IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 75 OF 2014

BETWEEN

MOSES MURITHI IKAMATI ……..……..…..……..APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Meru (Lesiit, J) dated 3rd October, 2013

in

H.C. Cr. Case No. 61 of 2010)

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JUDGMENT OF THE COURT

1. Moses Murithi Ikamati 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 is that on 25th day of September, 2010 at Thinyaine Location in Tigania West District within Eastern Province murdered Michael Mwenda. The appellant was tried, convicted and sentenced to death by the Honourable Justice Lessit of the High Court sitting at Meru. Aggrieved by the conviction and sentence, he has lodged this first appeal.

2. The key prosecution witnesses were PW1, PW2 and PW3. PW1 Jackson Maore testified as follows:

> ***"In 2010, I used to operate a bar; it was a popular wines and spirits bar. I remember 25th September, 2010. It was evening at 8.00 pm; two people were quarrelling; they were Mosses and Michael (deceased). Michael asked Mosses "are you still holding what you said that you and your mother will kill me?". Then Mosses told him, "You will know who I am". Moses left the bar and then returned after five minutes. When he came back, he did not speak to anyone. He went straight to where Michael was sitting. He stabbed Michael on the right side of the neck. Moses then walked away. Because I was the one operating the bar that day, I went to where Michael was, I saw he was injured; I went ahead to the***

police and reported. I went back to the bar with the police; other people helped me to carry Michael and take him to the police station. Michael died as we were crossing the tarmac road. Michael was taken to the mortuary; I was left at the police station. I knew Michael and Mosses as my customers. They were regular customers who came weekly or every other day. They used to come to the bar separately. On that day, the came following each other. I saw them clearly by electricity lights".

3. PW 2 Isaya Mutabari Mwenda testified as follows:

"On 25th September, 2010, I was at a popular Bar in Meru. Murithi and Michael were quarrelling. I heard Michael ask Murithi whether he still wanted to kill him as he and his mother had threatened. I was at the bar counter then. I took my bottle of beer and went and sat where some other men were sitting. After about five minutes, I saw Michael and Murithi struggling. I then saw Michael on the ground; when I went to assist, I realized Michael had been stabbed. I do not know what caused Michael to fall. I saw Michael loosing blood on the right side near the head. Murithi ran away. We decided to take Michael to hospital; we decided to pass by Ngundune Police Station which was across the tarmac road. When we arrived near the police station, Michael had died. The police took him to the mortuary. The OCS told us who had carried Michael that we must stay at the Police Station until day break so that we can explain what happened. We were locked up me and Maore. The next day we explained to the Police what had happened. There was electric bulb inside the bar and a bulb outside… I knew Michael and Murithi before. Both of them come from 2 Kms from my home. Michael comes from about 2 kms from my home but Murithi's home is a bit further. We also visit the same market place and that is how I knew them. Of the two I mentioned, I can see Murithi (accused) in court".

4. PW3 Henry Muriera Kanampiu testified as follows:

"I do recall on 25th September, 2010. At 7.30 pm I went to a popular Meru Bar Wines and Spirits. I found five people or so inside. One of them was Michael Mwenda and Moses Murithi. They were quarrelling when I went to the bar. I knew both of them because Mwenda Michael was living near me as my immediate neighbour. Their land is 3 shambas from mine. Murithi's home is a little further from ours. They were talking. I head Michael ask Moses whether it was true he would kill him as his mother (Moses' mum) had said. Moses answered in the affirmative and that is when Moses left. He stayed for 10 minutes then he came back. Michael was seated on the long stool near the half wall in the bar. I was seated near the counter. Moses came back and found Michael seated on a long stool. When Moses came back, he stabbed Michael on the neck when he was standing along the corridor. Michael was facing inside the bar… Moses approached Michael from behind. Moses stabbed Michael on the right side of the neck behind the ear. Michael fell down. I stood up to chase Moses because he started running away. On going to the corridor, I realized it was dark outside so me, Mwenda, Gitonga, Maore, Isaya and others feared to chase Moses unto the dark. We went back to where Michael was and found him bleeding profusely. We carried him to the police station and he died on the way".

5. PW4 Dr. Makandi Mutwiri produced a post mortem report conducted on the body of Michael Mwenda. The report shows that the body had an external stab wound on the right side of the neck cervical area measuring 6 X 6 cm; internally, the body had stab wound on the head cervical area measuring 6 X 6. The cause of death was identified as bleeding possibly from jugular as a result of the stab wound to the head.

6. The appellant in his sworn testimony stated that on the material day he was at his home; that he went to the popular wines and spirits bar where he started taking alcohol from 11.00 am; that there were other people in the bar including Michael Mwenda, Maore and Kitonga alias Tosh; that

Michael Mwenda (deceased) left before him as he was drunk; the appellant testified that he himself left the bar at 5.00 pm after a business colleague called Kamuyu called him and told him that they should leave for Isiolo; that he proceeded to the bus stage and took at taxi to Isiolo where he arrived at 10.00 pm; that he went to his relatives place and slept in that boma; the next day on 27th Monday 2010 , they proceeded to Isiolo market and bought goats; that at 2.00 pm a friend called Patrick Kimathi called him stating that a murder had taken place and advised him (appellant) to go Isiolo Police Station because it was said he had been seen in the area at the time of the murder; that Kamuyu took him to Isiolo police station and he reported what he had heard; he was placed in police cells until 29th September, 2010, when police from Ngudune Police Station collected him.; that he was beaten and he did not understand the murder charge; that he knew the deceased and he saw him on the fateful day when both of them were drunk.

7. The trial Judge in convicting the appellant expressed as follows:

> ***"The evidence before the court shows that the accused and the deceased quarrelled briefly before the accused walked away and returned with a knife with which he stabbed the deceased. The deceased died soon thereafter. From the Doctor's findings as presented by Dr. Makandi PW4, the cause of death was bleeding probably from the jugular as a result of a stab wound to the neck. The prosecution has established a nexus between the injury that caused the deceased death and the accused act of stabbing the deceased. The accused was seen stabbing the deceased on the neck area and the cause of death was bleeding from that area of the body"***

8. On the issue of malice aforethought, the trial Judge expressed as follows:

> ***"It is true from the evidence of the eye witness especially PW1 that both the accused and deceased were drunk. If that was the only fact of the case with the evidence of drunkenness or intoxication, Section 13 (4) of the Penal Code would have been relevant. However, from the evidence of the witnesses, the content of the quarrel between the accused and the deceased concerned a threat the accused had issued against the life of the deceased at an earlier state. …I find that the fact of an issue of a death threat by the accused against the deceased and the fact the accused went away to arm himself before stabbing the deceased, these circumstances are proof that prior to stabbing the deceased, the accused person had formed a specific intention to cause death to the deceased. It is on record that the accused stabbed the deceased on the neck. His choice of the area of the body that the deceased was stabbed is also evident of the fact that the accused intention was to fatally wound the deceased. The accused conduct after the incident is also relevant; he went into hiding for 2 days, which was the conduct of a person with a guilty mind. The second conduct which also implicates the accused is that he surrendered himself to the police specifically for this offence. His conduct strengthens the case of the prosecution against him that it was him who committed this offence and that at the time he stabbed the deceased he had formed the necessary malice aforethought to cause death or grievous harm to the deceased. The defence that he was a victim of mistaken identity cannot lie as the evidence against him is overwhelming as demonstrated by the evidence of PW1, PW2 and PW3".***

9. Aggrieved by the conviction and sentence by the trial Judge, the appellant lodged this appeal citing various grounds as follows:

> ***a) that the prosecution case was not proved beyond reasonable doubt;***
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> ***b) that the learned Judge erred in law and fact in convicting the appellant on evidence that was doubtful as to the identification of the person who killed the deceased;***
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> ***c) that the learned Judge erred in law and fact in relying on the evidence of***

prosecution witnesses which was not credible and was contradictory;

d) the learned Judge erred in law and fact in that she failed to consider the totality of evidence and found malice aforethought without any evidence to support such an inference;

e) that the learned Judge erred in law and fact in not considering the defence of the appellant;

f) the learned Judge erred in law and fact in shifting the burden of proof to the appellant.

10. At the hearing of the appeal, the State was represented by the Senior Prosecution Counsel **Mr. Jackson Makori** while learned counsel **Mr. D.M. Rimita** appeared for the appellant.

11. Counsel for the appellant filed written submissions and in his oral highlight he reiterated the grounds of appeal and concentrated on the issue of malice aforethought. Counsel submitted that the facts and evidence on record reveal the offence of manslaughter and not murder; that intoxication of the appellant ought to have been given more weight; that the quarrel between the appellant and the deceased disclose an element of provocation which was not considered by the trial Judge. It was submitted that PW1, PW2 and PW3 and even the investigating officer all agree that both the deceased and the appellant were drunk; that they quarrelled and there was a struggle; that the learned Judge erred in law when she completely failed to consider the issue of struggle in her judgment. Counsel for the appellant urged this Court to find that the trial Judge erred in failing to consider the issue of motive; that the trial Judge erred in finding that motive and malice aforethought were proved due to the alleged threat on the part of the deceased and his mother against the appellant. It was submitted that the alleged threats were never investigated to find out if they were true. The investigating officer when asked said the cause of attack seems to be the issue of drunkenness. The appellant cited the cases of ***James Mwaniki Gathangu – v- R, (Nyeri Criminal Appeal Bo. 351 of 22012); JMM –v – R, Nyeri Criminal Appeal No 271 of 2012; Joseph Kimani Njau – v- R, Nyeri Criminal Appeal No. 375 of 2012; Josephn Mwenda Marangu – v- R, Nyeri Criminal Appeal No. 271 of 2012*** and ***Antony Ndewa Ngari – v- R, Nyeri Criminal Appeal No. 352 of 2012).***

12. The State in opposing the appeal submitted that PW1, PW2 and PW3 were eye witnesses to the attack; that these witnesses were consistent and the events as narrated by the witnesses is the same; that there was no material contradiction in the testimony of PW1, PW2 and PW3. That the deceased was stabbed while seated; that before the deceased was stabbed, the appellant walked out of the bar and when he came back he stabbed the deceased; that the appellant had an opportunity to cool off when he walked out. It was submitted that the defence and alibi of the appellant is a bare denial; that the conduct of the appellant after the attack was suspicious and this was not the conduct of a person who was drunk; the appellant knew what he was doing, what he had done and knew it was time to run away. Counsel submitted that in his own testimony, the appellant stated he knew what was going on. The State submitted that *mens rea* for malice aforethought had been proved and established. The State cited the case of ***Kyalo Kalani – v- R, Nairobi Criminal Appeal No. 586 of 2010*** in support of its submissions.

13. We have considered submissions by both the appellant and the State. This being a first appeal, we are reminded of our primary role as the first appellate court namely, revisiting the evidence that was tendered before the trial Judge, analyzing the same independently and then drawing conclusion bearing in mind the fact that we neither saw nor heard the witnesses and make an allowance for that. See the case of ***Muthoka and Another versus Republic, (2008) KLR 297***. ***In OKENO V. R., [1972] EA 32 at p. 36*** the predecessor of this Court stated:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R. [1957] EA 336) and

to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (SHANTILEL M. RUWAL V. R. [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see PETERS -V- SUNDAY POST [1958] EA 424.".

14. In ***Suleiman Juma alias Tom – v- R, Criminal Appeal No. 181 of 2002 (Msa),*** this Court stated that where the life of an individual is at stake, the prosecution must be extremely careful not to bring evidence that is less than watertight. The appellant in his grounds of appeal contend that that the learned Judge erred in law and fact in convicting him on evidence that was doubtful as to the identification of the person who killed the deceased; that the learned Judge erred in law and fact in relying on the evidence of prosecution witnesses which was not credible and was contradictory. We have also considered these grounds of appeal against the evidence on record and bearing in mind the principle in ***Anjononi & Others vs. Republic, (1976-80) 1 KLR 1566,*** at page 1568 this Court held:

"…recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other".

15. We are satisfied that the identity of the appellant as the person who stabbed the deceased was established beyond reasonable doubt through recognition by PW 1, PW2 and PW3. All these witnesses not only recognized the appellant but were eye witnesses to the quarrel and struggle between the deceased and the appellant; they also witnessed the stabbing of the deceased by the appellant. On the issue of *actus reus*, we are not only satisfied but are convinced that the trial Judge did not err in finding that the prosecution had proved its case beyond reasonable doubt that the appellant is the person who stabbed and caused the death of the deceased. Our re-evaluation of the evidence on record does not show material contradictions in the testimony of PW1, PW2 and PW3 that negate the finding of fact that it was the appellant who stabbed the deceased.

16. We now turn to the issue of *mens rea* and malice aforethought. PW1, PW2 and PW3 who were eye witnesses to the crime testified that the appellant was drunk and was quarrelling with the deceased. The appellant in his testimony stated he was drinking from 11.00 am. We note that in the judgment, the trial court addressed the issue of drunkenness and or intoxication. The trial court correctly stated that when intoxication or drunkenness on the part of an accused is revealed by evidence, it is the duty of the trial court to consider the same and evaluate the entire evidence on record and satisfy itself if the ingredients of the offence as charged have been established and proved. The trial court in considering intoxication of the appellant discounted the same stating that there was an issue of death threat by the appellant against the deceased; the fact the appellant went away to arm himself before stabbing the deceased, these circumstances are proof that prior to stabbing the deceased, the appellant had formed a specific intention to cause death to the deceased.

17. It is our duty to re-evaluate the evidence on record and determine whether the trial Judge correctly arrived at the inference that *mens rea* or malice aforethought had been proved. Distinction should be drawn between cases where a person has already formed the intention to commit a crime and then gets intoxicated to obtain courage to commit the crime and cases where no prior intention to commit an offence had been formed. In the case of ***A-G for N. Ireland v Gallagher, [1963] AC 349;*** the defendant decided to kill his wife. He bought a knife and a bottle of whisky which he drank to give himself *"Dutch Courage"*. Then he killed her with the knife. He subsequently claimed that he was so drunk that he did not know what he was doing, or possibly

even that the drink had brought on a latent psychopathic state so that he was insane at the time of the killing. The House of Lords held that intoxication could not be a defence in either case as the intent had been clearly formed, albeit before the killing took place. Lord Denning stated:

> ***"If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on his self-induced drunkenness as a defence to a charge of murder, not even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of intent to kill. So also when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do".***

18. In the present case, motive was not established; the veracity of the threats allegedly directed to the deceased was not established and no evidence was led to show that prior to the commission of the alleged offence, the appellant had formed an intention to kill the deceased or any other person. In the case of ***Beth Katile w/o Charles Munyao – v- R, (184) eKLR***, this Court held that the learned Judge failed to take into account Section 13 (4) of the Penal Code which requires the courts to take into account intoxication for purposes of determining whether the person charged had formed any intention specific or otherwise without which he would not be guilty of the offence. In ***Said Karisa Kimunzu – v – R, Criminal Appeal No. 266 of 2006***, this Court stated that in a charge of murder, the specific intention required to prove such offence is malice aforethought. If there be evidence of drunkenness or intoxication under ***Section 13 (4)*** of the ***Penal Code***, the trial court is required to take that into account.

19. In the instant case, the alleged offence took place at around 8.00 pm. The appellant testified that on the material day, he had been drinking beer from 11.00 am. PW1, PW2 and PW 3 all testified that the appellant was drunk at the time of the incident. Although intoxication was not raised as a defence, the uncontroverted evidence on record reveals that the appellant had been taking alcohol from 11.00 am. Just like the learned Judge we are convinced that it is the appellant who inflicted the injuries that led to the death of the deceased. However, taking into account the evidence of intoxication, doubt exists as to whether the appellant had the requisite malice aforethought for the offence of murder considering the sequence of events as depicted hereunder.

20. First, the evidence does not show that the appellant had prior or premeditated plan or arrangement to meet with the deceased at the bar; second, from PW1's testimony, the appellant and the deceased came to the bar separately; third, the appellant was not armed with the knife when he came to the bar; fourth, the appellant had been drinking alcohol since 11.00 am and he was not armed; fifth, a quarrel and struggle ensued between the appellant and the deceased when both of them were drunk; sixth, when the appellant walked out of the bar he was drunk; seventh, when the appellant stabbed the deceased he was drunk; when the appellant walked out of the bar, did he know what he was doing or was he mentally incapacitated by intoxication? This question remains unanswered.

21. The case of ***Kyalo Kalani – v- R, Nairobi Criminal Appeal No. 586 of 2010*** is distinguishable. In the Kyalo case the court expressed itself:

> ***"From the evidence of the appellant himself, he had been drinking changaa on the material day for about one hour between 12.30 and 1.30 pm. Thereafter, he was sober enough to go back to his shamba at 3.00 pm and work until 5.00 pm. From 5.00 pm to 8.00 pm he was just resting at "kwa Wangombe Hotel." His next reference to his intoxication was when he had come back from Mulwa's house and was taking his changaa before the deceased shone a torch in his face and hit him on the left eye. From the totality of the evidence, including the time the appellant said he had taken changaa, his ability to work on his shamba for several hours thereafter, his almost three hours of rest at "kwa***

Wangombe Hotel, his telling PW9 that he was going in search of the deceased, his evidence of words exchanged between him and the deceased, his ability to dodge an attack by the deceased; and his presence of mind to go to Mulwa's house to avoid confrontation, it is difficult to conclude that the appellant was so drunk as to be incapable of forming the guilty intent".

22. We have considered the facts and dicta in the ***Kyalo case*** ***(supra)*** and find that the case is distinguishable from the present case. In the ***Kyalo case***, there was a break and interval in the intoxication by the appellant; in the instant case, the appellant continued to drink from 11.00 am to 8.00 pm - the time of the incident. The allegation by the appellant that he left the bar at 5.00 pm is displaced by the testimony of PW1, PW2 and PW3. On our part, we are of the view that had the trial Judge evaluated the sequence of events as illustrated heretofore, the court would have given the appellant the benefit of doubt as to whether malice aforethought was proved. We have found that the prosecution proved beyond reasonable doubt that it was the appellant who stabbed and caused the death of the deceased; however, we find that there is doubt whether the appellant had malice aforethought required for the offence of murder. The stabbing of the deceased to death was an unlawful act. This is punishable as manslaughter under the provisions of ***Section 202*** as read with ***Section 205*** of the ***Penal Code***. We hereby quash the conviction of the appellant for the charge murder and set aside the death sentence meted in respect to the charge. We substitute the charge of murder with manslaughter and hereby convict and sentence the appellant for manslaughter contrary to ***Section 202*** as read with ***Section 205*** of the ***Penal Code***. We sentence the appellant to 15 years imprisonment from the 29th September, 2010, when he was first arraigned before court.

Dated and delivered at Meru this 12th day of March, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR