IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 352 OF 2012

BETWEEN

ANTHONY NDEGWA NGARI ……...…….. APPELLANT

AND

REPUBLIC …….…….. RESPONDENT

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

dated 26th July, 2012

in

H.C.CR.C No.16 of 2009)

****

JUDGMENT OF THE COURT

1. ***Anthony Ndegwa Ngari,*** the appellant, was charged with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code,*** Chapter 63, Laws of Kenya in the High Court at Embu. The particulars of the charge were that on 18th July, 2009 at Karumandi Trading Centre, Karumandi Location in Kirinyaga District within the then Central Province, the appellant murdered David Munene Teresio.
2. PW11, Dr. Joseph Thuo, examined the appellant and found that he was mentally fit to take plea and stand trial. Thereafter, the appellant pleaded not guilty to the charge. The prosecution called a total of 14 witnesses in support of its case. The matter was partly heard by Karanja, J. (as she then was) and subsequently proceeded pursuant to ***Section 201*** of the ***Criminal Procedure Code*** from where it was left before Ong'undi, J. It was the prosecution's case that on 18th July, 2009 at around 8:00p.m. while PW2, Obadia Mwendia Njagi (Obadia), and David Munene Teresio (deceased) were walking at Karumandi town, they met the appellant outside a bar. The appellant came towards them and removed a Somali sword from his trouser pocket and stabbed the deceased on the neck. The deceased fell down and begun bleeding. Obadiah screamed and PW3, Jacinta Wairimu Muriithi (Jacinta), who was nearby came to the scene. The appellant ran away. It was Jacinta's evidence that she saw the deceased lying down and Obadiah informed her that it was the appellant who had stabbed the deceased.
3. Obadiah testified that the appellant and the deceased had not spoken; the appellant just stabbed the

deceased without talking to them. He testified that he was able to identify the appellant who was well known to him with the aid of electricity lights from the bar and a nearby shop; the appellant was wearing black trousers and a white t-shirt. He maintained that he did not know why the appellant stabbed the deceased. On the same night at around 8:30 p.m., while PW4, James Gichoya Mitaru (James), was heading to paradise bar he saw a man with a white t-shirt running. With the aid of the electricity lights from the buildings around that area and the moonlight he recognized the man as the appellant. He had known the appellant for a period of 10 years. He noticed that the appellant was carrying a Somali sword.

4. James continued walking and noticed a crowd about 10 metres from where he had seen the appellant. He went to where the crowd was and saw the deceased lying down. The police arrived and were informed that it was the appellant that had stabbed the deceased. The deceased was rushed to hospital but unfortunately died upon arrival. On the same night PW8, Cpl. Thomas Waburi (Cpl. Thomas) in the company of PW7, Justus Njagi Gachoki (Justus), the area assistant chief, PW4, James, and others went to the appellant's home. The appellant refused to open his door causing the police to force their way in. They found the appellant on the bed and arrested him. Cpl. Thomas recovered a blood stained Somali sword under the appellant's mattress.
5. Upon examining the blood stained Somali sword and the deceased's blood sample, PW6, Albert Kathuri Mwaniki (Albert), a government chemist, formed an opinion the blood on the sword matched with the deceased's blood sample. PW1, Dr. Stephen Wangombe Nderitu (Dr. Stephen), carried out a postmortem on the deceased's body and established that there was a deep stab wound on the left side of the deceased's neck with severed neck muscles. He testified that the cause of death was due to severe neck injuries.
6. In his defence, the appellant gave a sworn statement. He denied committing the offence he was charged with or even knowing the deceased. He maintained that the charge was framed against him by PW7, Justus. He testified that on 18th July, 2009 at around 3:00 p.m. he went to Karumandi town and purchased 3 bags of fertilizer. Thereafter, he went to a bar and drunk beer; he drank in three bars. After he was drunk, at around 9:30 p.m. PW7, Justus, tried to force him to pay a bill which was not his. A quarrel ensued and he decided to go home. He went home and fell asleep only to be woken up by policemen who forced their way into his house. He was arrested and charged.
7. After considering the evidence on record, the High Court (Ong'undi, J.) held that the appellant had killed the deceased with malice aforethought. The appellant was convicted of the offence of murder and sentenced to death. Aggrieved by that decision, the appellant has filed this appeal based on the following grounds:-

- ***The learned Judge erred in law and facts in finding that the appellant had the motive to kill yet he was drunk.***

- ***The learned Judge erred in law and facts in finding that there was sufficient evidence to found a conviction while the evidence to found a conviction while the evidence fell far below the required threshold.***

8. Mr. Kimunya, learned counsel for the appellant, submitted that the appellant had put forth the defence of intoxication which the trial court disregarded. The appellant in his defence testified that he was drunk at the material time. According to Mr. Kimunya, the learned Judge erred in finding that the appellant had motive to kill the appellant yet there was no evidence supporting such a finding. He argued that ***Section 13(4)*** of the ***Penal Code*** was applicable in this case. He went on to state that this was a case of manslaughter. He urged us to allow the appeal.
9. Mr. Kaigai, Assistant Deputy Public Prosecutor, in opposing the appeal, submitted that the learned Judge was correct in finding that the appellant had malice aforethought. He argued that there was no provocation. He submitted that the trial court took into consideration the allegation by the appellant that he was drunk and found that it was not to such a degree as to take away his reasoning. This is because the appellant was capable of running away from the scene. Mr. Kaigai submitted that the fact that the appellant had refused to open his door indicated his guilt. He urged us to dismiss the appeal.
10. In response Mr. Kimunya argued that the appellant did not open the door because he was drunk

and asleep.

11. For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. 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***). From the evidence on record it is clear that the appellant stabbed the deceased with a knife on his neck. As a result of the injuries the deceased died. This was established by the uncontroverted evidence of Obadia who witnessed the appellant stabbing the deceased and James who saw the appellant running with a sword after the incident. Further, the murder weapon was found with the appellant on the same night. The issue for determination is whether the appellant had malice aforethought when he stabbed the deceased. Instances when malice aforethought is established is 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."***

12. Based on the foregoing, there has to be intent to cause harm or death or knowledge that an act can cause death or injury on the part of the accused person. Did the evidence establish the requisite *mens rea* on the part of the appellant? We have perused the judgment of the lower court and note that despite the learned Judge mentioning the issue of the appellant being drunk, there was no finding on the same; also on whether the appellant was in a position to form a specific intention to kill (*mens rea*). ***Section 13(4)*** of the ***Penal Code*** provides:-

> ***"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 ***Said Karisa Kimunzu –vs- Republic- Criminal Appeal No. 266 of 2006,*** this Court held,

> ***"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."***

Further, in ***Julius Obare Angasa-vs- Republic – Criminal Appeal No. 271 of 2008*** this Court observed as herein under:-

> ***"As this Court pointed out in David Munga Maina –vs- Republic [2007] eKLR, a party who says he had taken some liquor is not necessarily raising the defence of insanity. Such a person may only be asking the court to take into account the fact of his having consumed liquor and whether that state had deprived him of the ability to form the specific intent to kill. The court is under a duty to consider such a defence where it is raised…"***

See also ***Peter Kuria Kaburi –vs- Republic- Criminal Appeal No. 234 of 2009.***

13. We cannot help but note that the appellant testified that he had been drinking on the material night in three bars and was drunk. We also note that Obadiah stated that he and the deceased saw the appellant outside a bar. PW8, Cpl. Thomas, testified that when they arrested the appellant on the same night he was drunk. This evidence clearly establishes the appellant was drunk. Therefore, was the appellant drunk to the extent he could not form the necessary intent to kill? It was Obadiah's evidence that the appellant stabbed the deceased without saying a word to either of them and without any provocation by the deceased. Cpl. Thomas testified that when they forced open the appellant's door, he was asleep and drunk. From the circumstances we find that the prosecution did not establish that despite being drunk the appellant had formed the requisite intention to kill the deceased. 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.
14. 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 of 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 26th June, 2012 when the appellant was convicted and sentenced by the High Court.

Dated and delivered this 30th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……

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