IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 22 OF 2017

BETWEEN

ABDALLA OMAR MWANGESHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgement of the High Court of Kenya at Mombasa (M.Muya, J.) dated 11th June, 2015

in

H.C.CR.C 29 OF 2012)

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JUDGMENT OF THE COURT

1. The appellant was charged and subsequently tried for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. Particulars of the offence were that on the 8th of June, 2012 at Makwasinyi village within Taita Taveta County he murdered Raphael Kigwanya (hereinafter referred to as the deceased). He was found guilty, convicted and sentenced to suffer death.

2. A brief background of the case as presented before the High Court is as follows. The deceased was the appellant's stepfather; his father having passed away and his mother having re-married. They lived together within the same homestead at Makwasinyi village within Taita Taveta. It was the prosecution's case that there had been bad blood between the appellant and the deceased. According to the evidence presented before the trial court, on the fateful day at around 8.00pm, the appellant arrived at the homestead drunk and armed with a panga threatening to kill the deceased or one of the deceased's children. He proceeded to arm himself with a knife and started to chase the deceased who in turn, fled into the bushes fearing for his life.

3. In the course of the pursuit, screams and shouts were heard from the deceased and soon thereafter he was found lying dead outside his neighbour's (PW5) house with stab wounds on his neck. The neighbour's children then chased and caught up with the appellant after which members of the public gathered and threatened to lynch him. Luckily for him, the area chief showed up and organized for the appellant to be taken to the police station. A post mortem carried out on the deceased's body by **Dr. Wilson Charo** revealed that the deceased had a penetrating cut wound on the left side of his neck with a ruptured cerotio artery on the same side. The left nervous valve had also been severed. The cause of death was found to be cardio- pulmonary arrest due to shock.

4. In his defence, the appellant who testified on oath conceded that the family usually took meals at the deceased's house and on the said day at about 8.00pm he was at the deceased's house. On arrival, he found the deceased drunk; the deceased proceeded to hurl insults at him; the deceased then picked a piece of wood and attempted to hit him; in an attempt to avoid a confrontation he got up opened the door and walked away; the deceased followed him and attempted to hit him again but he got hold of the deceased's hand; a struggle ensued and the deceased fell on the ground, screamed once and then kept quiet. Later, members of the public arrived at the scene and he was arrested. He maintained that he was intoxicated and acted in self - defense and did not kill the deceased; that he was the one running away from the deceased and not vice versa; that the deceased probably fell and hit himself on the neck causing a fatal injury.

5. The learned Judge (**Muya, J.**) considered this evidence and observed that it was the appellant who was armed with a panga and knife and who started chasing the deceased; that there was no logical evidence that the deceased was armed at the time and there was no evidence to the effect that the deceased provoked the appellant. To the contrary, it was the appellant who started the commotion and he clearly announced his intention to kill the deceased and the deceased's daughter.

6. The appellant's actions were found to be premeditated on account of him constantly quarrelling with the deceased. The appellant's defence of intoxication was dismissed for the reason that he failed to prove that as a result of the intoxication he had become temporarily insane; there was no mention of a third party having maliciously or negligently caused the state of intoxication upon him, rather, it was voluntary. The learned Judge found that the appellant voluntarily armed himself with a knife and panga, chased the deceased and accomplished his mission by stabbing him on the neck which could not have been acts of an insane person but of a cool and calculating mind. The learned Judge was satisfied that the appellant caused the deceased's death with malice aforethought and accordingly convicted and sentenced him to death.

7. Being aggrieved by that decision he has now proffered this appeal against his conviction and sentence on grounds that the learned Judge erred by failing to consider the issue of intoxication which greatly prejudiced him; misdirecting himself by failing to note the issue of provocation hence arriving at a wrong decision and misdirecting himself by failing to consider the appellant's defence.

8. During the hearing of the appeal, learned counsel **Mr. Gicharu** appearing for the appellant urged the 3 grounds of appeal together. He submitted that PW1, PW4 and PW5 placed the deceased at the *locus in quo* but nobody actually saw the appellant stab the deceased. According to him, the evidence against the appellant was circumstantial. He conceded that there was indeed a misunderstanding or bad blood between the appellant and the deceased but, that notwithstanding, it was the deceased who started insulting the appellant and even attempted to hit him with a stick. Further, that the appellant tried to walk away but the deceased still followed him. Counsel contended that the appellant ought not to have been convicted of the murder charge as he was intoxicated and urged for the lesser charge of manslaughter. He submitted that if the Court was to find that the appellant ought to have been convicted of manslaughter, it should take into consideration the time the appellant has been in prison custody since he was sentenced.

9. Opposing the appeal, **Ms Njoki**, learned prosecution counsel appearing for the respondent, supported both conviction and sentence and maintained that the case was proved to the required standard; that the learned trial Judge considered the appellant's defence and found that the appellant was not forced to take any alcohol; that the learned Judge on the issue of self defence did not err by finding that the murder was premeditated as the appellant had threatened to kill the deceased and his daughter. Counsel maintained that the eyewitnesses saw the appellant kill the deceased. She posited that although in the appellant's defence he indicated that he was hit with a wooden stick, the force with which he retaliated was excessive. For the foregoing reasons, counsel urged this Court to dismiss the appeal.

10. We have carefully considered the totality of the evidence on record, the impugned judgment, the grounds of appeal and the submissions by counsel. The key issues for consideration are whether the appellant caused the death of the deceased and whether there was malice aforethought.

11. This being a first appeal, the duty of this Court is as clearly spelt out in the case of **Okeno V. Republic (1972) EA.32** 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 versus Republic [1957] EA36) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own decision on the evidence (Shantilal M. Ruwala versus Republic [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 finding 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 had the advantage of hearing and seeing the witnesses."***

We are therefore enjoined to re-consider afresh the evidence we have summarized above and make our own conclusion one way or another. It is common ground that the deceased, as per the postmortem report, died as a result of cardio pulmonary arrest and shock due to a ruptured carotid artery. It is also common ground that none of the witnesses actually saw the appellant kill the deceased. The learned Judge found the witnesses truthful and credible. He found that the appellant was the agitator and he had actually confronted the deceased in his own house while armed, picked a quarrel with him, followed him outside and stabbed him with the knife he had armed himself with. After considering the evidence before him, the learned Judge arrived at the following conclusion.

> ***"There is no plausible evidence that the old man was armed at the time. There is no evidence to the effect that it's the old man who provoked the accused. Evidence adduced before the Court is to the effect that it's the Accused who started the whole commotion. He clearly and openly announced his intentions by stating that he would kill the Deceased and his daughter. His acts were premeditated. He was constantly quarreling with his father for reasons best known to himself."***

13. Can we fault the learned Judge for so finding? We remind ourselves of the caveat that unlike the trial Judge, we did not have the advantage of seeing the witnesses testify and the opportunity to assess their demeanor. There is nothing on record to even remotely suggest that the said witnesses were not telling the truth. Like the learned Judge, we believe the prosecution witnesses. On our own assessment of the evidence tendered by the appellant, we are not persuaded that he told the whole truth he swore to tell. We say so because his version of the story is not supported by the medical evidence contained in the post mortem report.

14. The deceased did not die from a fall. He died from a sharp cut wound on the left side of the neck which appears to have been inflicted with great force. The principal point for our determination is whether the fatal injury that put an end to the deceased's life was inflicted by the appellant. As stated earlier, the witnesses did not see the appellant in the act of stabbing the deceased. The evidence was therefore circumstantial.

15. As it has been constantly pointed out, in order for a conviction to be founded on such evidence, it must point irresistibly to the accused person to the exclusion of any other person. At the same time, there must be no co-existing factors or circumstances which may weaken or destroy the inference of guilt of the accused. See **R v Kipkering Arap Koskei [1949] EACA 135** and **Musoke v R [1958] E.A. 715**. Further, to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis other than that of his guilt. In the more recent case of **Judith Achieng' Ochieng' v. Republic Criminal Appeal 218 of 2006**, this Court amplified the said requirements and re-stated the law as follows:-

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

i. The circumstances from which the 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 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 none else."

16. Did the evidence before the trial court pass the above test? PW1 on cross-examination testified that she saw the appellant pushing and chasing the deceased and she could hear someone beating the other. PW 4 testified that she was in the deceased's house when the appellant threatened to kill her and the deceased. Also, that the appellant armed himself with a knife and a panga and followed the deceased. She further stated that she heard her neighbour crying that the appellant had killed his father and when she went to check she found that indeed he had been killed. This piece of evidence was corroborated by PW5 who in her testimony stated that she heard someone screaming outside calling for somebody to get hold of the appellant as he was "finishing" him. Further, that she got a torch to see what was happening and that's when she saw the deceased lying on the ground bleeding.

17. There is no evidence that there was somebody outside other than the deceased and the appellant at the time the deceased was stabbed. There is no evidence either to show that the deceased had disagreed with anybody else immediately before his demise, or that anybody else had reason to kill him. There was therefore no reason or even opportunity for any other person to follow the deceased outside his house and kill him. The chain of circumstantial evidence from the time the appellant picked a quarrel with the deceased in the latter's house to the time the deceased was stabbed and appellant found at the scene by the other witnesses was unbroken. We are satisfied the evidence on record proved beyond reasonable doubt that it was the appellant and nobody else who killed the deceased.

18. The only other issue for our consideration is whether the killing of the deceased was with malice aforethought. In his defence, the appellant raised the defence of self-defence claiming that the deceased had attacked him with a piece of wood and so he was just defending himself. We do not believe that the deceased is the one who attacked the appellant. The deceased even left his house to get away from the appellant. Even if he had attacked the appellant, a proposition not supported by the evidence on record, the retaliatory force used by the appellant was excessive and uncalled for. This would therefore negate his defence of self-defence. The defence of self- defence is not available to the appellant.

19. The other defence raised by the appellant was that of intoxication. Can the appellant be availed the defence of intoxication? The learned Judge considered the said defence and expressed himself as follows:-

"He has raised the defence of intoxication. Section 13(1) of the Penal Code provides,

"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 off 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".

In the present case the Accused is said to have been drunk. He himself stated to have started drinking from 2:00 pm to 8:00 pm. Its not stated what kind of drink he was imbibing and what quantity he had consumed but of much importance is whether he voluntarily caused the state of intoxication or it was caused by another person maliciously or negligently and whether as a result of that intoxication he had become temporarily insane. The Accused in the instant case imbibed drinks voluntarily. There is no mention of a third party having maliciously or negligently caused the state of intoxication on the Accused. When the Accused went home he clearly stated his main objective which was to kill the Deceased and his daughter (PW 4). He voluntarily armed himself with a panga and a knife, chased the old man and accomplished his mission by stabbing him on the neck and fatally injuring him. These were not the acts of an insane person but those of a cool and calculating mind. The defences of self-defence, provocation and intoxication are not available to the Accused in the present case. It is not in dispute that the cause of death was due to cardio pulmonary arrest and shock due to ruptured carotid artery. I am satisfied that the Accused caused the death of the Deceased with malice aforethought."

20. From the above finding, it is evident that the learned Judge failed to properly consider the defence of intoxication in making his finding as to whether there was malice aforethought or not. The learned Judge in making his findings dealt with the defence of intoxication within a very narrow scope i.e. simply in the sense that it was a defence pleading temporary insanity. He failed to consider the other aspect of the defence of intoxication which can also be pleaded to negative malice aforethought. In the latter situation, the strictures provided for under **section 13** of the **Penal Code** are loosened and the appellant has no onus to prove the requirements under the said section. This Court addressing a similar issue in the case of **Maina v Republic [2007] 2 EA 279 (CAK)** cited with approval the case of **Manyara v R (5) (1955), 22 EACA 502** where the predecessor of this Court stated:-

"It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the

offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused." **(See Kongoro alias Athumani s/o Mrisho v Reginam (1956) 23 EACA 532**)

The Court in the aforementioned case was making a distinction between a case where an accused person pleads insanity by reason of intoxication and a case where intoxication or drunkenness is raised as in this case merely to negative the intent to kill/malice aforethought. Further, in **Maina v Republic (supra)** this Court further cited the case of **Boniface Muteti Kioko and Willy Nzioka Nyumu v Republic [1982–1988] I KAR page 157**, where it was held *inter alia*:

> ***"It was the duty of the Judge to deal with alternative defences, such as intoxication, that emerged from the evidence, which might reduce the charge to manslaughter."***

The court went further to state that,

> ***"In this case, the learned Judge was clearly alive to the defence of intoxication and dealt with it. However, it is the way she dealt with it that was, in our view, and with every respect, not proper. She treated it as a plea of insanity by reason of intoxication, which it was not. It was a defence that would have, if properly considered, negatived the intent to kill and reduce the charge to that of manslaughter."***

21. Clearly, in this case the appellant was not pleading insanity by reason of intoxication and so he bore no onus to prove that defence. What the appellant was saying was that he was so intoxicated as to not to be capable of forming an intent to kill the deceased. In view of the above, it is evident that the learned Judge failed to properly consider the defence of intoxication that would ultimately have reduced the charge of murder to that of manslaughter.

22. Given that there is no doubt from the evidence on record that the appellant was intoxicated, applying the law as articulated in the decisions we have cited above, it is evident that on account of his intoxication, the appellant was not capable of forming an intent to kill the deceased. Malice aforethought was not therefore proved beyond reasonable doubt. Accordingly, our finding is that the charge of murder was not proved to the required standard, with the result that the conviction for murder is hereby set aside and in its place we substitute therefor a conviction for the charge of Manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code**.

23. On the issue of sentence, having considered the circumstances of the case and the mitigation tendered on behalf of the appellant, the sentence that commends itself to us is a prison term of 20 years imprisonment from the date of conviction. This appeal therefore succeeds in part to the above extent.

Dated and delivered at Mombasa this 28th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR