IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 85 OF 2014

BETWEEN

JOHNSON NJUE PETER ……..……. APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Lenaola, J.)

dated 9th June, 2006

in

H.C.CR.C No. 25 of 2003)

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JUDGMENT OF THE COURT

1. ***Johnson Njue Peter,*** the appellant, was charged with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code*** in the High Court at Embu. The particulars of the charge were that between the 8th and 9th December, 2002 at Njukiri Village, Embu Municipality in Embu District within the then Eastern Province, the appellant murdered Martin Mwaniki Njagi (deceased).
2. The appellant pleaded not guilty and the prosecution called a total of 10 witnesses in support of its case. It was the prosecution's case that on 7th December, 2002 at around 7:00 p.m. while PW2, Karuru Ireri Mwaniki (Karuru) and the deceased were on their way to buy cigarettes they ran into PW5, Wachira Njeru (Wachira). According to Karuru, Wachira hit the deceased and ran away. The following day at around 8:00 p.m. while PW1, Alfred Kinyua (Alfred) in the company of PW3, Emilio Muchangi Njeru (Emilio), PW5 (Wachira) and the appellant were at the shops near the show ground, the deceased and Karuru came. The deceased held Wachira by his shirt and asked him why he had hit him the previous day; a fight ensued between the two and Karuru stepped in to separate the two.
3. According to both Alfred and Karuru, the appellant went to his house which was close by and came back with a metal bar; he hit the deceased on the head with the said metal bar and tried to hit Karuru but missed the target and the metal bar broke into two. On the other hand, PW3 (Emilio) and PW5 (Wachira) testified that while the deceased and Wachira were fighting, the appellant

asked the people who were then at the scene to show support to his preferred candidate by saying '*Mwenge Juu*'. However, the deceased indicated that he supported another candidate known as Wambeti. Thereafter, the appellant went to his house and came back with a metal bar and hit the deceased. The deceased fell into a ditch and begun bleeding profusely from his head. According to Wachira, both the appellant and the deceased were drunk at the material time.

4. The matter was reported to the police and the deceased was rushed to hospital. Unfortunately, the deceased died the following morning due to the injuries he had sustained on his head. PW8, P.C. Christopher Matere (P.C. Christopher) recovered the metal bar in question behind the appellant's house. The appellant was arrested and arraigned in court.
5. In his defence, the appellant gave an unsworn statement. He denied committing the offence he had been charged with. He testified that on 8th December, 2002 he arrived at his house at 7:00 p.m. and never left. The following day he woke up early and went to work about 7Km from his house. Later that night he was arrested by the police and detained for 21 days before being charged. He denied hitting the deceased on the material day.
6. Satisfied that the prosecution had proved its case, the trial court by a judgment dated 9th June, 2006 convicted the appellant for murder and sentenced him to death. It is that decision that has provoked this first appeal based on the following grounds: -

- ***The learned Judge of the High Court erred in law and in fact in failing to find that the prosecution had not proved its case beyond reasonable doubt.***

- ***The learned Judge of the High Court erred in law and in fact by failing to find that malice aforethought was not established by the prosecution.***

- ***The learned Judge of the High Court erred in law and in fact in convicting based on contradictory evidence which was fraught with discrepancies.***

- ***The learned Judge of the High Court erred in law and in fact in rejecting the appellant's defence without cogent reasons.***

7. Mr. Muchiri wa Gathoni, learned counsel for the appellant, submitted that the issue that arises in this appeal is whether the prosecution had proved its case to the required standard. There was no evidence that the appellant had any issues/disagreement with the deceased. It was Wachira and the deceased who were fighting. At no time did the appellant plan to kill the deceased. According to Mr. Muchiri, the fact that someone died did not mean that the offence of murder had been established. He argued that *malice aforethough*t had not been proved against the appellant. There was evidence that the appellant was drunk at the material time. He urged us to allow the appeal.
8. Mr. Kaigai, Learned Assistant Deputy Public Prosecutor, submitted that PW5's (Wachira's) evidence should not have been disregarded. Wachira testified that both the deceased and the appellant were drunk at the material time. He submitted that this was a case of manslaughter and that the trial court did not consider whether *malice aforethought* had been established.
9. We have considered the record, submissions by counsel and the law. 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 conclusions bearing in mind the fact that we neither saw nor heard the witnesses and make an allowance for that. In ***Okeno -vs- [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-vs- 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 -vs- 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 -vs- Sunday Post [1958] EA 424".

10. There are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction for the offence of murder. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought. (See ***Nyambura & Others-vs-Republic, [2001] KLR 355***).
11. From the evidence on record it is not in doubt that the appellant hit the deceased on his head with a metal bar on the material day; the deceased sustained injuries on his head which caused his death. The main issue is whether the prosecution had proved *malice aforethought* on the part of the appellant to justify his conviction for the offence of murder.
12. Instances when malice aforethought is established are provided for in ***Section 206*** of the ***Penal Code***:-

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstance:-

a. ***An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***

b. ***Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***

c. ***An intent to commit a felony;***

d. ***An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."***

See ***Nzuki –vs- Republic – (1993) KLR 171***.

13. PW5 (Wachira) testified that at the material time both the appellant and the deceased were drunk. ***Section 13*** of the ***Penal Code*** provides in part as follows: -

"13(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

……..

(4) Intoxication shall be taken into account for the purposes 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 ***Said Karisa Kimunzu –vs- R – Criminal Appeal No. 266 of 2006,*** this Court while considering ***Section 13 (4)*** of the ***Penal Code*** observed,

"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."

14. We are of the view that prosecution failed to prove that the appellant who was drunk at the material time had formed the necessary intention to kill the deceased. We also note from the record there was no evidence that the appellant and the deceased had disagreed or quarreled prior to the incident. The evidence on record is that the appellant went to his house and came back with a metal bar and hit the deceased on the head. There was no evidence of motive on the part of the appellant to kill the deceased.
15. In ***Peter Kiambi Muriuki –vs- R – Criminal Appeal No. 321 of 2011*** this Court observed:-

"In Nzuki –vs- Republic (1993) KLR 171 the inculpatory facts were that Nzuki pulled the deceased out of a bar and fatally stabbed him with a knife. What however, was unnerving is that there was no evidence as to there having been any exchange of word between Nzuki and the deceased nor was there any indication as to why Nzuki came into the particular bar and straight away pulled the deceased out of it and then stabbed him. The court observed that the prosecution is not obliged to prove motive but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. ….. The court in substituting Nzuki's charge of murder with manslaughter observed:-

"There was complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause grievous harm, the superior court did not direct itself that the onus of proof that the necessary intent was throughout on the prosecution and that the same had been discharged to its satisfaction in view of the circumstances under which the offence in question was committed. Having not done so, and having regard to the environment in which the offence preferred against the appellant was committed as is mentioned above, we are uncertain whether or not malice aforethought, a necessary ingredient of the offence of murder, was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder was unstainable. His killing of the deceased only amounted to manslaughter."

Consequently, we are of the considered view that the prosecution did not prove the appellant killed the deceased with *malice aforethought*. Therefore, the evidence on record established an offence of manslaughter and not murder.

16. The upshot of the foregoing is that we find that the appeal herein has merit to the extent we set aside the appellant's conviction for murder and substitute it with a conviction for manslaughter. We also set aside the death sentence meted to him by the trial court. We sentence the appellant to 15 years imprisonment to run from 9th June, 2006 when the appellant was convicted and sentenced by the High Court.

Dated and delivered at Nyeri this 13th day of April, 2015.

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

MARTHA KOOME

……..

JUDGE OF APPEAL

J. OTIENO-ODEK

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR