



IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 351 OF 2012

BETWEEN

JAMES MWANIKI GATHAGUAPPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court at Embu (H. Ong’udi J) delivered on 27th June, 2012

in

H.C.CR. Case No. 20 of 2009)

JUDGMENT OF THE COURT

1. James Mwaniki Gathagu was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63 of the Laws of Kenya)**. The Information was that on the 4th day of August, 2009, at Ganduri market, Kianjiru location within Mbeere District of the Eastern Province, murdered Lawrence Nyagah Gathagu. The appellant was tried, convicted and sentenced to death by the Honourable Justice Ong’udi. Aggrieved by the conviction and sentence, he has lodged this appeal.
2. Our analysis and re-evaluation of the evidence on record shows that the prosecution case hinged on the testimony of four key witnesses namely PW1, PW2, PW3 and PW 11.
3. PW1 Grace Mueni testified as follows:

“I was working at Karumaindo Bar in August 2009. On 4th August, 2009, I was at Karumaindo Bar. Mwaniki (appellant) came and found Lawrence (deceased) drinking beer. He went to urinate. When coming back, he found Lawrence urinating in front of people. Accused asked him to stop doing so. Mwaniki hit the deceased and he fell down. Mwaniki then stepped on him severally on the chest. Lawrence lay down for about five minutes. Accused then lifted him and Lawrence went home. He did not come back. Later at night we heard that he had been taken to hospital and later on 20th August, 2009, his children told us that he had died”.

4. PW2 Anthony Muriuki Ndie testified as follows:

“On 4th August, 2009, I was at my place of work. One Wambugu came in the evening in the company of his mother. They told me that Mbogo’s father was sick and they requested that I take him to hospital. He was called Lawrence Nyaga. He was talking. He told me he had been assaulted by Mwaniki Kathagu. I brought him to Embu Provincial General Hospital. We got there at about 11.00 pm. He was not treated first. We were referred to the police station. We reported the matter. He was treated and discharged. We took him home. Finally, he passed away in Nairobi. He was complaining of stomach-ache (abdominal). He told me he had been hit by Mwaniki”.

5. PW3 Magrieta Thaara Njoka testified as follows:

“I sell in a bar; on 4th August, 2009, I was working at Karumaindo bar. At about 6.00 pm, Lawrence and Mwaniki were drinking beer. I was serving them. Lawrence went to urinate. Mwaniki told him to stop urinating in front of people. He kicked him on the chest and stepped on him. When on the ground, he kicked him on the stomach three times. Lawrence lay on the ground for about 10 minutes. He then got up and went home. He was walking holding his stomach. I later learnt that he had died. Lawrence had come to the bar before Mwaniki. He had come at midday. He was drinking Munyiri (an alcoholic drink). Mwaniki came at about 2.00 pm. The accused and the deceased were both drunk when the incident happened”.

6. PW11 Dr Joseph Ndung’u who conducted a post-mortem on the deceased testified as follows:

“I am a consultant pathologist at Kenyatta National Hospital. I carried out an autopsy of Lawrence Nyaga on 1st September 2009 at Kenyatta National Hospital Mortuary. I formed an opinion that the deceased died of renal failure due to severe infection which resulted from post surgical peritonitis i.e. the infection had resulted from perforated small intestines following blunt abdominal trauma. I completed the post mortem form which I signed and which I wish to produce as exhibit. Other than the perforation which was repaired surgically, the rest were secondary infections”.

7. The appellant in his defence raised an *alibi*; he stated that he was with his family and not at Karumaindo Bar. He stated that PW2 had a grudge against him because he (*appellant*) had a child with his 1st wife and his father had given PW2 a plot for ballast but the appellant told his father to chase him away.

8. The trial court having considered the prosecution evidence and the defence testimony delved into the issue as to whether the appellant had the requisite *mens rea* for the offence of murder. The trial court restated the provisions of **Section 206 (b)** of the **Penal Code** where malice aforethought is defined to include “*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*”. Applying the foregoing definition in **Section 206 (b)** to the facts of this case, the trial court held as follows:

“The accused person first hit the deceased who fell down. As if that was not enough, he continued to kick and beat him on the chest and stomach. The deceased never beat him even once. There were people present. The senseless persistent beating of the deceased was uncalled for. He knew that this kind of beating would cause grievous harm or even kill the deceased. He did not stop until PW4 intervened. This to me is sufficient proof of malice aforethought and satisfies the requirement of Section 206 (b) of the Penal Code”.

9. At the hearing of the appeal, the State was represented by Messrs Job Kaigai Assistant Director of Public Prosecution. The appellant was represented by learned counsel Messrs Gathiga

Mwangi.

10. Counsel for the appellant reiterated the grounds of appeal and concentrated on the issue of *mens rea* and malice aforethought. The appellant contends that the learned judge failed to consider the fact that no witness led evidence in court to show that there was malice aforethought; that although intoxication was not raised as a defence, the appellant and the deceased were drinking as from 2.00 pm and the incident occurred at 6.00 pm; that the evidence on record shows the appellant was drunk and intoxicated and the trial court failed to take this into account; the trial court erred in failing to take into account that the appellant was provoked by the deceased through his conduct of urinating in front of people; that the appellant did not use any weapon on the deceased. Counsel submitted that the evidence on record shows that the deceased did not die on 4th August, 2009, when the appellant hit him while they were at Karumaindo Bar; the deceased was taken to hospital where he was operated on and this constituted a new intervening condition. Counsel for the appellant cited the cases of ***Beth Katile w/o of Charles Munyao – v – R, (182) C.A. 95; Anthony Ndegwa Ngari – v- R, (2014) eKLR*** and ***Kinuthia s/o Kamau – v- R, (1950)17 E.A.C.A 37*** in support of his submission.
11. The State opposed the appeal and submitted that malice aforethought in accordance with **Section 206 (b)** of the **Penal Code** had been established. It was submitted that the appellant is not disputing that he beat the deceased; the beating of the deceased was witnessed by PW1, PW2 and PW3 who were all at the Karumaindo Bar; that PW 11 testified on the cause of death which corroborates the prosecution evidence that the deceased was beaten and kicked in the abdomen and stomach; that the evidence relating to the beating and kicking fits the definition of malice aforethought. The State submitted that intoxication and provocation were never raised as a defence before the trial court and in any event the appellant was not drunk to the point that he could not have malice aforethought; that the conduct of the appellant of senselessly beating and kicking the deceased meant that he had the strength and energy to beat a person and he was not incapacitated by the alcohol he had consumed; that the senseless beating of the deceased amounts to malice aforethought. The State submitted that intoxication can only be considered when it is specifically raised as a defence and in this case, it was never raised before the trial court.
12. We have considered the submissions by both the appellant and the State. This being a first appeal, we are mindful 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*.”

13. 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.

14. The key issue in this appeal relates to *mens rea* and malice aforethought. Voluntary drunkenness is never an excuse for criminal misconduct. (See ***Director of Public Prosecution –v- Beard, 1920 AG, 494***). 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. That is a distinction should be drawn in

cases where intoxication negatives *mens rea* and where it does not. 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 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".

15. In *Doherty case (1887) 16 Cox CC 306 at 307*, Stephen J. stated that the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter. (See *Smith & Hogan Criminal Law Cases and Materials, 7th ed. at pg 147*).

In *Mc Carthy (1952) Z NI ER 262*, it was stated that if a man is charged with an offence in which a specific intention is essential (*as in murder, though not in manslaughter*), then evidence of drunkenness which renders him incapable of forming that intent, is an answer. This degree of drunkenness is reached when the man is rendered so stupid by drink...

16. In the present case, motive 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 as 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.

17. In the instant case, the alleged offence took place at around 6.00 pm. PW3 testified that on the material day, the appellant had been drinking beer from 2.00 pm. PW1, PW2 and PW 3 all testified that the appellant was drunk at the time of the incident. In its judgment, the trial court did not consider and address the issue of intoxication. Although intoxication was not raised as a defence, the evidence on record reveals that the appellant had been taking alcohol from 2.00 pm. There is a complete absence of motive, no previous enmity or reason for the killing. (See **Kinuthia s/o Kamau – v- R, (195) 17 EACA 37**). It is the duty of the trial court to evaluate the entire evidence on record and satisfy itself if the ingredients of the offence of murder have been established and proved. We are convinced that it is the appellant who inflicted the injuries that led to the death of the deceased. Taking into account the evidence on intoxication, doubt exists as to whether the appellant had the requisite malice aforethought for the offence of murder, thus, the trial Judge ought to have given the appellant the benefit of doubt which we hereby do. We hereby quash the conviction of the appellant for murder and set aside the death sentence. We substitute the conviction for murder with manslaughter. The appellant is hereby convicted of manslaughter contrary to **Section 202** as read with **205** of the **Penal Code**. We sentence him to 15 years imprisonment from 29th September, 2009, when he was first arraigned before court.

Dated and delivered at Nyeri this 8th day of October, 2014.

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