IN THE COURT OF APPEAL

AT NYERI

SITTING AT NAKURU

CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

CRIMINAL APPEAL NO. 257 OF 2010

BETWEEN

P K C..1ST APPELLANT

F K B..2ND APPELLANT

AND

REPUBLIC..RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at

Kericho (Ang'awa, J.) dated 27th May, 2010).

in

(H. C. CR. C. No. 2 of 2009)

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JUDGMENT OF THE COURT

By this appeal, **P K C** (P) and **F K B** (F), (the appellants) challenge their conviction and sentence by the High Court at Kericho (Ang'awa J.) by which they were convicted of the offence of murder contrary to **Section 203** as read with **204** of the **Penal Code**. They were sentenced to life imprisonment instead of to death as prescribed in the Code, because according to the Judge, they *"were minors at time of the offence"*.

The particulars of the offence as stated in the information by the Attorney General on behalf of the Republic are that on the 1st Day of January, 2009 at Kyongong Village of Bomet District of Rift Valley Province, the duo murdered **BERNARD KIMUTAI BETT** (deceased). According to the prosecution, the deceased met his death at the hands of the appellants in the afternoon of New Year's day when a *chang'aa*-drinking session at the house of **ROSE CHEPKIRUI MARITIM** (PW1) suddenly turned nasty leading to a quarrel, a confrontation, an altercation and a death. According to BETSY CHELANGA KOSGEI (PW2), a neighbour of PW1's, she saw three drunken people fighting near her house at about 4.00 pm. They included the appellants and the deceased and that fight extended beyond her house as the

appellants chased the deceased and another person uphill. Along the way they picked a stick or fencing pole. The appellants who were drunk both before and after the chase returned about an hour later with P nursing a swollen face. His pair of long trousers was blood-stained.

PW1 herself confirmed in testimony that the appellants as well as the deceased did imbibe some *chang'aa* in the company of **EDISON TERER** (PW3) at her house and a physical struggle ensued between them. PW3's evidence as to the genesis of the fatal quarrel, as rendered in the rather disjointed and at times unintelligible manner of the entire proceedings, was as follows;

"We were inside Rose's house.........We sat, a person came to where we were. On arrival there he opened and made a short call where we were. As he did so, we got up. We asked why he did so near? (sic) He began to say he had eyes to see and a head he used and knew what he was doing. He returned to where he stood with others. We went there to explain his habits (sic). Those who were with him began to say we were following them. Then they began to fight."

PW3 went on to explain how that incident of drunken bravodo degenerated into a serious explosion of violence in which he and the deceased, a childhood friend, were chased by the appellants one of whom was wielding a stick. PW3 was himself hit on the back of the head and *"lost his memory"*. The appellants "*had been drinking alcohol and continued to do so"* before the incident.

Fourteen year old **A K** (PW8) is P's nephew. He was a standard seven (7) pupil when he testified that on the material day he was at home at about 4.00 pm when he *"saw the persons who were fighting at the field."* They included the appellants whom he knew. He went to the four beseeching them to stop fighting but they would hear none of it. Instead, F threatened to beat him and he left the scene to the canteen and thereafter to the river to bathe. He was firm and categorical that it is the appellants who beat the deceased.

KIPKORIR KETIENYA, (PW4) was looking after cattle when he heard screams that someone had died. On going in the company of **E K R** (PW5) to find out, he found that it was the deceased, who was a nephew of his. The deceased was bleeding from the nose and mouth, according to PW5, who carried him on his bicycle to the tarmac road to await a vehicle in which they took him to Tenwek Hospital where he succumbed to his injuries that night.

A post-mortem examination revealed that the deceased died from severe head injury with multiple depressed skull fractures inflicted by a blunt object. Indeed the skull bone was fragmented. Those injuries were quite consistent with the evidence that the deceased had been attacked with a fencing stick or pole. The post-mortem report was prepared by Dr. Njoka, the Bomet Medical Officer of Health and produced in evidence by **DR. ISAAC BIRECH** (PW10)

F was arrested at his house at Kapsimetwo on 3rd January 2009 according to Police Constable **ALFRED JUMA** (PW9) and Corporal **RICHARD MUTAI** (PW11) while P, who had gone off to Nairobi, was arrested on 14th January 2009 with the assistance of **W K K** (PW6) who was described as a police informer.

Placed on their defence, the appellants each gave an unsworn statement and denied the charge. F conceded to having been at PW1's house on the material day and to having witnessed a quarrel but he denied involvement in it. He blamed his being charged with the offence on his failing to give the police some Kshs 10,000/= they were demanding from people who had been arrested in connection with the incident so as to be released. He said he knew nothing about the offence.

On his part, P blamed his brother (PW6) for his predicament stating the latter had framed him over a disagreement over family land. He too said he had been at PW2's house as well as PW1's house on the material day but denied involvement in the offence.

We have set out the entire evidence consistently with our duty on a first appeal to conduct a thorough and exhaustive re-appraisal and re-evaluation so as to make our own fresh and independent conclusions of fact and draw appropriate inferences on it. See Rule 29 (1) of the Court of Appeal Rules. This is a duty

that the appellants are entitled to expect, and demand of us. We proceed by way of rehashing having warned ourselves that we have not had the advantage of hearing and observing the witnesses as they testified. See **OKENO VS. R [1972] EA 32** and **MWANGI VS. R. [2006] 2 KLR 28**. This creates a reasonable deference to the findings of fact by the trial court from which we depart only for good reason namely: where they are not based on evidence; are based on a misapprehension of the evidence or are demonstrably wrong and lead to misjustice. (See **CHEMAGONG VS. REPUBLIC [1984] 611)**.

The appellants initially raised a number of grievances in their separate but identical self-authored Memoranda of Appeal. These were, however, abandoned by their learned counsel **Mr. Mwallo** who relied on the Supplementary Memorandum of Appeal filed by the firm of Kiplenge & Kiplagat Advocates. In it is alleged that the learned Judge erred in law or fact in:-

- ***convicting the appellants on the basis of contradictory evidence***
- ***basing the conviction on the evidence of PW8 who had been coached to implicate them***
- ***taking into consideration the evidence of persons who had grudges against the appellants***
- ***convicting the appellants without proof of motive, the deceased having been previously unknown to them***
- ***convicting the appellants yet murder was not proved beyond reasonable doubt.***
- ***convicting the appellants on the face of gross misconduct and breach of law by the police***
- ***failing to consider the appellants' mental state.***

Arguing the appeal, **Mr Mwallo** contended that the evidence of PW8 was not credible because he admitted in cross-examination that his mother (PW2) had an acrimonious relationship with P. He urged that without PW8's evidence the rest was all hearsay and insufficient to found a conviction. Learned counsel also urged that as the learned Judge treated the appellants as minors, she should not have sentenced them to life imprisonment, a sentence not provided for under **Section 19** of the **Children Act.** More substantially, **Mr. Mwallo** submitted that the prosecution had failed to tender evidence to show motive or intention on the part of the appellants to cause the death of the deceased.

Opposing the appeal, **Mr. Kibelyon** the learned prosecution counsel first stated that he "had reservations" about the judgment of the learned Judge which, on the face of it, is quite scanty in detail and shallow in analysis. He also asserted, quite correctly, that the appellants were not minors at the time of the offence yet the learned Judge treated them as having been so. The evidence on record is that the two appellants were 21 years old at the commission of the offence and 23 years old at the time they were sentenced, a year and a half later. We therefore agree with **Mr. Kibelyon** that *"the trial court had no business referring to them as 'subjects', ascribing to them, initials and so on."* He was of the view that having been found guilty of murder, they should have been sentenced to death.

Counsel for the Republic maintained that the offence of murder was proved and that *"especially in view of PW8's consistent evidence",* the circumstances did not disclose provocation.

We think that the fate of this appeal hinges on **intoxication** which **Mr. Kibelyon** conceded, as he had to, is a relevant consideration by virtue of **Section 13 (4)** of the **Penal Code** in determining whether the relevant intention to commit murder, the malice aforethought, has been established. The Code provides as follows;

"S 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."

In the case of murder, the absence of the 'malicious intent' as defined by **Section 206** of the Code would reduce the proven act of killing from murder to manslaughter.

In the instant case, there is no doubt that the appellants had been drinking. Patrick was so drunk he went releasing the jet of urine that set in motion this tragic series of events. All the witnesses who were present at or near PW1's house were unanimous that the appellants were drunk. This fact cannot be ignored. The

issue of intoxication and its impact on a charge of murder was dealt with in the case of **KEDISIA VS. REPUBLIC [2009] KLR 604**; at p 608 to 609 as follows, and we agree;

"In this case, we have pointed out that Julius himself was most likely drunk. When cross-examined by Mr. Wafula who represented the appellant in the trial before the High Court, Julius admitted that when the appellant arrived at the home where the fight took place, the appellant was drunk. Evidence of drunkenness need not necessarily come from an accused person himself; such evidence can come from the prosecution witnesses and it cannot be simply ignored because it has only come from the prosecution witnesses. If the learned Judge had not wrongly discharged the assessors, it would have been her duty to direct the assessors on the issue of alleged drunkenness on the part of the appellant. In the case of SAID KARISA KIMUNZU V. REPUBLIC, Criminal Appeal No. 266 of 2006 (unreported), this Court dealt extensively with the question of drunkenness and its relationship to Section 13 (4) of the Penal Code.

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."

Given the circumstances of this case, it is quite clear that the element of malice aforethought was negatived by the intoxication of the appellants. The offence for which they were guilty is manslaughter and not murder.

Accordingly, the conviction for murder is quashed. The sentence of 20 years imprisonment is set aside and substituted with a sentence of 10 years imprisonment to run from the date of sentence at the High Court.

Orders accordingly.

Dated and delivered at Nakuru this 14th day of April, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

...

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