IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CRIMINAL APPEAL NO. 375 OF 2011

BETWEEN

JOSEPH KIMANI NJAU ....APPELLANT

AND

REPUBLIC …... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Wendoh, J.)

dated 3rd August, 2011

in

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

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JUDGMENT OF THE COURT

1. The appellant faced a charge of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***, Cap 63 of the Laws of Kenya. The deceased was a girl friend to the appellant. The Information against the appellant was that on the 10th February, 2009 at Maina Estates in Laikipia West District of the then Rift Valley Province, killed Lucy Nyambura Kungu

2. The key prosecution evidence was by PW1, Catherine Wanjiru Njaga, PW2 Serefina Bonareri and PW6, Dr. Fredrick Kariuki. PW1 Catherine Wanjiru Njaga testified as follows:-

> ***"On 10th February, 2009 at about 6.00 p.m. I was at my house when Maina Mwangi called me and told me Nyambura and Kimani were fighting. Kimani is the accused. Nyambura is the deceased. I went where they were. The deceased lived near where I lived. It is about 10 minutes walk away. I went there and Kimani did not stop beating her. That was the deceased house. She used to live with Kimani. I asked Kimani why they were fighting and Kimani said he found Nyambura drunk. They were outside the house in the plot. It was a rented house. There were many people. He was kicking her and using his hands to beat her. He beat her on the face, legs until she fell. He beat***

her for about 5 minutes. I did not see where she was injured because Kimani carried her into the house. He locked the house with a padlock and left. We also left. Next day, the deceased's child came about noon and asked if I had seen the mother, she is Margaret Wairimu. I told her to go and check on her at the house of Maina Kimani. She came back and said the grandmother had said the deceased was not there. ….. At about 1.00 pm I was called and told that Nyambura had died at Kimani's home. I went with my aunt called Wangechi. On arrival we found many people had gathered. Deceased was lying on the floor on a mattress at Kimani's house. The deceased was covered with many clothes. ...When we found the deceased, Kimani was not there. I went to the mortuary to identify the body before the post mortem was done. I saw the accused beat the deceased. I saw him beat her on the face and legs, slaps with bare hands. They used to fight often when they drunk alcohol. That day they came drunk."

3. PW2, Serefina Bonareri testified as follows:-

> ***"I do casual jobs. On 10th February, 2009 at about 6.30 p.m. I was in the village coming from the shamba. I heard noises outside my house. On going out, I found Kimani beating Nyambura. It was on the road next to the plot. He was using fists, elbows and hitting her on the wall of the house and kicking her. He kicked her on the back, cheek and made her fall and would lift her up and hit her again. People gathered on the road and an old woman was passing with her walking stick and warned him if he hit the girl again she would hit him. Kimani stopped beating her and carried the girl and took her into the girl's house... I did not see any injuries. He locked the door from outside with a padlock and left. I entered the house and people dispersed...The next day at 2.00 pm while sitting outside, I heard a neighbour say Nyambura could not be found. The door was opened and she was not there. I did not go there. Another lady came and said Nyambura had been found at the house of Kimani. We all went to the plot where Kimani was with his mother and found Nyambura was dead. When I saw Kimani beating Nyambura, Kimani was not drunk. Even Nyambura was not drunk. None of them was drunk."***

4. PW6, Dr. Fredrick Kariuki, a medical officer based at Nyahururu District Hospital produced a post mortem report conducted by Dr. Charles Nganga on the deceased. The report shows that the deceased had external multiple bruises on the head and a swollen face. Internally there was massive sub-dural haematoma - collection of blood within the brain tissue; the deceased had celebral oedema - swelling of brain tissue. The cause of death was given as severe head injury caused with a blunt force.

5. The appellant was tried and convicted of murder. He was sentenced to serve a term of 20 years imprisonment. Aggrieved by the judgement, the appellant lodged the present appeal against conviction and sentence citing the following grounds:

i. ***that he pleaded not guilty to murder contrary to Section 203 as read with Section 204 of the Penal Code;***

ii. ***that he is remorseful and deeply regrets the offence;***

iii. ***that extreme anger and provocation led to the incident and he was not in his lucid state of mind;***

iv. ***that he had an amicable and intimate relationship with the deceased;***

v. ***that the sentence imposed is harsh and severe taking into account all circumstances of the case;***

vi. ***that he has no previous conviction and he has a family that wholly depends on him.***

6. At the hearing of the appeal, the appellant was in person while the State was represented by Mr. J.

K.Chirchir, Senior Principal Prosecution Counsel. The appellant handed in written submissions for consideration by this Court. The appellant submitted that the trial court erred in convicting him of the offence of murder yet the evidence did not establish malice aforethought on his part. He submitted that he was provoked by the conduct of the deceased's companions when he inquired from the deceased about her state of drunkenness. He was also under the influence of alcohol and was not in control of his actions. It was the appellant's case that the prosecution's case was full of contradictions and the same could not have warranted a conviction. He finally submitted that he was remorseful for what he did. The appellant reiterated that he never intended to kill the deceased and urged this Court to consider the sentence.

7. The State submitted that even though the appellant was convicted of murder, malice aforethought was not proved; there was no motive established, no weapon, no excessive force and the appellant used his bare hands in beating the deceased; both the appellant and the deceased were drunk; that the facts of the case disclose the offence of manslaughter and not murder. It was submitted that had the trial court considered these facts, the appellant should have been found guilty of manslaughter and not murder. On sentence, the State submitted that this Court should allow the appeal on sentence.

8. This is a first appeal; and we are obliged to consider and analyse all the evidence on record and make our own findings without overlooking the findings of the trial court and bearing in mind that we did not have the advantage of seeing and hearing the witnesses testify. In ***Okeno -vs- 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).***

9. The prosecution case is based on the testimonies of PW1 and PW2. These were eye witnesses who saw the appellant beat the deceased. Both PW1 and PW2 were well known to the appellant who was their neighbour. The credibility of PW1 and PW2 was not shaken and we see no reason to fault the trial court for believing their eye witness account as to beating that the deceased endured in the hands of the appellant. We are satisfied as to the identity of the appellant as the person who beat the deceased. As was stated in ***Anjononi & others -vs- Republic (1976-80)1 KLR 1566***, this Court held at page 1568,

> ***"Recognition of an assailant is more satisfactory, more assuring, and more reliable..."***

> The post mortem report tendered in evidence by PW7 illustrated the parts of deceased's body that had injury which corroborates the testimony of PW1 and PW2 in so far as the parts of the deceased's body that were being hit by the appellant.

10. The key issue for determination in this appeal is whether malice aforethought was proved. ***Section 206*** of the ***Penal Code*** sets out what constitutes malice aforethought and as far as it is material to the matter before us, paragraphs (a) and (b) of that section are important and provide as follows:

> Malice aforethought is:

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 omissions 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:"***

11. The facts in this matter are not generally in dispute. From the testimony of PW1 and PW2, the appellant beat the deceased using fists and kicks on the head, face and cheek. The doctor's finding after

conducting the post mortem established that indeed, the injuries that the deceased suffered were multiple injuries to the head, which resulted internally to massive sub-dural haematoma - collection of blood within the brain. The cause of injury was attributed to a blunt force and that a fist could cause such injury. We have examined the judgment of the High Court. Unfortunately, the learned Judge did not address the issue of malice aforethought. Nowhere in the judgment is the *mens rea* required for murder considered. The learned Judge simply expressed herself as follows:-

> ***"Nobody witnessed the murder... Nobody saw who placed the deceased body in accused's house or room. What is before court is circumstantial evidence....I am satisfied that in the instant case, the circumstantial evidence points at none but the accused's guilt and there are no other co-existing circumstances that would weaken that inference... There is overwhelming evidence against the accused and this court is convinced beyond any doubt that the accused committed the offence. In the end, I find the accused guilty of murder of the deceased, Lucy Nyambura, as charged..."***

12. In all criminal trials, both the *actus reus* and the *mens rea* are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the *actus reus* and *mens rea* have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific *mens rea* required for murder had been proved by the prosecution.

13. In the case of ***Nzuki – vs- Republic, (1993) KLR 17*1**, this Court stated that malice aforethought is a term of art and emphasized that:

> ***"Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:-***

i. ***The intention to cause death;***

ii. ***The intention to cause grievous bodily harm;***

iii. ***Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.***

> ***It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a potential victim other than the one who succumbed. The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (see Hyman – v- Director of Public Prosecutions, [1975] AC 55".***

In ***Nzuki – vs- Republic, (supra)*** 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 words 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. ***(See R –v Sharmpal Sigh s/o Pritam Singh, (1962) EA 13 at page 17.*** The court in substituting Nzuki's charge of murder with manslaughter observed:

> ***"There was a 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 the***

fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought 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 is unsustainable. His killing of the deceased amounted only to manslaughter".

14. Our evaluation of the evidence on record in the instant case comes within the legal principles laid out in the ***Nzuki's*** case and we adopt the conclusions stated therein. In the case of ***Isaak Kimanthi Kanuachobi – vs- Republic*** -(***Nyeri) Criminal Appeal No. 96 of 2007 (ur)***, this Court expressed itself on the issue of malice aforethought in terms of ***Section 206*** of the ***Penal Code***:-

> ***"There is express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape, or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm, he is said to have had constructive malice aforethought (See Republic –v –Stephen Kiprotich Leting & 3 Others (2009) e KLR HCCC No. 34 of 2008). In the circumstances of this case, where there was a fight involving the appellant and others in a place of worship leading to another fight where the appellant stabbed the deceased with fatal consequences, we do not think there was malice aforethought at all. The appellant should not have been convicted of murder but should have been convicted of manslaughter. (***See ***Juma Onyango Ibrahim – vs- R, Criminal Appeal No. 312 of 2009 Court of Appeal (Kisumu,)."***

15. In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that *mens rea* for murder was not proved. Failure to prove *mens rea* for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes of death of another. We find that the conduct of the appellant in beating the deceased was unlawful. Being persuaded by the decision in ***Juma Onyango Ibrahim – vs- R (supra)*** and ***Nzuki – vs- Republic, (supra)*** we find that the prosecution had not proved malice aforethought on the part of the appellant to the required standard. We find that the totality of the evidence adduced by the prosecution is an account of two eye witnesses who saw the appellant beat the deceased with bare fists and kicks on her head. The testimony of these two witnesses, PW1 and PW2 is credible and cross-examination did not shake their evidence. Their evidence was water tight and the prosecution was able to prove beyond reasonable doubt that it was the appellant who beat the deceased. The testimony of PW1 and PW2 was not able to establish *mens rea*; their testimony established *actus reus*.

16. We find that malice aforethought was not proved to the required standard. In our analysis, it is not disputed that the appellant beat the deceased on her head with fists and kicks causing her death; the killing was unlawful. We partially allow the appeal, quash the conviction for murder and set aside the 20 year term of imprisonment as sentence for murder. We substitute in its place a conviction for the offence of manslaughter contrary to ***Section 202*** as read with ***Section 205*** of the ***Penal Code***. The appellant is sentenced to serve 15 years with effect from 13th March, 2009 when his plea was taken before the trial court.

Dated and delivered at Nakuru this 27th day of November, 2014.

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