IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & MURGOR, JJ.A) CRIMINAL APPEAL NO. 195 OF 2016

BETWEEN

WILLIAM MUIRURI NJOROGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit, J.), dated 1st October, 2015

In

H.C. CR. C. No. 88 of 2012)

****

JUDGMENT OF THE COURT

The appellant was convicted by Honourable Lady Justice Lesiit of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced to death. The appellant had appealed to this Court against conviction and sentence. He filed a memorandum of appeal in person, which shows that this appeal is against the entire decision of the High Court. However, Mr. McRonald, upon appointment as counsel for the appellant, filed a supplementary memorandum of appeal containing eight grounds of appeal which he relied on during the appeal.

At the trial, the prosecution called a total of eight witnesses. PW1, who was the appellant's neighbour, testified that she heard Wairimu, sister to the appellant, screaming and when she came out of the bathroom, found the appellant and his sister Wairimu fighting. As the two fought, the deceased came from the neighbouring plot to fetch water and found the two still fighting. PW 1 also testified that the deceased took the appellant outside the gate and locked it up to end the fight and proceeded to draw water. According to Wairimu, she heard the appellant calling the deceased to go outside to where he was and the deceased obliged. PW1 saw the deceased on the ground struggling to stand up soon thereafter. She testified that she and Wairimu saw that the deceased had been stabbed. PW1 called PW2, the mother of the deceased, before taking the deceased to a nearby clinic where he was given first aid. PW2 and other family members transferred the deceased to Kenyatta Hospital where he was admitted for two months after which he died.

The cause of death, according to Mr. Ndegwa who performed a post-mortem on the deceased on 11th March 2011, was peritonitis due to infection in the abdomen caused by an early penetrating stab wound. When put on his defence at the trial, the appellant opted to give a sworn statement. He stated that he was quarrelling with his sister Wairimu, who had taken Kshs.500 from his house without permission, when the deceased walked into the compound to fetch water. The deceased, according to the appellant, tried to intervene and in the process, he and the deceased fought and as they did, the deceased fell over utensils which Wairimu had washed and as a result, he was stabbed. The appellant stated that he asked Wairimu to assist him to take the deceased to Kwa Mwango dispensary. However, the appellant ran away claiming that he followed Wairimu's advice that he may be subjected to mob justice. The appellant did not visit the deceased in hospital but claimed to have followed the progress of the deceased's treatment because his family advised against it. He learnt that the deceased passed away while in police custody after being arrested for stealing property. It was thereafter that he was charged with murder contrary to **section 203** of the Penal Code which provides;

> ***"203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."***

The learned Judge of the High Court convicted the appellant of murder contrary to that section and sentenced him according to **section 204** of the Penal Code which provides;

"Any person convicted of murder shall be sentenced to death."

The grounds of appeal outlined by counsel in the supplementary memorandum of appeal can be dealt with wholly by two grounds; that the learned Judge erred in law and in fact in convicting the appellant for murder yet the prosecution failed to prove beyond reasonable doubt that the appellant had malice aforethought when he stabbed the deceased and that the learned Judge erred in law in completely failing to consider the appellant's mitigation on record and thereby passing a sentence which was manifestly harsh and excessive in the circumstances.

Counsel for the appellant, Mr. McRonald, relied on the case of ***Moses Murithi Ikamati vs Republic [2015] eKLR*** for the submissions that the Court of Appeal has a duty to re-evaluate the evidence on record and determine whether the trial judge correctly arrived at the inference that *mens rea* or malice aforethought had been proved.

We also take into consideration that according to the case of

Susan Munyi vs Keshar Shiani Civil Appeal No. 38 of 2002 (unreported) the learned Judges stated that;

"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

In understanding this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."

We have considered this as well as the case of ***Evans vs Bartlam [1937] AC 473***, a decision of the House of Lords, in which Lord Atkins said in part at p. 480-481:

"..and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that it will not interfere with the exercise of the judge's discretion except on grounds of law, yet it sees that on other grounds the decision will result in injustice being done it has both the power and duty to remedy it."

Counsel submitted that the appellant was fighting with his sister Wairimu and the deceased tried to separate the two to put an end to it. The deceased took the appellant outside the gate and it is at that time the deceased was stabbed by the appellant. Counsel submitted that malice aforethought was not established and that at first it was a mere fight. He submitted further that, the appellant was trying to wrestle a knife from the deceased and that malice aforethought was not established at the trial court. Counsel also submitted to the Court that the evidence of PW1 was not clear and that no stab wounds evidence were on record. He submitted that the evidence on record did not establish the particulars of murder. Mr. McRonald also submitted that it was not clear whether the stabbing was intentional or not and that having established that it was a normal fight; there was no intention to cause death.

The defence of the appellant is that he was intoxicated at the time he committed the offence and that he was provoked, both of which were not considered.

The prayer made by learned counsel for the appellant to this honourable Court is that the appellant be given a non-custodial sentence or a lighter sentence commensurate with the conduct of the appellant. He asked that the Court consider that the deceased was in hospital for some time which he submitted was a circumstance intervening between the period of stabbing and death which resulted two months later.

Mrs. Murugi was present for the State. She conceded that the charge of murder be substituted with manslaughter. She submitted that PW1 did not prove that the appellant was armed, according to page 77 of the record of appeal, with the alleged murder weapon before he attacked the deceased. Also, that PW1 only saw one stab wound. Counsel for the State cited that counsel for the appellant raised a defence which was not considered in the trial. She further submitted that it is the appellant that caused the death of the deceased but requested that, the Court substitute the charge noting that the appellant does not deny that he caused the death of deceased.

Counsel asked that the Court consider the initial cause of action and everything else secondary. She concluded by submitting that the stab was not accidental and that it was the appellant who inflicted the stab wound.

We have read through the record of appeal and considered counsel's submissions. On the first ground, that the learned Judge erred in law and in fact in convicting the appellant for murder yet the prosecution failed to prove beyond reasonable doubt that the appellant had malice aforethought when he stabbed the deceased. From the witness statements, it is clear that the appellant called the deceased outside the gate where, according to PW1, he was locked out by the deceased so as to stop the fight that had ensued between him and Wairimu, who is the deceased and appellant's sister, and continued to draw water. Wairimu clearly states in her testimony that she heard the appellant calling the deceased outside to where he was and the deceased proceeded there. It is recounted by PW1 that soon thereafter, she saw the deceased on the ground struggling to stand up and when she and Wairimu went to where he was, they saw that he had been stabbed.

Section 206 of the Penal Code defines malice aforethought and in its pertinent parts states:-

"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.

First, we have considered the fact that none of the witnesses testified to having seen the appellant actually stab the deceased. However, the appellant has admitted that he did indeed stab the deceased but put a defence that he did not commit the crime intentionally. It is just that we ensure that the Court establish that the *mens rea* existed to cause the death of or to do grievous harm to the deceased. It is with this in mind that we have considered the circumstantial evidence in this case. As we know from ***Republic vs Taylor Weavor and Donovan (1928) 21 Cr. App. R.20.***

"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 of evidence to say it is circumstantial."

In ***Sawe vs. Republic [2003] KLR 364*** this Court held;

"1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. …

5. …

6. …

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

We shall rely on the evidence by PW1 and Wairimu who both gave an account of the circumstances surrounding the commission of the crime. It is not disputed that the deceased separated Wairimu and the appellant in a bid to stop a fight that had ensued between them and was thereafter locked outside the gate by the deceased who continued to draw water afterwards. PW1 and Wairimu thereafter opened the gate for the appellant who called the deceased outside the gate and it is soon thereafter, as PW1 testifies, that the deceased was on the ground struggling to stand up.

There is an inference of premeditation because the appellant asked the deceased to go outside the gate to where he was; where neither PW1 nor Wairimu could see them. The appellant has not denied stabbing the deceased. Further, the appellant did not call for help or assist the deceased even though he claims that it was accidental. From PW1's testimony, we infer that the appellant did not offer any assistance at that instant, to his wounded and now deceased, brother. We also find a range of contradicting accounts from the appellant about what caused the stab wound on the deceased. The first account at the trial court was that he fell over utensils which Wairimu had washed when he was stabbed. The second account was to this Court where the appellant submits that he was intoxicated when he stabbed the deceased. The appellant concedes that he called the deceased outside the gate and he also concedes that he stabbed the deceased on that day. It is immaterial that the deceased died two months after the crime was committed. The cause of death has been corroborated by Dr. Ndegwa at the trial court, paragraph 4 of the judgment, that the cause of death was peritonitis due to infection in the abdominal cavity due to an early penetrating stab wound. We also note that the murder weapon was in the appellant's possession after he was locked outside the gate by the appellant and it is only reasonable to infer that the appellant premeditated that crime.

In the case of ***Abanga alias Onyango vs Rep Cr. A. No.32 of 1990*** (UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

"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 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."

We infer that from the evidence adduced by the witnesses, the doctor and the appellant that the circumstances from which an inference of guilt is sought to be drawn are without doubt cogently and firmly established**.** The circumstances have also unerringly pointed towards guilt of the appellant and finally, the circumstances have cumulatively formed a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and no one else. It is also established that the crime was premeditated by the appellant accordingly to the evidence.

Since it is well established that the appellant committed the crime, the next undertaking by this Court is to consider the defence that was raised by the appellant through his counsel; that the appellant was intoxicated at the material time he committed the offence and that there was provocation which was not concluded. We note that this defence was not raised at the trial court; however, this being a first appeal, we are mindful of our primary role as the first appellate court namely, revising the evidence that was tendered before the trial judge, analyzing the same independently and then drawing conclusions bearing in mind the fact that we neither saw nor heard the witnesses and make an allowance for that. In ***Okeno vs R., [1972] EA 32*** at p. 36 the predecessor of this Court stated: -

> ***"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 vs R. [1957] EA 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. (Shantilel M. Ruwal vs R. [1957] EA 570)."***

The defence of intoxication is outlined under **section 13** of the Penal Code;

> ***"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.***
>
> ***3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal procedure Code Cap. 75 relating to insanity shall apply.***
>
> ***4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.***
>
> ***5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."***

It is essential to note that this defence is considered where the person that committed the crime did not know that the act or omission was wrong or did not know what he was doing and the state of intoxication was caused without consent by the malicious negligent act of another person or the person charged or was by reason of intoxication insane, temporarily or otherwise at the time of such act or omission. The statute also guides this Court on what circumstances the defence of intoxication is 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.

In ***James Mwaniki Gathungu vs Republic Criminal Appeal 351 of 2012 [2014] eKLR***, the key issue of the appeal related to *mens rea* and malice aforethought. It was established that voluntary drunkenness is never an excuse for criminal misconduct. The appellant has not produced any evidence to prove that he was intoxicated at the time that he committed the crime. Also, none of the witnesses at the trial court mentioned that the appellant was intoxicated or seemed to be in such state. The weight of the evidence is therefore not cogent or watertight. We threw caution to the appellant's counsel by citing the case of ***Suleiman Juma alias***

Tom vs R, Criminal Appeal No. 181 of 2002 (Msa), where this Court stated that, where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight. We therefore hold that this defence does not hold water and after analyzing the evidence adduced at the trial court by the appellant and submissions before this Court, we are of the opinion that the appellant's defence is weak and cannot be supported by any evidence on record.

The appellant has also submitted that he was provoked by the deceased. ***Black's Law Dictionary, 7th Edition*** defines the term "provocation" as ***"something (such as words or actions) that arouses anger or animosity in another, causing that person to respond in the heat of passion."*** In as much as it is relevant to this case, **section 208** of the Penal Code explains what constitutes provocation: -

> ***"S.208 (1) The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."***

We hold that there is no proof that the appellant was provoked by the deceased. We also infer from the evidence given by PW1 and as well as

the appellant's own defence that the deceased was a peace-maker who seemed to prefer that there be no conflict; to this end, this defence also holds no water before this Court.

Learned counsel for the appellant and for the State have asked that this Court substitute the charge of murder with manslaughter submitting that the appellant caused the death unintentionally. However, after perusing the record of appeal, reviewing the judgment and assessing the submissions before this Court, we hold that the appellant was rightfully charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. We find that the prosecution proved beyond reasonable doubt that the appellant had malice aforethought when he stabbed the deceased. We have considered the appellant's mitigation on record and find that the learned judge at the trial court convicted the appellant rightfully for the offence of murder contrary to **section 203** of the Penal Code. This Court therefore upholds the sentence under **section 322** of the Criminal Procedure Code (Cap 75). From the foregoing reasons, the appeal is dismissed.

Dated and delivered at Nairobi this 27th day of April, 2018.

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR