IN THE COURT OF APPEAL

AT NYERI

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

Criminal Appeal No. 12 Of 2010

BETWEEN

BONIFACE GATHEGE WACHEKE ….....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court at Nyeri (Makhandia, J.)

dated 5th February, 2010

in

H.C.CR.A NO. 19 OF 2008)

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JUDGMENT OF THE COURT

1. Boniface Gathege Wacheke, the appellant herein was charged with the offence murder contrary to **section 203 as read with section 204** of the **Penal Code, Chapter 63, Laws of Kenya.** The particulars of the offence are that on 29th February 2008 at Mioro village, Gacharageini Sub-location in Muranga North District within Central Province, he murdered Julius Nyamai Mwangela, hereinafter referred to as the deceased. The appellant was tried and convicted of the offence and sentenced to death as by law prescribed. Aggrieved by this decision, he has appealed to this court.
2. The evidence in support of the Information was given by PW1, Jane Njeri Daniel, the wife of the deceased. She testified that on 29th February 2008 at about 1.00 pm, she was at her home. The appellant who is a neighbour in the plot came and stopped at the door; he was armed with a panga.

Using the panga, he hit the door and told her to come out so he could slash her. The reason being that he suspected that she and her husband had bewitched his child and two brothers who were now mad. PW1 decided to go and report the matter to the area Chief. On her way, she met the deceased who told her that he had been with the appellant in the Administration Police Offices and had been asked to come for her. They went back but never found the appellant. They boarded a motor vehicle on the way home; the appellant too entered the same motor vehicle. She alighted at Mioro shopping centre and went home leaving the appellant with the deceased. At about 8.30 pm, two women, Mercy Wairimu Maina (PW3) and Milka Wangare, came to her house. They were screaming and asked her for a torch to assist them to confirm something they had seen outside the compound. They fetched a lamp from a neighbour, Margaret Wanja and proceeded to the scene where they came across the body of the deceased having a cut on the forehead. He was dead. They screamed and people came; they proceeded to the house of the accused but he was nowhere to be seen; only his bag was found, they entered the house and recovered a panga. She stated she had known the appellant for about two years and they were neighbours living in the same compound.

3. PW 3 testified that on the material day at about 8.00 pm, she went to the deceased's house. On the way, she met the appellant and the deceased. They appeared drunk and were pushing each other and quarrelling. On her way back in the company of a neighbour, they saw something where she had last seen the appellant with the deceased. They went to the deceased's house to get a torch and find out what they were seeing. They managed to get a lamp and saw that it was the body of the deceased.
4. PW 5 Francis Munga Mwangi who runs a bar at Mioro shopping centre testified that the appellant and the deceased came to the bar and ordered alcohol; they drunk as they talked and left at about 7.50 pm.
5. PW 7 Dr Julius Kimani, a consultant surgeon testified that he conducted a post-mortem examination on the body of the deceased and it had a cut on the forehead about 3cm long and deep to the skull. There was a depressed skull fracture at the back.
6. In home-made grounds of appeal, the appellant contends that the learned judge erred in law and fact in not considering that both the appellant and the deceased were drunk at the time of the alleged offence; that the motive for murder was not established; the prosecution did not prove who killed the deceased; the defence of the appellant was not taken into account and there are inconsistencies in the evidence given.
7. Learned counsel **Mr. J. Macharia** appeared for the appellant while the state was represented by **Mr. J. KAIGAI**, the Assistant Director of Public Prosecution.
8. Counsel for the appellant submitted that the learned Judge did not give due weight to the issue of intoxication and this was a fundamental flaw. PW 3 testified that the appellant appeared drunk and this should not have been ignored. That the evidence against the appellant was circumstantial; the way the learned Judge treated the issue of motive was prejudicial to the appellant; the learned Judge erred in finding that because the appellant was not at his residence, he was guilty of the offence charged.
9. In opposing the appeal, the Assistant Director of Public Prosecution stated that the evidence against the appellant was watertight and the case was proved to the required standard. The appellant and the deceased were neighbours and this was a case of identification through recognition; that evidence was led indicating the appellant went looking for the deceased while armed with a panga and the appellant was the last person to be seen in company of the deceased. That the P3 Form and medical report revealed the deceased had injury to the forehead; from this injury, it is clear that the intention was to cause grievous harm. That the deceased disappeared from the scene of crime and this conduct is inconsistent with his innocence. It was submitted that the issue of intoxication was never raised during trial.
10. This is a first appeal. ***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."

11. We have considered the grounds of appeal and submissions by counsel. We have examined, considered and re-evaluated the evidence afresh. One of the issues is that the evidence against the appellant was circumstantial. We agree; the evidence against the appellant is largely circumstantial and inculpatory; there was no eye witness to the murder; however, from the testimony of PW 3, the deceased was the last person seen with the appellant at about 8.00pm and shortly thereafter the deceased was found dead. In the case of **R –v- Kipkering arap Koske & another (1949) EACA 135**, it was held that **"in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."** PW 1 testified that immediately after discovery of the body of the deceased, they screamed, people came, and they proceeded to the house of the accused but he was nowhere to be seen. The appellant's conduct of disappearing from the scene of crime is not consistent with that of an innocent person. The defence that the appellant had been attacked by some people at night is not credible. PW1 and other persons went to the appellant's house so soon after PW3 had seen the deceased with the appellant. We are satisfied that the inculpatory circumstantial evidence point to the appellant as the person who caused the death of the deceased.
12. It is the appellant's case that the learned Judge did not give due weight and consideration to the issue of intoxication. It is clear from the evidence adduced by PW3, PW5 and the defence that the issue of intoxication was raised. The learned Judge in addressing the issue said **"I discount the issue of the accused and the deceased being drunk."** With respect, we are of the view that the reasons for discounting this evidence should have been stated **(See David Munga Maina –v – R 2006 eKLR**). In the case of **Boniface Muteti Kioko and Willy Nzioka Nyumu – v – R (1982-88) 1 KLR 157** one of the holding is: **"It was the duty of the Judge to deal with alternative defences, such as intoxication, that emerged from the evidence which might reduce the charge to manslaughter".**
13. In the instant case, while opposing the appeal, the state submitted that the issue of intoxication was not raised before the trial judge. In the case of **Manyara – v – R (5) (1955) 22 EACA 502** the Court stated:

"It is of course correct that if the accused seeks first to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is misdirection if the trial court lays the onus of establishing this upon the accused."

14. In this case, the learned Judge was clearly alive to the defence of intoxication but did not give it the weight and consideration it deserved. The trial Judge erred in not considering this issue to determine whether the appellant had the requisite *mens rea* for the offence. In our view, the benefit of doubt as to whether the appellant was so drunk as to negative the intent to kill or cause grievous harm goes to the appellant. The offence of manslaughter was established. The evidence that both the appellant and deceased were drunk was also relevant and the trial Judge did not give sufficient weight to this fact. In addition, the evidence disclosed that the appellant's child and two brothers were mad and the appellant suspected that his child and two brothers were bewitched by PW1 and the deceased. The prosecution should have investigated these facts to determine if the appellant had the capacity to form *mens rea* for the offence. The totality of the above is that we allow the appeal against the offence of murder and set aside the conviction and sentence of death. 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 imprisonment for a period of 15 years with effect from 5th February 2010.

Dated and delivered at Nyeri this 6th day of June 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR