IN THE COURT OF APPEAL

AT NAKURU

(CORAM: VISRAM, OKWENGU & MARAGA, JJ.A)

CRIMINAL APPEAL NO. 73 OF 2009

BETWEEN

JOSEPH KIPKOECH KURGAT.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a conviction and sentence of the High Court

of Kenya at Nakuru (Ang'awa, J) dated 2nd March, 2009

in

H. C. Cr. C. No. 26 of 2008)

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JUDGMENT OF THE COURT

Mary Ang'awa, J tried and convicted the appellant, ***Joseph Kipkoech Kurgat***, on an information that had charged the appellant with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars contained in the Information were that on the 14th June, 2008 at Kariba Village in Bomet District of the then Rift Valley Province, the appellant murdered Joseph Kipyegon Kitur, hereinafter referred to as the deceased. Upon convicting the appellant the learned Judge duly sentenced him to death, but before doing so, the Judge had called for a probation report on the appellant. It is not quite clear why she did so, nor is it clear from the proceedings what the probation officer recommended. Nonetheless, the Judge did not rely on the probation report.

The facts found by the Judge are straightforward. The deceased and the appellant were neighbours. On the day of the incident, the deceased was at his son's homestead at Kiriba Village. He was helping repair the fence. His daughter-in-law Naomi Chepkorir Yegon (PW 1) (Naomi) and niece Chepngeno Linzy (PW 2) (Linzy) were at home. At some point the appellant came over, across the fence, and started talking to the deceased. Both Naomi and Linzy saw them talking from a distance, but could not hear what was said, nor could they tell if the two were quarreling. Suddenly, then, both Naomi and Linzy saw the deceased use the stick he was holding to push the appellant. However, the appellant grabbed the stick, and used the same to hit the deceased on the back of his neck. The deceased fell down. On seeing this, Naomi

fainted and Linzy began to scream, attracting the attention of the neighbours. The appellant ran away but was apprehended by members of the public, and handed over to police. Meanwhile, the deceased was rushed to hospital, but was pronounced dead on arrival. The post-mortem report prepared by Dr. Birech (PW 11) later confirmed that the cause of death was due to "massive hemorrhage due to injuries and lacerations from hard object".

In the appellant's unsworn statement, he told the Judge:

"I was coming from safari. I was drunk. We met with the man who was doing this. I asked him where are those things. He said he took and then used the same to buy me alcohol. He took a stick to push me, we struggled. I used the stick to hit him. I then ran away."

Despite submissions by defence counsel that this was a case where the defences of provocation, and drunkenness applied, the learned Judge did not deal with the issue of provocation at all, and only superficially dealt with the issue of intoxication. For our part, we are satisfied on the material before us that the deceased, by pushing the appellant who was unarmed, with a stick, provoked the appellant. However, the appellant used excessive force on the deceased and caused his death.

Similarly, with regard to the issue of possible intoxication, there was clear evidence before the court, from the prosecution's own witnesses, and from the appellant's unsworn statement that he was drunk at the material time.

Here is what Linzy said:

"I know the accused was drunk because he was staggering. I saw him at the point when he was coming".

Of course, drunkenness as such does not and cannot constitute a valid defence to a charge such as murder unless certain conditions set out in ***section 13 (2)*** of the Penal Code are met. But as we have repeatedly pointed out, under ***section 13 (4)*** of the Code, a trial judge is bound to consider the question of whether an accused person who is intoxicated is still capable of forming the specific intent necessary to prove a charge of murder. If, due to intoxication, the person charged is not in a position to form the specific intent, then such a person cannot be convicted on a charge of murder – see for example ***Moses Olesugut Paranai vs Republic, Criminal Appeal No. 166 of 2005 (unreported)*** and ***Geofrey Manoti Obaigwa vs Republic, Criminal Appeal No. 131 of 2009 (unreported)***.

Elaborating on these points, Mr. D. N. Mongeri, learned counsel for the appellant, submitted that mens rea was not proved because there was evidence that the appellant was intoxicated and the trial judge erred in not considering the issue of intoxication, in the same way as she disregarded the defence of provocation.

With respect, we agree. The appellant ought to have been convicted of the lesser offence of manslaughter, not murder.

Accordingly, we allow the appellant's appeal to the extent that we quash the conviction for murder under ***section 203*** of the Penal Code and substitute therefor a conviction for manslaughter under ***section 202*** of the Code. We also set aside the sentence of death imposed pursuant to ***section 204*** and substitute it with a sentence of **10 (ten) years** imprisonment pursuant to ***section 205*** of the Code. The sentence of imprisonment shall run from the 12th March, 2009, when the learned Judge imposed the sentence of death. Those shall be the Court's orders in this appeal.

In the absence of Okwengu, JA, who is away on study leave, this Judgment is written under ***Rule 32 (2)*** of the Court of Appeal Rules.

Dated and delivered at Nakuru this 14th day of February, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

D. K. MARAGA
.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR