appellant had pleaded not guilty to the charge and when put on his defence, opted to give sworn evidence. What the appellant stated in his opening statement to the court, taken together with his plea of not guilty and the sworn defence, could only be construed as a slip of the tongue. The logical conclusion is that the appellant intended to say that he was aware that he was charged with killing someone. This underscores the need for a trial court to caution an accused person where he makes a statement in the course of the trial that contradicts his plea and appears to be an admission that he committed the offence. The court must probe further in order to confirm that the accused understands what he is saying and the implication. In this case the learned Judge did not caution the appellant or question him in order to be sure he understood what he was saying. The statement that was made by the appellant in court cannot therefore be taken as a confession or evidence of admission of any fact, and the learned Judge erred in construing it as such.

[**35**] As regards the report that the appellant made to the Assistant Chief Simeon, it is evident that the report was made by the appellant voluntarily. The Assistant Chief is someone who is in the administration and must therefore be taken as someone who is in authority over the appellant. This means that the statement could not be admissible in court as a confession, as Assistant Chief Simeon was not qualified under section 25(A) of the Evidence Act to receive a confession. However, the evidence of Assistant Chief Simeon was admissible as evidence going towards the conduct of the appellant and not evidence of a confession. Thus, neither the statement made by the appellant in court nor the report he made to Assistant Chief Simeon were admissible as confessions. The learned Judge misdirected herself in this regard, but we are satisfied that the appellant was not prejudiced by this misdirection because even if the evidence regarding the confession is excluded, the remaining evidence that we have already analyzed demonstrates that the evidence against the appellant is sufficient to establish the *actus reus* that is required for the offence of murder.

[**36**] On the issue of whether the appellant had malice aforethought, the learned Judge found in the affirmative, drawing conclusion from the appellant's actions which showed that he had the intention of causing grievous bodily harm, through his act of stabbing the deceased and Munyoki with a knife without provocation.

[**37**] **Section 206** of the Penal Code defines malice aforethought as follows:

> **"206. 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."**

[**38**] The appellant having stabbed the deceased with a knife, it is evident that he knew that that action would probably cause death or grievous harm to the deceased. Malice aforethought can therefore be inferred under section 206(b) of the Penal Code. We come to the conclusion that the charge against the appellant was proved to the required standard and his conviction was therefore safe.

[**39**] As regards sentence, one of the appellant's grounds of appeal was that the sentence imposed on him was too harsh and excessive. The appellant was sentenced to serve 30 years' imprisonment. The trial Judge considered the mitigation that was made on behalf of the appellant by his counsel. Nevertheless, the trial court exercised its discretion taking the view that in the circumstances of the case, a sentence of 30 years would be adequate. We have no reason to interfere with the exercise of discretion by the learned Judge.

[**40**] Accordingly, we uphold the appellant's conviction and sentence, and dismiss his appeal in its entirety.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

……..

JUDGE OF APPEAL

F. SICHALE

……..

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR