



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO, & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 107 OF 2014

BETWEEN

BAKARI MAGANGHA JUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Tuiyott,J.) dated 28th February 2014

in

H.C.CR.C. No. 11 of 2010)

JUDGMENT OF THE COURT

On 28th February 2014, the High Court of Kenya at Mombasa (***Tuiyott, J.***), convicted the appellant, ***Bakari Magangha Juma*** of the offence of murder contrary to ***section 203*** as read with ***section 204*** of the ***Penal Code*** and sentenced him to death. The information that formed the basis of the charge stated that on 4th May 2010 at Kariokor Majengo in Voi Township in present day Taita Taveta County, he murdered ***Beatrice Mwadima (the deceased)***.

Aggrieved by the judgment, the appellant has preferred the present first appeal in which he faults the trial court for holding that the offence of murder was proved reasonable doubt; for relying on a dying declaration without caution; for ignoring the defence of intoxication; and for meting out a punitive, harsh and excessive sentence.

The evidence adduced in the High Court was that on the material day, the appellant had spent the better part of the day drinking traditional *mnazi* brew with friends. In his evidence, he started drinking at 9.00 am and continued until 6.30 pm, taking only a short break between 1.00 pm and 2.00 pm for lunch. When the *mnazi* seller closed for the day at 6.30 pm, the appellant bought a jerry can of more brew and retreated to the home of his neighbour, ***Joseph Mbogho Mwandima (PW1)*** where in the company of two others they continued drinking. By 10.00 pm, the appellant was drunk, rowdy and abusive. The deceased, who

was PW1's sister, was then sleeping in her house nearby.

Disturbed from her slumber by the bedlam, she woke up and requested him to stop his noisy antics. The appellant became agitated and abusive, and exchanged bitter words with the deceased. The appellant left for his house, some 20 metres away and returned in about three to five minutes. Again he exchanged abusive words with the deceased when he insisted on continuing to drink. As the deceased retreated to her house, the appellant followed her and there was a commotion. The appellant came back running. When his drinking partners went to check what had happened, they found the deceased holding her neck, from which she was bleeding profusely. Soon she collapsed and succumbed to her injuries on the spot.

None of the witnesses saw the appellant inflicting the injuries on the deceased. However, according to **Zainab Maemba (PW4)**, when she reached the injured deceased, the latter stated: "**Bakari has stabbed me**". The appellant then proceeded to the house of **Michuba Ouma Ndaga (PW2)** where he asked for water to wash his hands. His clothes were bloodstained. Before PW2 could accede to the request, he heard screams from the direction of the deceased's house and decided to find out what was happening. Upon getting to the scene, he found that the deceased was already dead and fellow villagers claiming she had been stabbed by the appellant. PW2 immediately went back to his house where he had left the appellant and locked him up in an empty room. The police later arrested the appellant from the same room where he was found fast asleep. A knife was retrieved from his pocket during his arrest.

The evidence of the Senior Medical Officer, Voi, **Charo Wilson, (PW5)** was that when he examined the body of the deceased two days after her death, he found that she was pregnant and in blood-stained clothes. She had a deep cut wound on the carotid region measuring 4x1 cm in diameter which was oozing blood, and a deep cut wound on the left pentoid region (shoulder) measuring 6x2 cm in diameter. In his opinion, the cause of her death was cardiac-pulmonary arrest due to hypothalamic shock caused by rupture of canmolid artery. A sharp knife probably caused the injuries.

The appellant gave sworn defence and did not call any witness. His defence was that he had been drinking virtually all day before joining his neighbours at the home of PW1 where they continued drinking into the night. He left PW1's house to buy cigarettes from a nearby shop, but was assaulted by an unknown person and sustained injuries to his left hand. On his way back he met PW2 who took him to his house and gave him water and a towel to clean his bloodied hand. The appellant was left at PW2's house from where the police woke him up later and inquired about a fight, which he knew nothing about. He was arrested, handcuffed and taken to Voi Police Station. He denied having had a knife and contended that his injured hand caused the bloodstains on his clothes.

On cross-examination, he confirmed that the deceased had come to where they were drinking and asked them to stop making noise. It was his evidence that he could not remember exchanging any words with the deceased or quarreling with her. It was also his evidence that he could not remember whether he had a knife that day.

After analyzing the evidence adduced by 7 prosecution witnesses and the appellant's defence, the trial judge convicted the appellant as we have already stated, precipitating this appeal based on the four grounds we set out at the beginning of this judgment. **Ms. Otieno**, learned counsel appeared for the appellant while **Mr. Yamina** appeared for the respondent.

Ms. Otieno submitted that due to the appellant's state of intoxication, the offence of murder was not proved beyond reasonable doubt because malice aforethought was not proved on the part of the appellant. From the circumstances of this case, counsel submitted, any malice aforethought on the part of the appellant was negated by his state of drunkenness and provocation. In her view, all the prosecution witnesses were consistent that the appellant was very drunk and disorderly, having been drinking for most of the day. In those circumstances, it was submitted, the appellant did not have malice aforethought due to intoxication.

Learned counsel further submitted that it was the deceased who provoked the appellant. Once more, it was contended, all prosecution witnesses at the scene before the deceased was stabbed testified on the

bitter words that were exchanged between the deceased and the appellant. We were urged to find that the appellant had acted on the heat of the moment.

On the dying declaration, it was submitted that the learned judge erred by relying on it without cautioning himself of the danger inherent in such evidence. The dying declaration was evidence of the weakest kind, counsel continued, because it was made in the absence of the appellant and the maker could not be subjected to cross-examination. In addition, the authenticity of the dying declaration was called into question because of all the prosecution witnesses who were present; it was only PW4 who purported to have heard it.

Counsel concluded by submitting that in the circumstances the trial court erred by convicting the appellant of murder and sentencing him to a manifestly excessive sentence of death when he ought to have been convicted of manslaughter.

Mr. Yamina opposed the appeal contending that the trial court properly found that the appellant was not intoxicated. Citing section 13 of the Penal Code, counsel argued that if we were to find that the appellant was intoxicated when he committed the offence, the only recourse open to the Court is to find that he was insane by reason of intoxication, find him guilty but insane, and direct that he be detained at the President's pleasure under section 166 of the Criminal Procedure Code. In counsel's view, the courts have all along been in error for reducing a charge of murder to manslaughter on account of intoxication. It was claimed that a finding of guilty but insane is the only option open to the court.

Counsel conceded that on the basis of the evidence on record the appellant was indeed intoxicated. However, he contended, the appellant did not raise the defence of intoxication and that the trial court had therefore arrived at the correct conclusion by ignoring his state of intoxication. He concluded by submitting that the appellant could not rely on the defences of intoxication and provocation at the same time.

On the dying declaration, counsel submitted that although the trial court did not warn itself before relying on it, nevertheless there was sufficient corroborating circumstantial evidence, which made the conviction safe. We were urged to find the appeal unmeritorious and dismiss the same.

As this is a first appeal, we are obligated to subject the evidence as a whole to a afresh and exhaustive examination and arrive at our own decision on the evidence. We are also required to weigh conflicting evidence and to draw our own conclusion. In so doing, we must bear in mind that we do not have the advantage, which the trial judge had of hearing and seeing the witnesses as they testified. (See ***Okeno v. Republic (1972) EA 32***).

In our estimation, this appeal turns on the question whether, in the circumstances of this case, the defence of intoxication was available to the appellant. While it is contended for the appellant that his state of intoxication was such as to negative the *mens rea* for the offence of murder, a strange proposition is pressed by the respondent to the effect that the defence of intoxication is available to an accused person only where he is established to have been insane by reason of intoxication. In cases where intoxication is upheld as a defence to a charge of murder, the respondent claims, the court cannot convict the accused of manslaughter, but must find him guilty but insane.

Before we consider the merits of the appeal, we must point out that contrary to the claim by the respondent that the appellant did not raise the defence of intoxication, the record is crystal clear that the appellant specifically raised that defence and led evidence on his state of intoxication at the time of commission of the offence. The prosecution witnesses also testified to the appellant's intoxication.

With respect we do not agree with the respondent's interpretation of section 13 of the Penal Code. Other than not being borne out by the wording of the provision, the respondent's interpretation is contrary to a long and consistent line of decisions of our courts, which the respondent's counsel mistakenly assumes to be wrongly decided. For convenience, it is necessary to reproduce the terms of 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 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.”

Under section 13 of the Penal Code, intoxication is not a general defence to a criminal offence, except in the circumstances set out in the section. A person who commits an offence while intoxicated is not *ipso facto* excused from the consequences of his act. In our view the section affords a defence of intoxication in three situations as follows.

The first situation is in what is called involuntary intoxication, where at the time of commission of the act complained of, the accused person does not know that it is wrong or does not know what he is doing, because of intoxication caused without his consent by the malicious or negligent act of another person. In such a case, the court is required to discharge the accused person.

The second situation is where the accused person, by reason of intoxication is insane, temporarily or otherwise, so that at the time of commission of the act complained of, he does not know that it is wrong or does not know what he is doing. This situation brings the case within the *M’Naghten Rules* and the court is required to deal with the accused person in the manner prescribed by the Criminal Procedure Code for accused persons who were insane at the time of commission of the offence, culminating in a special finding of guilty but insane and the detention of the accused person in a mental hospital at the pleasure of the President.

In *Rex v. Retief [1940-1943] EA 71*, the former Court of Appeal for Eastern Africa explained this aspect of the defence of intoxication as follows:

“The insanity whether produced by drunkenness or otherwise is a defence to the crime charged. The law takes no note of the cause of insanity and, if actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. It is immaterial whether the insanity so induced was permanent or temporary and if a man’s intoxication were such as to induce insanity so that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity and the verdict should be as laid down in section 159 of the Criminal Procedure Code ‘guilty of the act charged but insane when he did the act.’ ”

The third situation, contemplated by section 13(4), arises where by reason of intoxication the accused person is incapable of forming a specific intent, which is an element of the offence charged. Sometimes

this situation is referred to as “intoxication or drunkenness negating *mens rea*”. In *Said Karisa Kimunzu v. Republic, CR App No. 266 of 2006 (Msa)*, this Court stated thus regarding intoxication or drunkenness negating *mens rea*:

“But under subsection (4) 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. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant’s drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son.”

From the foregoing, we are satisfied that the respondent’s assertion that the defence of intoxication is only available to an accused person where he is proved to have been insane by reason of intoxication is absolutely without merit. In *Julius Obare Angasa v. Republic, Cr. App. No. 271 of 2008*, this Court quoted *David Munga Maina v. Republic, Cr. App. No. 202 of 2005* and addressed the issue directly as follows:

“...a party who says he had taken some liquor is not necessarily raising the defence of insanity. Such a person may only be asking the court to take into account the fact of his having consumed liquor and whether that state had deprived him of the ability to form the specific intent to kill. The court is under a duty to consider such a defence where it is raised...”

In this case, the appellant having raised the defence of intoxication and having led evidence of his state of intoxication on the material day, which was never challenged or controverted by the prosecution, the trial court was duty bound to take it into account for the purpose of determining whether the appellant was capable of forming malice aforethought, in the absence of which he could not be guilty of murder. If the trial court were to be satisfied that the appellant killed the deceased but without malice aforethought, it would have been entitled to convict him of manslaughter rather than murder. (See for example *Karisa Wara v. Republic, Cr. App. No. 267 of 2006*; *Peter Kariuki Kaburu v. Republic, Cr App. No. 234 of 2009*; and *Boniface Gathege Wacheke v. Republic, Cr. App. No. 12 of 2010*). It would have had no basis at all for finding him guilty but insane and directing his detention in a mental hospital at the pleasure of the President as the respondent contends.

We agree with Ms. Otieno that the trial judge erred by failing to warn himself before relying on the dying declaration. In *Philip Nzaka Watu v. Republic, CR APP No. 29 of 2015*, this Court stated as follows regarding dying declarations:

“Notwithstanding section 33 (a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in *CHOGE V. REPUBLIC* (supra):

‘The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the

admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

The error notwithstanding, we are satisfied that the circumstantial evidence on record fully justifies the inference of the appellant's guilt. The appellant followed the deceased towards her house immediately after exchanging bitter words with her. There was no evidence that any other person, other than the appellant, was with the deceased when she was stabbed. The witnesses present heard a commotion a short distance away and soon thereafter saw the appellant running back. Upon checking on the deceased, they found that she had been stabbed to death. According to the evidence of PW2, when he encountered the appellant shortly after the deceased was stabbed to death, the appellant's hands and clothes were bloodstained.

The above evidence is incompatible with the appellant's innocence and incapable of explanation upon any other reasonable hypothesis than that he was the one who stabbed the deceased. In addition, we find no other co-existing circumstances, which would destroy or weaken the inference of his guilt. (See ***Sawe v. Republic [2003] KLR 364***).

As earlier stated the appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Malice aforethought is the specific intention that had to be proved before the appellant could be convicted of murder. Under section 13(4), the trial court was therefore required to take into account the appellant's intoxication for purposes of determining whether he had formed malice aforethought.

The evidence on record indicates that the appellant started drinking traditional *mnazi* brew at 9.00 am and continued until when the offence was committed. He had been drinking throughout, save for a period of about one hour over lunchtime. There was agreement both by the prosecution and defence witnesses that by about 10.00 pm, the appellant was very drunk and rowdy. The events leading to the death of the deceased were triggered by the deceased's insistence that the appellant should cease making noise and disturbing neighbours after which harsh words were exchanged between the two.

The burden of proving that the appellant was capable of forming the intent necessary to constitute the offence of murder always remained with the prosecution and was not discharged if the probability emerges from the evidence that the appellant was incapable of forming that intent. (See ***Malungu s/o Kieti v. R [1959] EA 797*** and ***Buzoya & Another v. Republic [1975] EA 215***).

In the circumstances of this case, there is serious doubt whether the appellant killed the deceased of malice aforethought, the benefit of which ought to go to him. After stabbing the deceased, never made any attempt to flee the scene, other than staggering to a neighbour's house from which he was found sleeping peacefully, and arrested. Such is not normally the conduct of a person with a guilty mind.

We do not find any merit in the respondent's submission that the appellant cannot raise at the same time the defences of intoxication and provocation, simply because each defence must be considered on its own merit. See ***John Kaberi Njoroge v. Republic, Cr. App. No. 186 of 1987***.

In the circumstances we allow the appeal, quash the conviction for murder and set aside the sentence of death. In lieu thereof we substitute a conviction for manslaughter contrary to section 202 as read with section 205 of the Penal Code and sentence of 15 years imprisonment with effect from the date of the appellant's conviction and sentence by the High Court. It is so ordered.

Dated and delivered at Mombasa this 22nd day of April, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR