



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

(CORAM: KIHARA KARIUKI, P.C.A., NAMBUYE & KIAGE, J.J.A.)

CRIMINAL APPEAL 49 OF 2016

PETERSON MUTHEE MURANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from an Judgment of the High Court of Kenya at Meru (Lessit, J.) dated 30th May, 2014

in

H.CR. C. 56 OF 2010)

JUDGMENT OF THE COURT

[1] The appellant, **Peterson Muthee Muranga**, (*the appellant*), was charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**, (**Cap 63 of the Laws of Kenya**). The information was that on the 5th day of September, 2010, at Chirigwe village, Thigaa Sub-location, Maara District within the then Eastern Province, he murdered **Dennis Mutegi Kea**, (*the deceased*). The appellant was tried, convicted and sentenced to death by the High Court, (**Hon. Lady Justice Lessit, J.**), sitting at Meru. Aggrieved by the conviction and sentence, the appellant has lodged this appeal before us.

[2] The Prosecution's case was that on 5th September, 2010, at about 7 p.m., **Karen Kambura Mutegi**, (**PW 1**), (**Karen**), got a note of Kshs. 500 from the deceased, (*who was her husband*), and went to a nearby kiosk to buy ¼ Kg of sugar which then cost Kshs. 25. She found the appellant at the kiosk and gave him the Kshs. 500 for the ¼ Kg of sugar. When she demanded her change of Kshs. 475, the appellant refused to give her. She returned home and informed the deceased. He decided to immediately go for the change himself since he required the money for school fees as schools were opening the next day. Shortly after the deceased was gone, Karen heard voices from the direction of the kiosk and went to investigate. She saw the appellant holding a dagger and stating he would kill someone. She pleaded with the appellant and asked him to "*stop the bullying and return the change*". According to **Karen**, instead of the appellant returning the change, he stabbed the deceased. He then turned on Karen who started fleeing. The deceased attempted to run but according to **Karen**, he fell facing down. The appellant could not catch up with **Karen** and returned where the deceased was and stabbed him several times as **Karen** watched.

[3] The same voices which attracted Karen to the scene, attracted other neighbours - among them **Lenson Gitari Miriti**, (PW 2), (*Lenson*), **Benson Kirimi Murage**, (*Benson*) and **Judith Kanyua Kea**, (PW 4), (*Judith*). **Lenson** arrived at the scene and found the deceased lying down with stab wounds. The appellant was also there. He then arranged for transportation of the deceased to hospital. On his part, **Benson** testified that when he arrived at the scene, he found a crowd of people and was informed by **Karen** that the appellant wanted to kill the deceased. He then took the appellant and as they walked away, he felt a stab on the leg. For her part, **Judith** found the deceased lying down and when she called him, he did not respond. Karen informed her that the deceased had been cut repeatedly by the appellant.

[4] The deceased was eventually taken to PCEA Chogoria Hospital where he was pronounced dead on arrival. Thereafter, **Dr. George Mwaniki** performed postmortem examination on his body and opined that the cause of death was hemorrhagic shock. The postmortem report was produced by **Dr. Polly Kiende**, (PW 9), (*Dr. Kiende*), under **sections 77 and 33** of the **Evidence Act**. In the interim, the appellant was arrested by **Salesio Mbabu Kamungi**, (PW 5), the area Assistant Chief in the company of a team of Administration Police Officers led by **A.P. IP Charles Njoka**, (PW 6). They recovered a blood-stained dagger from the bed where the appellant was sleeping and escorted the appellant to Ntumu Police Station where he was re-arrested by **CIP David Muli**, (PW 8) and subsequently charged with the offence of murder aforesaid.

[5] The appellant's defence was that on the material date, he spent the day at his home up to 6.00 p.m. when he went to the local market and joined his colleagues in enjoying local brew of alcohol and miraa until 7 p.m., when he returned home. He later retired to sleep and was awakened by his wife when the Assistant Chief and his team came calling to arrest him. The next day he was informed that he had killed the deceased with whom he claimed he had no problem. He denied that he had refused to return Karen's change. He contended that the kiosk was not run by him but by his mother. He further denied seeing the deceased on the material night and claimed that his (the appellant's) brother, **Benson**, lied to the court because of a land issue they had between them. He also denied that he could be violent when drunk and stated that he did not even have knowledge of the death of the deceased on the material night.

[6] The learned Judge considered the entire evidence a summary of which we have set out above and having done so, found the appellant guilty as charged, convicted him and sentenced him to death as already stated above provoking the appeal under review.

[7] The appellant initially set out ten (10) grounds of appeal. At the hearing, however, **Mrs. Ntarangwi**, learned counsel for him abandoned those grounds and canvassed only one ground contained in her supplementary memorandum of appeal namely; that "*the learned Judge erred on a point of law and fact in making a finding that the prosecution had proved a case of murder against the appellant when the ingredients of the said offence had not been proved*". **Mrs. Ntarangwi** submitted that on the material night the appellant was drunk and a finding of intoxication should have been made in which event **section 13 (4)** of the **Penal Code** should have been applied. Learned counsel placed reliance on the following authorities; **David Munga Maina -v- Republic [Nyeri C. A. Criminal Appeal No. 202 of 2005] (UR)** and **Charo Kitsao Ngao -v- Republic [Mombasa C.A. Criminal Appeal No. 448 of 2007] (UR)**.

[8] In opposing the appeal, learned counsel for the respondent, **Mr. Mungai**, submitted that the offence of murder was proved. He referred to the testimony of **Karen** which was direct and to the effect that the appellant stabbed the deceased several times and, therefore, knew that he would cause his death. In learned counsel's view, drunkenness did not impair the appellant's mind and if the Court held a different view, then consideration was to be made of the fact that the deceased was unarmed and was related to the appellant.

[9] In a judgment running to fourteen (14) typed pages, the learned Judge considered the evidence of the prosecution and that of the appellant and concluded thus:

"16 ...

I find that the prosecution case against the accused person is strong. There is eye witness

account by PW 1 who saw the deceased exchanging words with the accused before the accused set upon him with a knife. PW 3 and 7 even though they came a little later, were equally attacked by the accused person with the same knife he stabbed the deceased with. There is no possibility of mistaken identity. The accused was placed at the scene of crime. I find that the alibi defence of the accused person has been displaced by the strong evidence of the prosecution".

Regarding proof of malice aforethought, the learned Judge stated:

"18. ... the Court must also consider whether the accused inflicted a single or multiple blows. I am guided by the case of DANIEL MUTHEE -v- REP. CA NO. 218 OF 2005 (UR), where Bosire, O'Kubasu and Onyango Otieno, JJ.A., while considering what constitutes malice aforethought observed as follows:

'when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are, therefore, satisfied that malice aforethought was established in terms of section 206 (b) of the Penal Code' ".

[10] The learned Judge then continued:

"19. The Accused stabbed the deceased first on the chest and then on the back in full view of PW 1. Those injuries were confirmed by the Doctor in the post mortem report produced by Dr. Kiende on behalf of Dr. Mwaniki who performed it. The doctor found a stab wound on the neck, one stab wound on the upper left lung and one stab wound on the lower right side. The cause of death was hemorrhagic shock. The accused stabbed the deceased several times and must have known that the stabs could cause death or grievous harm.

23. I also find that malice aforethought was proved in the evidence which shows that the accused set upon the deceased with a knife and stabbed him several times on the chest and the back which injuries caused excessive bleeding. The bleeding was the cause of death....

Malice aforethought was proved under section 206 (b) of the Penal Code".

[11] The above excerpts from the judgment of the learned Judge clearly show that the learned Judge had the right rule in mind. *Mrs. Ntarangwi* submitted before us that the learned Judge should have considered whether the appellant's intoxication interfered with his state of mind to the extent that he may not have formed the intention to commit the offence charged. Learned counsel was in other words doubting whether malice aforethought was demonstrated given the appellant's drunkenness.

Section 13 (4) of the Penal Code which learned counsel invoked is in the following terms:

"13. ...

(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".

[12] The learned Judge, however, said nothing about the appellant's drinking at the time. We are alive to the fact that the appellant did not have to set up intoxication to negative the intent to kill. We are equally fully alive to the fact that drunkenness or intoxication *per se* is not a defence to a charge of murder. Nevertheless, the learned Judge with all due respect had a duty to take into account the issue of whether the appellant's drunkenness or intoxication deprived him of the ability to form malice aforethought.

[13] Notwithstanding the failure of the learned Judge to consider the appellant's drunkenness, as a first

appellate court, we are duty bound to revisit the evidence afresh, analyze the same, evaluate it and reach our own independent conclusion. (See ***Okeno -v- Republic***, [1972] EA 32). Even as we revisit the evidence, we remind ourselves of what **Sir Kenneth O'Connor P.** stated in ***Peters -v- Sunday Post Ltd.*** [1958] EA 424, at page 429 that:

"It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case, and who had the advantage of seeing and hearing the witnesses".

[14] So, did the prosecution prove beyond reasonable doubt that the appellant had the malice aforethought notwithstanding the intoxication? In this regard, the evidence of Karen is crucial. At around 7 p.m., of the material date, she went to the kiosk where the appellant was serving customers. She gave him a note of Kshs. 500 for him to deduct Kshs. 25 for a ¼ Kilogram of sugar which she had purchased. She expected Kshs. 475 as change. The appellant refused to give her the said change. Karen did not testify that the appellant was drunk or in any way failed to appreciate his actions.

[15] **Karen** went back home and informed the deceased that the appellant had declined to return the said change. The deceased decided to go for the said change as he was due to pay fees the next morning. Soon thereafter, **Karen** heard voices from the direction of the kiosk and went there to investigate. She saw the appellant holding a knife and saying he would kill someone. She did not observe drunken behaviour on the part of the appellant. She then saw the appellant start stabbing the deceased and continued with the stabbing after the deceased's attempt to escape failed. It is significant that throughout the entire incident, the appellant did not exhibit drunken behaviour at all.

[16] **Lenson**, on his part, testified that when he arrived at the scene, he saw the deceased lying down while the appellant was moving up and down near his kiosk. He too did not observe drunken behaviour on the part of the appellant. The others who visited the scene after the attack on the deceased were **Benson, Judith, Selesio, AP IP Charles Njoka** and **Ken Njeru**. All these witnesses except **Benson** never testified that the appellant exhibited drunken behaviour. For his part, **Benson** stated, in cross-examination that when he found the appellant, he was drunk. He, however, did not elaborate on the appellant's conduct at the time.

[17] The facts disclosed by the above testimonies plainly exclude the application of **sub-sections (2) (3) and (4)** of **section 13** of the **Penal Code**. Having taken into account the fact that the appellant took alcoholic beverages before attacking the deceased, our conclusion is that the drinking did not deprive him of the ability to form malice aforethought. He himself denied that he could be violent when drunk. We find that the prosecution proved beyond reasonable doubt that the appellant had the malice aforethought notwithstanding his having taken some alcoholic drinks.

[18] This case is clearly distinguishable from the case of ***David Munga Maina -v- Republic*** [Nyeri CA Criminal Appeal No. 202 of 2005] (UR). There, unlike in this case, the appellant consumed alcohol from around 2 pm till 5 p.m. There was also evidence that the deceased was also under the influence of alcohol. Those circumstances do not obtain in this case where drunkenness took a back seat for both the prosecution and the appellant.

[19] The case of ***Patrick Kilikia M'Kaibi -v- Republic*** [Nyeri C.A. Cr. Appeal No. 45 of 2012] (UR), is also distinguishable. There, two versions were put forward on how the deceased met his death. The Court accepted the version that the deceased and the appellant fought and it was not clear who had instigated the fight. There was also doubt as to how the weapon which inflicted fatal injuries on the deceased found itself at the scene. Those are clearly different circumstances from those obtaining herein where there is no doubt as to how the deceased died and how the attack occurred.

[20] The case of ***Charo Kitsao Ngao -v- Republic*** [Mombasa C. A. Cr. Appeal No. 448 of 2007] (UR) was also relied upon by the appellant. There, the deceased, the appellant and two others went out on a drinking spree for three (3) hours after which a fight ensued between the deceased and the appellant ending in the death of the deceased. Those circumstances clearly demonstrated the offence of manslaughter and not murder. That is not the position here where the appellant left his house at about 6

p.m. for the local market to relax with friends. He returned home at around 7 p.m., after consuming some local brew. He did not fight as he relaxed with friends and when he returned home, he stabbed the deceased when all the latter wanted was his change.

[21] We reiterate that the testimonies of the eyewitness and that of **Dr. Mwaniki** who performed the post mortem examination proved, beyond reasonable doubt, that the appellant plainly intended to inflict grievous harm to the deceased or cause his death and did, in fact, cause grievous harm leading to his death. The stab wounds on the chest, neck, lung and back of the deceased caused hemorrhagic shock and death of the deceased.

[22] We agree with the learned Judge of the High Court that malice aforethought was proved beyond reasonable doubt by the prosecution. The case against the appellant was watertight and accordingly was proved beyond reasonable doubt.

[23] The upshot is that we find no merit in this appeal. The same is dismissed in its entirety.

Dated and delivered at Meru this 10th day of October, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR