IN THE COURT OF APPEAL
AT NAKURU

CORAM: BOSIRE, ONYANGO OTIENO & NYAMU, JJ.A.

CRIMINAL APPEAL NO. 266 of 2009

BETWEEN
JOEL KIPKOECH LANGAT……..APPELLANT

AND
REPUBLIC……...……RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kericho (Ang'awa, J) dated 11th November, 2009

in

H.C.CR.C. NO. 23 OF 2008)
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JUDGMENT OF THE COURT

In an information dated 5th day of June, 2008, the appellant, ***JOEL KIPKOECH LANGAT*** was arraigned in the High Court with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code. The particulars were that:-

"On the 19th day of April, 2008 at Cheramor in Kericho District of the Rift Valley Province, murdered William Kiprono Chepkwony."

When the charge was read to him on 17th June, 2008, he pleaded not guilty and the court (*G.B.M. Kariuki, J*) entered a plea of not guilty in the record and proceeded to fix the matter for hearing on 1st and 2nd October, 2008. On 30th September, 2008, the matter came up for mention and the appellant's advocate informed the court that the appellant intended to offer a plea to the lesser offence of manslaughter. The learned State Counsel sought a mention date to look into that offer. The matter was fixed for mention on 15th October, 2008 for that purpose, but on that date the learned State Counsel again sought another mention date which was fixed for 29th October, 2008. On that date the learned Judge was not sitting. The matter came up on 3rd November, 2008 before *Ang'awa J.* The record shows as follows.

"Advocate - matter is for plea bargaining we ask for hearing date.

Accused – Joel Kipkoech Langat charge read to accused. It is true I murdered the deceased and I ask court to forgive me.

Hearing 20th and 21st May, 2009 (formal proof)."

It will be noted that although the appellant had wanted all the time to plead guilty to manslaughter, the court apparently recorded a plea to the offence of murder and for whatever reasons, did not have the input of the appellant's advocate ***A.C. Bett,*** who was in court holding brief for *Mitei*, the then advocate for the appellant. Secondly, it is rather odd but interesting that the learned Judge appears to have fixed the matter for formal proof notwithstanding that this was a criminal hearing and not a civil matter.

Be that as it may, when the hearing properly commenced before the same learned Judge, the record shows that both the deceased and the appellant were neighbours and were at the relevant time were casuals contracted to perform various odd jobs (including cane cutting) in the area where they lived. ***Nancy Chepkirui Chepkwony (PW1)*** was the wife of the deceased whereas ***C. C, (PW6)*** was his daughter. *C*, who was a minor aged about 12 years old, testified in cross examination, that the appellant used to work with her father, the deceased; and that in the morning of 19th April, 2008, the appellant called at their home, i.e. deceased's house. He had a panga, at times also referred to in the record as cutlass. He asked the deceased for a sharpener to sharpen the panga and he was given the sharpener. The two then left for their work and she confirmed that they used to work together. In the evening, *C* said in evidence both in chief and in cross examination that the deceased returned home drunk. At 7.00 p.m., the appellant also came to the deceased's home drunk and was staggering as he walked. At that time the deceased was seated outside his house. The appellant asked the deceased for his money but the deceased insisted he did not have appellant's money. A quarrel ensued over the money. The appellant then cut the deceased with the panga he had on the neck. *Nancy* confirms that evidence of *C* and also said in evidence that the deceased, her husband was drunk by the time he arrived home that fateful evening. She further stated in evidence that the appellant was also drunk and she also saw the appellant staggering as he walked and talked. She heard the two struggling over money which the appellant said was Ksh.100/=. The incident was reported to the Chief of the area who reported it to ***Acting Inspector Norman Mugogo (PW7)*** then in charge of Kipsitet Police Post, who, together with ***Sergeant Alfred Okech (PW5),*** visited the scene on 20th April, 2008 and collected the body of the deceased; took it to the Mortuary where on 25th April, 2008, ***Dr. Ethanius K. Ochieng (PW7)*** (sic) performed postmortem on it and formed the opinion that the deceased died as a result of asphyxia from aspirated blood contributory acute haemorage. It is perhaps necessary to state here that the Acting Inspector Mugogo, in his evidence in cross –examination stated that in his investigation, the two were drunk. The appellant later surrendered himself to the police and was charged as we have stated hereinabove. In his defence, he did not deny killing the deceased, but repeated several times that it was due to being drunk, he did not know that he had killed his friend at the time the offence took place and he slept that night in the bush as he was not aware of what he was doing.

After full hearing, the learned Judge of the High Court, found the appellant guilty, convicted him of the offence of murder, and sentenced him to death. In convicting the appellant, the learned Judge made the following findings.

"<u>III. Findings</u>*:*

15. The prosecution has established in its facts that the deceased was in his home asleep. That the accused came demanded to see him and when he did begun (sic) a quarrel with him. It has also been established that the deceased took a panga/cutlass and slit the deceased throat. He disappeared for (sic) the scene of the crime for about a week.

16. What arises herein is whether the accused had malice aforethought.

17. He raised a defence of being drunk. That he had been drinking with the deceased.

18. From the findings of this court the deceased was cut by the accused. It has been established that he had time to reflect what he was doing when a quarrel was begun and instigated by him. He pleaded guilt (sic) to the offence.

19. I am satisfied that the prosecution has proved its case beyond any reasonable doubt. I convict the accused on his plea of guilty to the offence of murder also and accordingly find him guilty of murder 306 Criminal Procedure."

The above is what prompted this appeal before us, premised on six grounds in the supplementary grounds of appeal filed on 5th January, 2012, *Mr. Ajigo*, the learned counsel for the appellant having abandoned the original memorandum of appeal filed by the appellant in person. The six grounds are in a brief summary, that the conviction was misplaced as evidence on record did not establish malice aforethought on the part of the appellant; that the evidence adduced was not analysed by the court before convicting the appellant; that the learned Judge erred in convicting the appellant on his own plea of guilty whereas the record does not bear that out; that the findings were at variance with evidence on record; that the learned Judge failed to pass sentence upon conviction of the appellant on his alleged plea of guilty; that the charge of murder was not proved and that the conviction went against the weight of evidence on record.

In his address to us in support of the above grounds, *Mr. Ajigo* submitted that the offence that was proved was that of manslaughter and not murder as both deceased and appellant had gone out to work and had while out embarked on a drinking spree such that by the evening when they picked a quarrel with both were so drunk that the appellant could not form an intention to murder the deceased. He stated further that the weapon used was the same panga the appellant was using the whole day in cutting sugar cane and was thus not a weapon acquired by the appellant with the intention of killing the deceased. He ended his submission by saying that the record shows that the plea bargain that was sought by the appellant was rejected and as such the appellant could not have been convicted on his own plea and lastly, he was of the view that the learned Judge did not address himself to the provisions of ***Section 13*** of the Penal Code which provides for cases where intoxication is raised in defence

Mr. Nyakundi, the learned State Counsel conceded the appeal submitting that the evidence on record proved the offence of manslaughter and not murder.

This is the first case to our knowledge, in which an alleged formal proof has been held in a criminal case in the history of this country. In law formal proof is only carried out in civil cases and not in criminal cases. That apart, the appellant, through his counsel, had offered to plead guilty to a lesser charge of manslaughter. There is nothing on record to show whether that offer was accepted or not. What is next on record is that the appellant pleaded guilty to murder. There is no record that that plea was accepted. As this court has stated in several judgments, that plea could not have been accepted and acted upon without the appellant being fully warned of the consequences of such a plea. That was not done here. In any event, even as regards that alleged plea, there is nothing to show that the learned Judge followed the correct procedure in respect of a plea of guilty in criminal cases as spelt out in the well known case of ***ADAN V REPUBLIC (1973) EA 445*** in which this Court held:-

"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused's own words should be recorded and if they are an admission a plea of guilty should be recorded.

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the accused does not agree the facts or raises any question of his guilt his reply be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and statement of the facts relevant to sentence together with the accused's reply should be recorded."

This accepted legal approach was not followed here and as we have stated, the appellant was not warned of the consequences of pleading guilty to murdering the deceased. Instead a completely alien procedure to criminal law, called "formal proof" was apparently adopted. All this was with respect, wrong.

That the deceased died as a result of the appellant's act of cutting him with a panga was not in dispute. The appellant admitted that much in his sworn statement in his defence. He said inter alia:-

"I killed William."

He also admitted going to the deceased's house and quarrelling with the deceased. What was in dispute and which, with respect, was brought out very well by *Mr. Ajigo* in his submission to us, was as to whether the appellant had formed the intention to kill the deceased. *Mr. Ajigo* says, malice afterthought was not proved as the evidence on record showed that the appellant was so drunk that he was incapable of forming the intention to kill. *Mr. Nyakundi* accepts that argument and has conceded the appeal. The learned Judge of the High Court, in our view, gave that aspect of the effect of drunkenness what we may, with respect call very casual consideration in these words:-

"He raised a defence of being drunk. That he had been drinking with the deceased."

and thereafter, without considering that aspect in any meaningful manner, the learned Judge concluded that it had been established that the appellant had time to reflect what he was doing when a quarrel was begun and instigated by him. It is not certain as to what evidence established that the appellant had time to reflect what he was doing when a quarrel was begun by him. *Nancy* said when the deceased walked home, he was drunk. *C* confirmed the same. They both said the appellant went to their home drunk and was staggering as he walked and talked. The appellant said in his sworn defence that the two had been drinking intermittently throughout the day, and that he was so drunk that he did not know that they even quarreled and he cut the deceased. When then, one may ask, had the appellant time to reflect on what he was doing? We are aware of the provisions of ***Section 13(1)*** of the Penal Code, and are aware that intoxication per se cannot be a defence to a criminal offence unless the claim of intoxication falls under ***Section 13(2),*** but in this case, the issue as to whether the appellant was so drunk that he could not form the intention to murder had to be resolved by the court.

In our view, upon the evidence on record, we are persuaded that the appellant, at the time he killed the deceased whom he claimed was his friend and who according to *Nancy* and *C* was a neighbor, and was working with him often, was drunk to the extent that he could not have formed the intention to kill the deceased. We agree with *Mr. Ajigo* and *Mr. Nyakundi,* that when all is considered, the benefit of doubt should be given to the appellant and his original offer to plead guilty to a lesser charge of manslaughter was founded.

This appeal succeeds to that extent. The conviction for the offence of murder is quashed and sentence of death is set aside. We substitute in their place, a conviction for the lesser offence of manslaughter and being aware that a young life was nonetheless lost, the appellant is sentenced to serve ***twelve (12) years imprisonment*** from the date of the judgment in the High Court i.e. from 8th October, 2009.

DATED and DELIVERED at NAKURU this 23RD day of FEBRUARY, 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR