



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KIHARA KARIUKI (PCA), MAKHANDIA & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 6 OF 2011

BETWEEN

JOHN WAIGWA MUMBI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

***(Appeal from the Judgment of the High Court of Kenya at Malindi (Omondi, J.) dated
16th February 2011***

in

Criminal Case No. 16 of 2006)

JUDGMENT OF THE COURT

1. John Waigwa Mumbi, the appellant herein, was by way of an information dated the 6th February 2007, charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that he, on the 2nd day of July 2006, while at Sunpark area in Malindi Township within Malindi District of the Coast Province, murdered Domittilah Kanini Mackenzi.
2. The evidence led by the prosecution was as follows: on the 1st July 2006, the deceased went to the house of Rhoda Kalunde (PW3) where she spent the night. The next morning, the deceased returned to her house accompanied by Rhoda. Shortly after their arrival, the appellant came into the house; the deceased asked him to remove his clothes from her house and leave. The appellant indicated that he could collect his clothes at a later time, and he left. Thereafter, Rhoda and the deceased went to Maweni where they found Fredrick Daudi (PW2). The deceased was looking for a curio vender known as Mambo, and she sent the appellant to go and call him. Mambo never came, so Fredrick, Rhoda, the deceased and the appellant went to the Mabeste Club to meet with Bakari Amin Abubakar Ali Kolo (PW4) who translated a letter for the deceased. As Bakari was translating the letter, the rest were drinking beer. Rhoda left for Malindi town and it was agreed that she would meet up with the deceased, the appellant and Fredrick at the Urafiki bar. Later that day, the deceased, the appellant, Fredrick and Rhoda met at the Urafiki bar where they shared some roast meat. At this time, the appellant and Fredrick were drinking beer, but the deceased drank a soda.
3. Later on, Fredrick, the deceased and the appellant left for the DC's office in Malindi to conduct

- some business and after that, they headed for the deceased's house. At some point, the deceased and the appellant left Fredrick in the house. The two returned about three hours later and went into the deceased's bedroom where they stayed for about thirty minutes. Fredrick got curious as to what the two were doing in the bedroom so he went and knocked on the bedroom door.
4. When no one responded, he looked through the bedroom window and saw blood; he decided to go to a nearby shop to call for help from David Wambua (PW1). Fredrick and David returned to find that the appellant was outside the deceased's house brandishing a knife. The appellant ran towards David who ran off to save himself. Fredrick attempted to disarm the appellant but the appellant cut his hands so Fredrick also ran away. Fredrick and David returned with some police officers. These were PC Thomas Muraguri (PW8), PC Joseph Kitili and Corporal Winstone Mwashu (PW6).
 5. As the door leading into the deceased's house was locked from inside so the police officers broke down the door and entered. The bedroom door was also locked and the police broke it down as well. In the bedroom, Fredrick, David and the police officers found the deceased lying in a pool of blood, and the appellant hanging from the ceiling on an electric cable. The police cut down the electric cable and took both the appellant and the deceased to the Malindi General Hospital for treatment. At the hospital, the deceased was confirmed as being dead on arrival.
 6. Dr. Marylin Omondi (PW9), a medical officer working at the Malindi District Hospital, performed the postmortem after the body of the deceased had been identified to him by Paul Nthenge Mackenzie (PW5). Her observations were that the body of the deceased had cut wounds on the hands, the lower back area, below the right breast, on the left knee and in the spinal region at the back. In the doctor's opinion, death was due to a hemorrhage that resulted from the perforation of the abdominal aorta arising out of injury from a sharp object.
 7. In his defence, the appellant gave sworn testimony in which he stated that on the morning of the 1st July 2006, he woke up and went to work, leaving his wife, meaning the deceased at home. That afternoon, he received information that one Daudi Kenga had died, and so he went to Kenga's home. The mourners agreed to meet that evening at 8:00 pm so the appellant went home and informed his wife of the death. The appellant and the deceased then went for the meeting, where she made her contribution and left. The appellant spent the entire night drinking at Kenga's home. He returned home the next morning and realized that the deceased, and her friend Rhoda, had also just arrived. He asked the deceased where she had been and she responded that she had spent the night at Rhoda's home.
 8. The appellant, Rhoda and the deceased left to go and find one Mambo who was to supply the appellant with carvings for his business. They did not find him, so they went to drink at a local *mnazi* den. The three later went to Urafiki bar where they continued to drink. The appellant claimed that he got so drunk that he could not remember anything that happened thereafter. His testimony was that he woke up on the 5th July 2006 in the hospital without any memory of what had happened. He maintained that he did not commit the offence that he was charged with and that he did not attempt to kill himself by hanging.
 9. Upon consideration of all the evidence the High Court found the appellant guilty of the offence of murder and sentenced him to death as is provided by law.
 10. Being aggrieved with that conviction and sentence, the appellant has now preferred this first appeal. He has raised issues of law and fact challenging the finding of the trial court; these issues include a failure of the trial court to adhere to the provisions of sections 200 and 201 of the Criminal Procedure Code; to consider his defence of intoxication; in relying on uncorroborated evidence to convict him; and a violation of his rights under Article 49 of the Constitution.
 11. Our duty on a first appeal is to evaluate and examine the evidence afresh and make our own conclusion, bearing in mind that we have not seen or heard the witnesses and making an allowance for that. See *Joseph Kariuki Ndungu & Another v Republic* [2010] eKLR (Criminal Appeal Nos. 183 & 188 of 2006) in which this Court rendered itself in the following manner:

“This being a first appeal, we have a duty to re-appraise the evidence, subject it to exhaustive examination and reach our own findings. We, however, appreciate that the trial judge had the advantage of seeing and hearing the witnesses. We further appreciate that because of that advantage, the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should

not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law.”

12. Mr. S.M. Obaga, learned counsel for the appellant, presented arguments in support of the appeal. Counsel argued first that section 200 of the Criminal Procedure Code was not complied. Section 200 of the Criminal Procedure Code provides for ***“Conviction on evidence partly recorded by one magistrate and partly by another.”*** That section, in part, envisages a scenario where there is a change of the judicial officer presiding over the trial of an accused person.
13. In particular, section 200(3) of the Criminal Procedure Code imposes a duty upon the Court to inform the accused person of his right to re-call witnesses who had already given evidence before a judge or magistrate who has since ceased to exercise jurisdiction over the proceedings. Mr. Obaga submitted that when the matter was taken over by Ouko, J. (as he then was) from Ombija, J. and later by Omondi J., the accused was never informed that he had a right to proceed *de novo* or to recall witnesses for examination, thus occasioning him prejudice. In counsel’s opinion, the appellant had a right to give an opinion as to the manner in which he wished to have his trial proceed. He therefore contended that the subsequent proceedings were a nullity and would have us apply section 200 (4) which provides as follows:

“(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

This section applies with equal force to criminal proceedings in the High Court by virtue of section 201 of the Criminal Procedure Code.

14. Mr. Musyoki, learned Senior Principal Prosecution counsel for the state, argued that section 200 of the Criminal Procedure Code was fully complied with. He pointed out that at all times, the appellant was represented by counsel who did not oppose the continuation of the hearing and as such, there was no prejudice. In addition, the appellant had complained that there had been delay in the hearing of his case, and it was therefore reasonable to continue with the hearing from where it had stopped. After the matter was transferred to Ouko J., only one witness had testified, and at the time, the appellant was represented by Mr. Mwarandu. Later, the matter had substantially been heard before Ombija, J. and only one witness was remaining. At this time the appellant was represented by Mr. Shujaa who indicated to the trial court that ***“we would like to proceed where the matter had stopped.”***
15. The record indicates what transpired on the 23rd June 2009. There was a Mr. Shujaa holding brief for Mr. Mwarandu, counsel for the appellant, who informed the court that the defence wanted to proceed from where the matter had stopped and that they did not wish to recall any witnesses. After this, Omondi, J. made the following order: ***“matter to proceed for (sic) were it had reached, section 200 (3) having been complied with...”***, clearly showing that the learned judge was alive to, and did address, the requirements of this section.
16. Section 200 (4) of the Criminal Procedure Code gives this Court discretion to set aside a conviction if it is found that the accused person was materially prejudiced. We have noted that the appellant was represented by counsel who indicated to the court that he did not wish the trial to begin afresh. There was no further complaint on the matter, and thus we find nothing to indicate that the appellant was in any way prejudiced. In the absence of such prejudice, as is the case here, the court will not set aside the conviction on this ground, and therefore this ground of appeal must fail.
17. In order to sustain a charge and conviction for the offence of murder, the evidence must demonstrate three essential elements. First, the death of the deceased, and the cause of his death; the second is that the person accused must be shown to have committed the unlawful act which caused the death of the deceased; and thirdly that in committing that unlawful act, the accused person acted with malice aforethought. See the decision of this Court in ***Abdi Kinyua Ngeera v Republic [2014] eKLR.***

18. The death of the deceased is not in dispute. Fredrick and the police all saw the body of the deceased lying on the bed in the bedroom. It was the testimony of the police that after they broke into the deceased's house, they found her lying in a pool of blood on the bed. The cause of death was determined by Dr. Omondi who performed a post mortem on the body she found that the deceased had multiple stab wounds on her body, and her conclusion was that the deceased had died due to haemorrhage due to perforation arising out of an injury caused by a sharp object. The evidence of the government chemist was also clear and pointed to the fact that a knife recovered from the scene was covered in blood of the deceased's blood type; the inference here being that the deceased was stabbed with that knife.
19. We now turn to consider if there was evidence that it was the appellant who caused the death of the deceased. Fredrick testified that he and the deceased returned to her house. After some time, the deceased and the appellant went into the bedroom, where they remained for a period of about thirty minutes. Fredrick decided to check on the two and knocked on the bedroom door which yielded no response. He therefore decided to look through the window and saw a lot of blood. He ran for help, and when he returned with David, they met with the appellant who chased them off with a knife. They therefore ran away and returned with the police, and after breaking into the house, they found that the deceased was lying in a pool of blood on the bed.
20. The evidence that points to the appellant as having stabbed the deceased is circumstantial. In ***Sawe v Republic [2003] KLR 364*** it was held as follows:-

“1. In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.”

And in ***Mwangi & Another v Republic [2004] 2 KLR 32*** the Court said:-

“It may be asked: why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge....”

21. Mr. Obaga submitted that Fredrick ought to have been considered a suspect since he never indicated what prompted him to go into the bedroom in the first place; he further hypothesised that perhaps Fredrick was a secret lover of the deceased who was unhappy with the relationship of the deceased and the appellant, and that he probably killed her. In support of his submission, learned counsel pointed out that there was no medical evidence to prove Fredrick's claim that the appellant had attacked him.
22. In our view, the absence of medical evidence to prove that Fredrick was attacked by the appellant does not aid the appellant's case. The charge against him is on the murder of the deceased, and has nothing to do with the attack on Fredrick.
23. We find it improbable that any other person other than the appellant could have killed the deceased. The sequence of events as given in the testimonies of Fredrick and David leads us to the conclusion that the appellant was responsible for the death. The appellant is the person who was last seen with the deceased; less than an hour later, she was lying in a pool of blood in the locked bedroom where only she and the appellant were present. Upon seeing the deceased, Fredrick ran to call for help from David. David corroborated Fredrick's account of events, which was that when they went to the deceased's house, they found the appellant outside; he was holding a knife and he attempted to attack David. The evidence therefore points to the appellant as the one who killed the deceased.
24. Turning now to the last of the essential elements, which is whether or not the appellant had malice aforethought (the *mens rea*, or intention) in causing the death of the deceased, section 206 of the

Penal Code outlines the circumstances in which malice aforethought will be inferred . However of particular importance to this case is if it is established that in committing the unlawful act, the appellant has acted with an intention to cause death, to do grievous harm or to commit a felony, then malice aforethought would have been proved.

- 25.Appellant’s learned counsel submitted that the appellant had indicated to the court that on the material day he had been drinking, and therefore if he did indeed cause the death of the deceased, he did so when he was temporarily insane by virtue of being drunk, and thus did not have the necessary intention to commit the murder.
- 26.Mr. Musyoka on the other hand saw no merit in the defence of intoxication, contending that the accused could not plead such a defence because he had gotten intoxicated intentionally. Counsel further contended that if the appellant was indeed drunk, he was not so drunk as not to appreciate what he was doing.
- 27.Section 13 (1) of the Penal Code provides in part that **“intoxication shall not constitute a defence to any criminal charge.”** There are exceptions to this though in section 13 (2) which reads as follows:

“(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.”**

- 28.In addition, section 13 (4) of the Penal Code provides that the state of intoxication shall be taken into account in determining whether or not an accused person has the necessary *mens rea* in committing a crime. That section provides that:

“(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.”

- 29.There is ample evidence that the appellant was drinking beer on the 1st July 2006. Bakari testified that when he was translating a letter for the deceased, the appellant and the deceased were both drinking beer. Rhoda testified that when they met at the Urafiki bar, she saw the appellant drinking beer. The appellant himself testified that the night before, he had been drinking the entire night, and that on the material day, he and the deceased were drinking at various bars until 11:30 am. He was very drunk by that time and therefore could not recall anything that transpired after that. Even Corporal Mwashu was of the opinion that the appellant may have been drinking because when he cut down the electric cable from which the appellant was hanging, he could smell the alcohol on him.

- 30.In rejecting this defence, the trial court rendered itself as follows:

“However, there is no evidence of levels of alcohol content in the accused’s blood, none of the prosecution witnesses testified that accused was so drunk as not to even know what he was doing, his actions suggest that he was well oriented in time and space – he was not staggering or aided to walk, even when deceased ordered him to leave her huse, he did not begin a drunken argument or get violent immediately – he exercised self-control and said nothing – these are not actions of one who is so drunk as not to know what he was doing.” (sic)

- 31.It has been stated by this Court that **“... the defence of intoxication is very narrow in its application. [section] 13(4) of the Penal Code should not be read in isolation. It should be read within the confines of Sections 13 (1), (2)(a) & (b).”** See *Roba Galma Wario v Republic* [2015]

eKLR.

32. When presented with a defence of intoxication, the court must consider if “... *the drunkenness or intoxication deprived the [accused person] of the ability to form the specific intention required for the commission of a particular crime.*” See Charles Heho Ndirangu v Republic [2009] eKLR (Criminal Appeal 346 of 2008) and Kyalo Kalani v Republic [2013] eKLR (Criminal Appeal 586 of 2010).
33. In order to prove insanity by reason of intoxication, the appellant was required to demonstrate on a balance of probabilities that he was too drunk to appreciate what he had done. See Maina v Republic [2007] 2 EA 279 (CAK) where it was held that:

“If an accused person seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove.”

34. See also Richard Kaitany Chemagong v Republic [1984] eKLR (Criminal Appeal 150 of 1983) where this Court held that:

“... the burden of proving an averment of insanity, once raised, lies upon the accused person to show on the balance of probabilities:

that at the time of the killing the deceased was-

(a) suffering from disease affecting his mind;

(b) through such disease incapable –

(i) of understanding what he was doing, or

(ii) of knowing that he ought not to kill the deceased.”

35. The sum of the appellant’s defence is that he was so intoxicated that he was temporarily insane at the time of the murder. While there is corroborated evidence that the appellant had been drinking on the material day, there is nothing to show that the appellant was actually in a state of intoxication. However, the appellant’s actions were glaringly obvious: he did not respond to Fredrick’s knocks on the bedroom door, and when Fredrick and David came onto the scene, the appellant chased them off while brandishing a knife, and later, when the police arrived, they found that the appellant had attempted to end his own life by hanging himself. The fact that the appellant reacted this way indicates that he was in a position to appreciate the nature of his actions. He has therefore not demonstrated that at the time of commission of the crime, he was suffering from infirmity of the mind that would have rendered him insane.
36. We have also considered that the nature of the injuries suffered by the deceased. In Morris Aluoch v Republic [1997] eKLR this Court read a lack of intention to kill where an accused person had struck his victim only once. In the present appeal, we note that the appellant inflicted various stab wounds on the deceased. The deceased had three cuts, one of which measured four centimeters. She also had multiple stab wounds on her lower back, and one of these stab wounds measured five centimetres and extended to abdominal cavity. The nature and extent of these wounds inflicted by the appellant leads us to conclude that he had every intention to kill the deceased.
37. Before we conclude this judgment, we would like to comment on observations made by the trial judge regarding the fact that there was a knife in the deceased’s bedroom. The judge stated that:

“Ordinarily a knife is kept in the kitchen, there is nothing to suggest that the couple routinely kept a knife in the bedroom, and for the accused to have had it there demonstrates a plan to use it to inflict maximum injury.”

These observations are, in our view, tantamount to a theory that the appellant is the one who took

the knife to the bedroom. This course of action by the trial judge was improper as there was nothing in evidence to suggest that the appellant had taken the knife to the bedroom so that he could later attack the appellant. As was stated in *Okethi Okale and others v Republic [1965] 1 EA 555 (CAN)* “... *it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels’ speeches.*”

38. Ultimately, after an analysis and evaluation of the evidence, we are satisfied that the appellant did, with malice aforethought, cause the death of the deceased. We therefore uphold the conviction of the appellant and affirm the sentence meted out on him. We find no merit in this appeal and accordingly order that it be and is hereby dismissed.

Dated at Mombasa this 16th day of October, 2015.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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