



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME, ODEK, J.J.A)**

**CRIMINAL APPEAL NO. 67 OF 2008**

**BETWEEN**

**PHARIS WACHIRA KARURI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Kasango J) dated 24<sup>th</sup> January, 2008***

***in***

***H. C. CR. C. No. 16 of 2008)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**Pharis Wachira Karuri**, the appellant herein, was tried and convicted in the High Court at Nyeri (Kasango, J) on Information that had charged him with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the said Information were that on the 12<sup>th</sup> day of June, 2006 at Nyakiai village in Murang'a District of the then Central Province, the accused murdered Edward Kamau Karuri (the deceased).

The deceased and the appellant were brothers, who had ventured in the business of bar and restaurant called Muringu Bar (the bar) at Nyakiai Village. Their third brother, James Mwangi Karuri (James) (PW 5), had at one time been employed at the bar, but because of differences arising out of stock shortages, which the appellant had blamed upon James, the latter had been dismissed from his employment at the material time. On the fateful day, and according to the appellant himself, he (the appellant) had traveled to Murang'a earlier on in the day to purchase Keroche beer for sale at the bar. While at Murang'a, he met a friend, with whom he had three beers, before purchasing the Keroche beer, and returning to the bar. Upon his return to the bar late that afternoon, he continued drinking, as he helped the deceased serve customers. By 7 p.m he was almost drunk. Two other customers, Evans Karanja Macharia (Evans) (PW 3) and James Maina Gatuma (Gatuma) (PW4) who came to the bar that evening testified that the appellant had been drinking as he served them. Both Evans and Gatuma took too much alcohol and fell

asleep on or around their tables, and saw nothing of what happened later. James, the appellant's third brother, and the only eye-witness to the incident, arrived at the bar just before 7 p.m, and found the appellant confronting the deceased and throwing beer bottles to the floor. According to him, the appellant was drunk. He heard the appellant complain that his wife had been made to clean the deceased's children, as he threw more bottles around, and as he also threatened James. James saw two people asleep on the tables. At this point, the appellant went out of the bar, and returned within five minutes. On returning to the bar, the appellant went straight to the deceased and began hitting him on the face. The deceased fell down. James noticed the deceased bleeding on the face and blood oozing out of his chest. He saw the appellant run away, and he rushed home to get help. The deceased died on the way to the hospital. A report was made to the police, and the appellant was arrested the following morning and charged with the offence stated herein before.

At the trial, there was uncontroverted evidence, from both the prosecution and defence, that the appellant had taken a considerable amount of alcohol.

Evans and Gatuma, the two customers who had fallen asleep in the bar testified about the appellant drinking beer as he served them, as did James when he arrived at the bar just before 7 p.m. The investigating officer, Acting Inspector Benjamin Kiprono (PW8) also testified about the state of the appellant's drunkenness the following morning when he arrested the appellant.

However, the learned trial Judge did not analyse this evidence in any detail, and simply rendered herself, rather briefly, in judgment, as follows:

***“The evidence of PW 5 clearly showed that the accused deliberately stabbed the deceased. That evidence clearly showed malice aforethought. Immediately the deceased was punched by the accused, PW 5 noticed blood flowing from his nose, ears and the chest. According to the Post Mortem report, death was caused by injury to the chest.”***

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 this Court has 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 PARANI VS. REPUBLIC**, Criminal Appeal No. 166 of 2005 (unreported) and **GEOFFREY MANOTI OBAIGWA VS. REPUBLIC**, Criminal Appeal No. 131 of 2009 (unreported).

Elaborating on these points, Mr. Gichuhi Mwangi, 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.

Mr. Mwangi also argued that the appellant's constitutional rights were breached as he was arraigned in court four months after his arrest, and urged us to acquit the appellant on that ground alone.

With respect, we disagree with Mr. Mwangi that his client is entitled to acquittal for breach of his constitutional rights. There are many instances in which courts have held that a delay in arraigning a suspect in court beyond 24 hours (or 7 days as the case maybe) does not necessarily entitle the suspect to an acquittal. (See **DOMINIC MUTIE MWALIMU VS. REPUBLIC**, Criminal Appeal No. 217 of 2005; and **EVANSON K. CHEGE VS. REPUBLIC**, Criminal Appeal No. 722 of 2007). This Court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In **JULIUS KAMAU MBUGUA VS. REPUBLIC**, Criminal Appeal No. 50 of 2008, this Court stated that:

***“a trial court can take cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the***

*fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection- like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.”*

In **JULIUS KAMAU MBUGUA VS. REPUBLIC**, this Court upheld the proposition that even where violation of right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated exist. In the present case, the appellant has not demonstrated that he has suffered a trial related prejudice to warrant an acquittal. This ground of appeal has no merit.

Mr. J. Kaigai, learned Assistant Director of Public Prosecution opposed the appeal, arguing that the appellant ought to be presumed to have had “malice aforethought” given the savage nature of the attack.

With respect, we agree with Mr. Mwangi, that mens rea was not proved given the state of the appellant's intoxication..

Accordingly, and for the reasons stated, we allow the appellant's appeal to the extent that we set aside the conviction for murder recorded under **section 203** of the Penal Code. We also set aside the sentence of death imposed pursuant to **section 204** of the Code.

Under **section 205** of the Penal Code, we sentence the appellant to fifteen (15) years imprisonment. The sentence shall run from 24<sup>th</sup> day of January, 2008 when he was sentenced to death. Those shall be the orders of the court.

**Dated and delivered at Nyeri this 16<sup>th</sup> day of May, 2013.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**M. K. 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**