IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, W. KARANJA & AZANGALALA, JJ.A.)

CRIMINAL APPEAL NO. 56 OF 2016

BETWEEN

BERNARD MWENGA WILSON.....APPELLANT

AND

REPUBLIC.....……..……..…….. RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 29th September, 2015

in

H.C. Cr. C. No. 92 of 2007)

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JUDGMENT OF THE COURT

[1] ***Bernard Mwenga Wilson***, the appellant, was charged in the High Court at Nairobi 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 the 28th day of October, 2007, at Mlolongo Market within Embakasi Division, of the then Nairobi Province, now Nairobi County, the appellant murdered ***Catherine Mbete*** *(hereinafter "the deceased").* He pleaded not guilty but after a full trial he was found guilty, convicted and sentenced to death. It is against that conviction and sentence that he now appeals. His learned counsel, ***Mr. Nyende***, listed six (6) grounds of appeal in the supplementary memorandum of appeal he filed on 16th June, 2016. At the hearing of the appeal, however, learned counsel condensed the said grounds into two broad issues, namely that the charge of murder was not proved beyond reasonable doubt and that the appellant's fair trial rights were violated by the High Court.

[2] Being a first appeal, we have the duty of reconsidering and re-evaluating the evidence afresh in order to draw our own conclusion in deciding whether the judgment of the High Court should be upheld (See ***Okeno -v- Republic, [1972] EA 32***). The facts of the case were quite straight forward. The proceedings in the High Court commenced before ***Ochieng, J***., who after hearing three (3) witnesses, was transferred elsewhere. The case was the placed before ***Muchemi, J***., who, on the appellant's application, started the trial *de novo*. The learned Judge then heard three (3) witnesses and she too was transferred elsewhere. ***Kimaru, J.,*** took over the trial and the appellant with the concurrence of the prosecution informed the court that the case proceeds from where ***Muchemi, J.,*** had reached.

[3]The appellant and the deceased were husband and wife and lived at Mlolongo Township, a South Eastern suburb of Nairobi City. The deceased was, before her demise, working in a hair salon christened 'Beauty Point Salon' at the suburb which outfit was owned by ***Francisca Mukei Ndeke (PW 1),*** *(Francisca).*

On 28th October, 2007, which was a Sunday, the deceased was on duty at the said salon.

[4] As 1:00 p.m. approached, ***Francisca*** arrived at her salon to deliver certain salon items and expected to find the salon operating. Instead, she found the salon surrounded by a throng of people peering in her salon through the windows as both the front and rear doors were locked from inside. She went to the rear door and peeped inside the salon where she saw the appellant atop the deceased stabbing her several times on the neck and chest with a knife. The two were the only ones in the salon. ***Francisca*** also saw the appellant take salon items such as driers and hit the deceased with them. Thereafter, the appellant licked blood from the knife he had been using and stabbed himself on the hip. Members of the public and ***Francisca*** watched helplessly as their attempt to gain entry into the salon was not successful.

[5] After the attack upon the deceased and the futile attempt to commit suicide, the appellant unlocked the front door but could not escape as members of the public set upon him with crude weapons injuring him severely until he became unconscious.

[6] The police were informed and when they arrived, they stopped members of the public from further assaulting the appellant when they realized he had not died. The police secured the scene and took away the appellant.

[7] In the interim, ***Charles Ngunza Munyao (PW 2) (Munyao)***, the brother of the deceased was informed that his sister had been killed by her husband. He visited the scene and saw the body of the deceased which had then been taken outside the salon. He observed multiple stab wounds on the stomach, neck and chest of the deceased.

[8] The body of the deceased was subsequently taken to Nairobi City Mortuary where, on 6th November, 2007, it was identified, to ***Dr. Peter Muriuki Ndegwa*** *(Dr. Muriuki),* by, among others, ***Munyao***. Besides identifying the body of the deceased to ***Dr. Muriuki, Munyao*** also gave some insights on the relationship between the appellant and the deceased. He testified that earlier the deceased had informed him by telephone that the appellant was beating her because of her alleged improper use of a mobile phone he had bought her. He was of the view that the marriage between the deceased and the appellant was not a happy one. He admitted, on cross-examination, that he had contended previously that the appellant was drunk and violent on the material day.

[9] Dr. Muriuki, performed post mortem examination on the body of the deceased after it was identified by ***Munyao***, his brother and ***PC Mukara***. He observed twenty three (23) stab wounds on various parts of the body of the deceased among them the chest, abdomen and cheek. He formed the opinion that the cause of death was hemorrhage due to multiple organ injuries due to multiple stab wounds.

[10] The appellant gave a sworn statement in his defence. He recalled the happenings of 27th and 28th October, 2007 when he appeared to be on a drinking spree. He drunk along with friends in the evening of 27th October, 2007, returning home in the night. He resumed drinking the next morning with brief intervals when he checked on friends or sought the deceased at their house or at her place of work. His testimony suggested that he had a black out and two weeks later found himself at Kenyatta National Hospital. On discharge he was arrested by *PC Maurice Mukara Ingosi (PW 5), (PC Mukara)* and later charged as already stated.

He could not remember killing his wife or being attacked. The appellant stack to that story on cross-examination.

[11] The learned Judge went over the evidence adduced before him and the submissions of learned counsel and in the end came to the conclusion that the charge of murder had been proved beyond reasonable doubt against the appellant. In the learned Judge's view, *"the defence of intoxication was not established"* by the appellant.

In his own words:

> ***"Prior to the incident, the accused had lost his job. On the day before the incident, he picked up a quarrel with the deceased over the use of a mobile phone that he had given her. The accused was not happy that the deceased was receiving calls from her customers through the particular mobile phone. He warned her to desist from using the phone in the said manner.***
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> ***The court's evaluation of the evidence points to the fact that the accused was not satisfied that the deceased had complied with his directions. He followed her to her place of work. He stabbed her 23 times. He hit her using blunt objects he found in the salon. The accused's actions clearly showed a person who was extremely angry. He was out of control. The fact that he armed himself with knives clearly showed that he had the intention to harm the deceased.***
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> ***No witness testified as to accused's alleged intoxication. Even if he was intoxicated this court is unable to agree with thrust of his defence that he was so intoxicated that he did not know what he was doing or what was taking place. It is highly improbable that an intoxicated person would have the mind to pick a knife walk some distance to the place where the deceased worked, lock the door and then stab the deceased in such frenzied manner that he caused her death. The accused even attempted to kill himself by stabbing himself with the same knife.***
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> ***The court is of the considered view that the actions of the accused were not of a person who was intoxicated to such an extent that he did not know what he was doing. The accused did not have a good relationship with his wife. He must have realized that the deceased having secured employment, there was a high chance she would leave him for good. The accused could not stand this hence his decision to kill the deceased. This Court holds that the accused had the intention to kill the deceased. The case is an example of the worst form of domestic violence".***

[12] Having found that the appellant had killed the deceased with malice aforethought, the learned Judge convicted him of the offence of murder. The learned Judge then considered the appellant's circumstances and the prosecutor's comments on sentence and sentenced the appellant to death.

[13] The appeal came up for hearing before us on 29th June, 2016, when ***Mr. Nyende*** arguing the first broad issue, submitted that the learned Judge did not appreciate the evidence of intoxication and how it impacted on proof of *men srea*. Learned counsel further contended that the learned Judge wrongly placed the burden of proving the intoxication on the appellant. In his view, the witnesses who could have demonstrated the same were essential and were not called by the prosecution.

[14] On breach of fair trial rights, learned counsel submitted that the learned Judge made findings which were not supported by the record. In learned counsel's view, the findings suggested that the learned Judge was not acting impartially which, according to him, thereby vitiated the trial. To buttress that contention, learned counsel invoked this Court's decision in ***Peter M. Kariuki -v- Attorney General [2014] eKLR***.

[15] Learned Senior Principal Prosecution Counsel, ***Mr. Gitonga*** for the State, in opposing the appeal, submitted that the offence of murder was proved beyond reasonable doubt against the appellant. He contended that the appellant failed to demonstrate that he was intoxicated to the extent that it affected his actions. In learned counsel's view, failure to disclose the joints at which he had consumed the alcohol and those who accompanied him weakened the plea of intoxication.

[16] It was the alternative submission of ***Mr. Gitonga*** that the appellant was used to drinking and would therefore not be affected by alcohol. The appellant, according to him, had the necessary *mes rea* to commit the offence for which he was convicted.

On alleged breach of fair trial rights, ***Mr. Gitonga*** submitted that the complaint was devoid of merit and failure of justice had not been demonstrated.

[17] We have anxiously considered the judgment of the trial court, the record of the proceedings, the submissions of both learned counsel as well as authorities cited to us. We shall first consider the complaint that the appellant's right to a fair trial was infringed by the learned Judge of the High Court. The substance of his arguments, in our view, was that the learned Judge did not act impartially. This argument was made primarily because of the statements made by the learned Judge in his Judgment. The learned Judge concluded that the appellant's motive for committing the offence was that on realizing the deceased had secured employment he feared that she was likely to leave him for good which realization made him kill the deceased. This conclusion, according to learned counsel, was without basis and demonstrated that the learned Judge was not impartial. In learned counsel's view, ***Article 50 (1)*** of the ***Constitution*** was infringed. The article guarantees the right to have any dispute which can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body. The infringement of ***Article 50 (1),*** according to learned counsel, entitles the appellant to an acquittal because in his view, his trial was vitiated by the impartiality.

[18] The retired Constitution had the same right in ***Article 77(1)*** and (9). In ***Peter M. Kariuki -v- Attorney General*** (supra) upon which the appellant placed reliance, this Court found that that Article, among others, had been infringed and quashed the conviction of the appellant by a Court martial. Learned counsel for the appellant invoked that decision to urge the view that likewise, we should quash the appellant's conviction. We think the appellant was overstretching the principle in ***Peter M. Kariuki -v- Attorney General*** (supra). We say so, because in that case we found several violations of the appellant's fair trial rights. The violations were not merely in the statements of the presiding officers and members of the Court Martial or the High Court. The violations spread throughout the trial of the appellant therein. There, the appellant specifically applied for witness summons for the then ***Army Commander, General Mulinge***. The application was declined. Yet it was the appellant's case that the General would have exonerated him. It also transpired that before the Court Martial declined the appellant's application to summon the General, the Attorney General, who had no role to play in the Court Martial, somehow appeared before the Court Martial and stated that the General would not be called to avoid embarrassing him.

It was also demonstrated, beyond peradventure, that the Judge - Advocate whose role was to advice the Court Martial on any question of law or procedure relating to the charge or the trial, was plainly partisan in favour of the prosecution and thus abdicated his responsibility of ensuring that the appellant did not suffer any disadvantage at the trial.

There was another crucial violation of the right to a fair trial committed by the Court Marital. It occurred in this way. The appellant had been held incommunicado for over 147 days without access to anyone outside prison precincts before he appeared before the Court Martial. He therefore applied for adjournment to enable him prepare for his trial when he appeared before the court martial. The application was declined without assigning any reason for the refusal of the adjournment. In so rejecting the application for adjournment, the Court Martial clearly occasioned a miscarriage of justice as the appellant's right to adequate time and facilities to prepare his defence was violated.

[19] In our view, the case of ***Peter M. Kariuki -v- Attorney General*** (supra) is clearly distinguishable from the case before us. The case is in an entirely different league. In our case, no complaint has been raised concerning the trial of the appellant. The complaint that essential witnesses were not called is vastly different from unsuccessfully applying for witness summons for a witness who would exonerate an accused. The appellant has not suggested, even remotely, that the learned Judge herein held a sham trial. The statements complained of, in the judgment in our view, were, indeed, unfortunate. The learned Judge indeed erred and the appellant is entitled to complain. However, the error cannot constitute a violation of

the appellant's right to a fair trial and is not an error that would vitiate the trial of the appellant. Accordingly, we reject the appellant's complaint regarding alleged infringement of his right to a fair trial.

[20] The evidence that the appellant killed the deceased was overwhelming and we are not at all surprised that learned counsel for the appellant did not seriously challenge that conclusion. The testimony of ***Francisca***, although of a single identifying witness, demonstrated beyond reasonable doubt that the appellant killed the deceased using a knife and other objects he found in the salon.

[21] The substantive issue in this appeal, in our view, however is whether the appellant killed the deceased with malice aforethought. It was ***Mr. Nyende's*** submission that he did not, given his state of intoxication at the material time. We have anxiously considered this contention and have come to the conclusion that the submission is not altogether without merit. We are of course fully alive to the fact that drunkenness *per se* is not a defence to a charge of murder which is the charge for which the appellant was convicted and sentenced to death. We have however, considered learned counsel's submission in the light of ***section 13*** of the ***Penal Code*** which provides as follows:

> ***"13 (1) Save as provided in this section, intoxication shall not constitute a defence to any charge.***
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> ***(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 an 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.***
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> ***(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 any case falling under paragraph (b) the provisions of this code and of the Criminal Procedure Code relating to insanity shall apply.***
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> ***(4) Intoxication shall be taken into account for the purposes of determining whether the person charged had formed any intention, specific or otherwise, in absence of which he would not be guilty of an offence.***
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> ***(5) For the purpose of this section, intoxication includes a state produced by narcotics or drugs".***

[22] Having considered the evidence adduced in this case, we have come to the conclusion that sub-sections (2) and (3) have no application in this case. How about ***sub-section (4)***? Under that sub-section the court is required to take into account the issue of whether the drunkenness or intoxication alleged deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. With regard to the offence of murder, malice aforethought is such a specific intention required to prove the charge. It cannot be gainsaid that in such a case 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.

[23] In this case, the appellant testified on oath that on the eve of the incident and on the material date, he was on a drinking spree. He maintained that testimony in cross-examination. The learned Judge did not accept the appellant's testimony on his drunkenness as can be seen from the extract from his judgment already referred to above. His view would appear to be that even if the appellant could have consumed alcohol he was not so intoxicated as not to know what he was doing.

[24] There are a number of serious misdirections in the above extract from the judgment of the learned Judge. The learned Judge seemed to find motive for the killing of the deceased in their strained

relationship and the fact that the deceased had secured employment and could leave the appellant.

[25] That conclusion was not borne from the record. No one suggested those reasons for the killing of the deceased. We are puzzled that the learned Judge, with all due respect to him, was prepared to advance a theory of his own unsupported by evidence whilst discrediting the appellant's testimony of experiencing a black out as a result of heavy drinking.

Furthermore, the learned Judge appeared to suggest that the appellant had a higher burden of proof beyond setting up the issue of drunkenness. He appeared to suggest that the drunkenness the appellant had, if at all, could not satisfy the requirements of ***section 13(2)*** and ***(3)*** of the ***Penal Code***. He did not, with respect, go further to consider the effect the drunkenness could have on the appellant under ***sub-section (4)*** of the same section.

It is significant that the appellant's drunkenness received support from ***Munyao*** who testified for the prosecution as PW 2 and stated, in cross-examination, *inter alia*, that: ***"I said that the accused was drunk and violent on the material day".***

[26] Our perusal of the record further reveals that the learned Judge made assumptions which prejudiced the appellant. He assumed, for instance, that the appellant armed himself with a knife presumably at his house, walked with it to the salon and attacked the deceased. There was no basis for that conclusion. No evidence was led by the prosecution to exclude the possibility that the knife the appellant used was picked in the salon and applied in the heat of the moment. The learned Judge further assumed that the fear of losing the deceased angered the appellant so much that he attacked the deceased to death. The prosecution did not lead evidence to exclude alcohol-induced anger.

[27] In our view, the actions of the appellant at the material time suggested one who had no control of his faculties. The use, by the Judge, of phrases such as ***"accused's actions clearly showed a person who was extremely angry"***. ***"He was out of control", "the appellant stabbed the deceased, in such a frenzied manner..."***, demonstrates that the learned Judge appreciated that the appellant had lost control. Further evidence that the appellant was not acting normally is furnished by the manner of the attack upon the deceased. The doctor observed no less than 23 stab wounds. ***Fransisca*** witnessed the appellant stab the deceased numerous times. She also saw the appellant attack the deceased with a variety of items from the salon such as driers. Surely, the attack upon the deceased by the appellant was outside the normal.

[28] Those circumstances, in our view, suggest that the appellant may not have been capable of appreciating his actions. We, therefore, have our doubts whether the prosecution proved, beyond reasonable doubt, that the appellant had the malice aforethought notwithstanding his intoxication. That doubt must be resolved in favour of the appellant.

[29] In the premises, 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 conviction for murder under ***section 203*** of the ***Penal Code,*** and set the conviction aside. We substitute it with a conviction for manslaughter under ***section 202*** as read with section ***205*** of the ***Penal Code***.

[30] With regard to sentence, we observe that the appellant was sentenced to death for the murder of the deceased. We set aside that sentence and substitute it with a sentence of fifteen (15) years imprisonment to run from the date when the appellant was convicted and sentenced by the High Court.

Judgment accordingly.

Dated and delivered at Nairobi this 4th day of November, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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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