



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & AZANGALALA, JJ.A.)

CRIMINAL APPEAL NO. 8 OF 2015

BETWEEN

ANTHONY WASIUKHU WENANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri

(Wakiaga, J.) dated 27th June, 2014

in

H.C. Cr. C. No. 57 of 2009)

JUDGMENT OF THE COURT

[1] **Anthony Wasiukhu Wenani**, the appellant, was charged in the High Court at Nyeri with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on 8th November, 2009 at Labura Village in the then Nyeri North District (*now Nyeri County*), the appellant murdered **Samuel Kingara Gathii** (*hereinafter "the deceased"*). He pleaded not guilty but after a full trial he was found guilty convicted and was sentenced to death.

[2] It is against that conviction and sentence that he now appeals to this Court as a first appeal. He listed five (5) grounds of appeal in a memorandum of appeal which he filed himself which grounds, his counsel, **Mr. Kimunya**, abandoned in favour of the supplementary memorandum of appeal filed on 27th October, 2015. Only one ground is set out in the supplementary memorandum of appeal, namely, that:

"1. The trial Judge erred in law and facts (sic) in finding that mens rea was proved, while the accused was drunk".

[3] Being a first appeal, we have the duty of reconsidering and re-evaluating the evidence in order to draw our own conclusion in deciding whether the judgment of the High Court should be upheld. (See **Okeno - v- Republic [1972] E.A. 32**).

[4] The background facts leading to the death of the deceased may be briefly stated as follows:

Both the deceased and the appellant were employed as farm workers on a farm at Labura in Nyeri County. The appellant lived on the farm in a timber structure, while the deceased lived with his grandmother on a neighbouring farm. On 8th November, 2009, (the material date or day), the deceased was to visit his in-laws at 2 p.m., with his wife, **Stella Wangechi Mwaniki (PW 2), (Stella)**. He did not make the visit but **Stella** and her sister went to their parents' home where they expected the deceased in vain. The two sisters then made their return journey at about 5.00 p.m. On their way back, **Stella** found the deceased and the appellant at an outfit where alcohol was being sold and consumed and the deceased asked from her Kshs. 100/= to settle a bill he and the appellant had incurred at the joint. **Stella** gave the joint-owner a Kshs. 1,000/= note with instructions that he deducts his Kshs. 100/= debt and keep the balance for her. She then left for home.

[5] The next day, **Stella** did not see the deceased at his place of work and demanded to have access to the appellant's house to investigate which demand was rejected by the appellant. The appellant told her that the deceased had gone to a place called Babito where he had been summoned. In the interim, the deceased's employer, **John Mwangi Mathenge, (PW 1), (Mwangi)**, attempted to contact the deceased through his mobile phone without success and reported his disappearance to the police. On 15th November, 2009, **Mwangi** went to the farm and was informed of a foul smell, emanating from the appellant's house. He broke into the house and found the body of the deceased in a shallow grave under the appellant's bed. **Mwangi** then reported the discovery to Mweiga Police Station. Police officers visited the scene, exhumed the body of the deceased, took photographs and took the body to Mweiga Hospital Mortuary where **Dr. Ndindi** performed a post mortem examination and prepared his report of the examination. The report was produced at the trial by **Dr. Alice Wambui (PW 9)**. The body was identified by the deceased's grandfather, **Charles Gathii Matheri, (PW 3), (Gathii)**. According to **Dr. Ndindi**, the cause of death was "*severe head injury secondary to trauma*".

[6] **John Gitonga Kamunge, (PW 7), (Gitonga)**, is a farmer and owned the farm next to where the appellant and the deceased worked. He recalled the evening of the material date at about 5.00 p.m., when he saw, the appellant and the deceased leave their place of work together. Later at about 9.00 p.m., he heard a lot of noise from the deceased and the appellant as they returned to the appellant's living quarters. **Gitonga** did not see both the appellant and the deceased the next day.

[7] **Agnes Mbura Gitonga, (PW 4), (Agnes)**, was another neighbour of the appellant and the deceased. She owed the appellant some money which he demanded from her from where he was hiding. **Agnes** had known of the discovery of the body of the deceased in the appellant's house and alerted the police of the demand made upon her by the appellant. The police laid a trap and arrested the appellant as he went to collect his debt. The arresting team included **PC Nelson Otieno Okumu, (PW 5), (P.C. Otieno)** and **C. I. Kingsforth Nyaga, (PW 6), (C. I. Nyaga)**.

[8] The appellant gave an unsworn statement in his defence. He recalled the happenings of the material date when he and the deceased were on a drinking spree. An argument then ensued when the appellant wanted to retire but the deceased wanted to continue consuming alcohol. The appellant left for his house and the deceased followed him. In the house, the deceased hit him thereby provoking a fight which ended with the deceased hitting his head on a door frame in the house after being pushed by the appellant.

[9] The learned Judge **Wakiaga, J.**, went over the evidence which had partly been taken by **Sergon, J.**, and partly by himself. He also considered the submissions of learned counsel and in the end, came to the conclusion that the prosecution had proved the charge of murder against the appellant beyond reasonable doubt. The appellant was found guilty as charged and sentenced to death as already stated.

[10] It is from the foregoing that the appellant comes to this Court by way of a first appeal as already stated. Only one ground was argued by **Mr. Kimunya**, learned counsel for the appellant, namely, that the appellant demonstrated the issue of his intoxication at the material time. That issue, according to learned counsel, was not appreciated by the learned Judge. Given the intoxication demonstrated by the appellant, it was doubtful, so learned counsel argued, whether malice aforethought was proved beyond all

reasonable doubt.

[11] **Mr. Kaigai**, learned Senior Assistant Director of Public Prosecutions, in resisting the appeal, submitted that malice aforethought was demonstrated by the prosecution. In learned counsel's view, the appellant's narrative at the trial and the severe nature of the injuries the deceased sustained were not consistent with the drunkenness alleged by the appellant. It was learned counsel's firm view that the charge of murder was proved beyond reasonable doubt against the appellant.

[12] The appellant's testimony in his defence at the trial and his submissions before us supported the prosecution's case that the deceased lost his life at the hand of the appellant. The only issue for our determination is whether the prosecution demonstrated, beyond all reasonable doubt, that the appellant killed the deceased with malice aforethought. We have anxiously and carefully considered the evidence which was adduced before the trial court. There is really no dispute that the appellant and the deceased consumed alcohol prior to the demise of the deceased. **Mwangi** testified that his workers told him that the appellant and the deceased were drinking together the day and evening before the demise of the deceased. **Stella** not only found the pair at a drinking joint but she also paid a bill they had incurred at the outfit and left them consuming more alcohol. Even before she left the pair, she observed that they appeared drunk to her. **C.I.P. Nyaga**, the Investigating Officer also learned, in the course of his investigation, that the deceased and the appellant had, prior to the demise of the deceased, been on a drinking spree. A glimpse at the state of intoxication of the pair comes through the testimony of **Gitonga**. The pair, according to **Gitonga**, returned at night from their drinking spree making a lot of noise.

[13] Our re-evaluation of the evidence leaves no doubt in our minds that the deceased and the appellant were close friends besides being workmates and we are not at all surprised that after their drinking spree, they ended up in the appellant's house. We are of course fully alive to the fact that drunkenness *per se* is not a defence to a charge of murder. We have however, considered this matter in the light of the provisions of **section 13** of the **Penal Code** which reads:

"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 sub-section (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 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 an offence.

(5) For the purpose of this section, intoxication includes a state produced by narcotics or drugs".

[14] It is plain that the facts in this case exclude the application of **sub-sections (2)** and **(3)** of the above section. However, in our judgment, the provisions of **sub-section (4)** clearly applied. Under the sub-section, the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. Malice aforethought is such a specific intention required to prove a charge of murder.

So, evidence of drunkenness is crucial and the prosecution must demonstrate that notwithstanding the intoxication, the accused still had the malice aforethought if conviction for murder is to be achieved.

[15] In this case, our perusal of the record reveals that the learned Judge never considered the appellant's drunkenness at all. He instead found motive for the killing of the deceased in a statement made to the effect that the deceased was one of the people who caused the appellant's wife to leave him. That statement was made by **Mwangi** who claimed he was informed of the same by the appellant. In our view, that statement, with due respect, should not have been accepted without scrutiny. We are of that view because in cross-examination, **Mwangi** admitted that he had not said so when he first recorded his statement with the police. Furthermore, the witnesses who met the deceased and the appellant on the day and evening before his death did not testify of any such disagreement between the pair. In our view, even if the appellant had made such a statement earlier, it could not have provoked the killing of the deceased on the material date given their common activities the day and evening before the death of the deceased. The witnesses who talked to the pair, including the deceased's wife **Stella**, detected no disagreement between the appellant and the deceased. In the premises, there was really no basis for the learned Judge's conclusion that the appellant had the alledged motive to kill the deceased.

[16] Our conclusion, based on the evidence adduced before the trial Judge, is that the prosecution did not prove, beyond reasonable doubt, that the appellant had the malice aforethought notwithstanding his intoxication. The learned trial Judge with all due respect did not consider or take into account the appellant's drinking of alcohol the day and evening before the demise of the deceased.

[17] In the end, we have come to the conclusion that the conviction of the appellant for the offence of murder in the circumstances of this case was unsafe. We accordingly allow the appeal against the conviction for murder under **section 203** of the **Penal Code**, set it aside and substitute it with a conviction for manslaughter under **section 202** of the **Penal Code** as read with **section 205** of the **Penal Code**.

[18] With regard to sentence, we observe that the appellant was convicted by the High Court on 27th June, 2014 but sentenced on 15th October, 2014. He has therefore been in prison custody for sometime. We set aside the sentence of death and substitute therefor a sentence of fifteen (15) years imprisonment to run from the date when the appellant was sentenced by the High Court.

Orders accordingly.

Dated and delivered at Nyeri this 25th day of January, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR