



**IN THE COURT OF APPEAL  
AT NAKURU**

**(CORAM: OMOLO, O'KUBASU & GITHINJI, J.J.A)**

**CRIMINAL APPEAL NO. 42 OF 2010**

**BETWEEN**

**SIMON KIPKORIR KOECH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from a sentence and conviction of the High Court of Kenya at Kericho (Ang'awa, J) dated 3<sup>rd</sup> March, 2010)*

**In**

**H.C. Cr. C. No. 1 of 2009)**

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**JUDGMENT OF THE COURT**

Simon Kipkorir Koech, the appellant herein, was tried before Mary Angawa, J on an Information charging him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the Information were that on the 25<sup>th</sup> March, 2008 at 8.00 p.m. at Chebiwor Farm in Kipkelion District of the Rift Valley Province, the appellant murdered Peter Kiprotich Koech, the deceased.

It is not quite easy to understand the proceedings as recorded by the learned Judge, but what we generally gather from the record is that the deceased was the brother of the appellant and it appears the deceased used to take his meals in the appellant's house. On the 25<sup>th</sup> March, 2008, Hillary Koech Sang (PW1), who was a neighbour of the appellant, visited the appellant's house. The appellant and the deceased were there and it would appear from the evidence of Hillary that the appellant and the deceased were quarreling over food, with the appellant complaining that the deceased was being fed while he himself (deceased) made no efforts to provide food. The appellant's wife was present in the house. Hillary then left but on his way, he heard the wife of the appellant screaming. Hillary decided to go back to the appellant's home but he apparently changed his mind and did not reach the home. The wife of the appellant was not and could not have been called to testify as to what happened between the appellant and the deceased after Hillary left them. **Section 127 (2) (ii)** of the Evidence Act, **Chapter 80** Laws of Kenya would not allow that unless the appellant himself had wanted his wife to come and testify or unless the appellant had been charged with certain offences specified in **section 27 (3), (a), (b) and (c)**. In respect of the charge against the appellant only Hillary said he left the appellant and the deceased together in the appellant's house. Thereafter, Hillary heard the wife of the appellant screaming.

Police Constable Richard Juma (PW4) visited the home of the appellant during the same night of 25<sup>th</sup> March, 2008. He found the body of the deceased lying dead on the road “*heading to their home.*” Constable Juma took the body to the mortuary at Londiani District Hospital. There Doctor Makhoha performed the post-mortem on 29<sup>th</sup> March, 2008 at 2.00 p.m. The post-mortem report was produced on behalf of Dr. Makhoha by Dr. Isaac Bunei (PW5) who said he had worked with Dr. Makhoha and knew her hand-writing and her signature. The report showed that the deceased had succumbed to “*Cardiopulmonary arrest due to penetrating left chest stab wound with rupture of the heart due to assault.*” Constable Juma did not find the appellant at his home that night. The officer took possession of a knife from the appellant’s house and it is clear to us from his evidence that, had he found the appellant at home that night, he would have arrested him. The evidence of the officer was that the appellant was not arrested until 31<sup>st</sup> December, 2008, nearly nine months after the death of his brother. We need to add that Hillary said the appellant had taken some liquor and the appellant himself said in his unsworn statement that he had bought some liquor for Kshs.40/- and consumed it before he went to his home. But the appellant did not say what happened to his late brother after Hillary had left them in his (appellant’s) house. On this evidence, the learned trial Judge convicted the appellant and sentenced him to death. The appellant appeals to the Court against both the conviction and sentence.

Mr. Rugut, learned counsel for the appellant, submitted before us that the evidence of the prosecution against the appellant was inconclusive. No one saw the appellant attack his dead brother and the brother’s body was not found in the home of the appellant. The body was found on the road and the deceased could have been the victim of “*mob-justice*”. Mr. Omutelema, the learned Senior Principal State Counsel supported the conviction and submitted that Hillary left the appellant with the deceased in the appellant’s house and thereafter, Hillary heard the wife of the appellant screaming. Constable Juma visited the scene at about 11.00 p.m. and found the body of the deceased lying on the road. The appellant was nowhere to be seen.

One thing is clear to us and it must have been clear to the learned trial Judge. Hillary was with the appellant and the deceased in the appellant’s house. There was some altercation between the appellant and the deceased over food. Hillary left the two of them in the house and shortly thereafter Hillary heard the wife of the appellant screaming. When he was cross-examined nobody ever suggested to Hillary that he had not been with the appellant and the deceased. Nobody suggested to him that he never heard the appellant’s wife scream and it is clear from the record that somebody did report the incident at Londiani Police Station to enable Constable Juma to be there by 11.00 p.m. The person who reported the incident was certainly not the appellant, though it was his brother who had been killed. The evidence of Hillary and that of Constable Juma was accepted by the trial Judge and there is really no proper legal basis upon which the Judge’s acceptance of the evidence can be faulted by this Court. That evidence showed that Hillary left the appellant and the deceased in the appellant’s house. The two were quarrelling about food and shortly after Hillary left them he heard the appellant’s wife screaming. Constable Juma came to the scene and found the deceased lying on the road dead with a stab-wound on his chest. The appellant was nowhere to be seen and was not arrested until the 31<sup>st</sup> December, 2008. True, nobody saw the appellant attack the deceased; the evidence was entirely circumstantial. But these circumstances which we have set out repeatedly clearly show that it could only be the appellant who stabbed his brother with a knife as a consequence of the quarrel over food. That is the only hypothesis upon which the appellant’s sudden disappearance from the scene can be explained. Had he been innocent of the crime, Constable Juma would have found him at the scene and the appellant himself would have explained why his wife had been screaming after Hillary left their house. The appellant must be the one who stabbed the deceased and caused his demise.

But was the appellant guilty of murder? On this aspect, we are not quite certain ourselves. Hillary had left the two brothers quarrelling over an issue. Hillary thought the appellant had taken some liquor though not much. The appellant himself said he had bought and consumed some liquor. Of course there was no evidence that the appellant was intoxicated but even if he had been intoxicated, that, by itself, would afford him no defence unless he was able to bring himself within the provisions of **section 13 (2) (a)** and **(b)** of the Penal Code. But **section 13 (4)** of the Code provides that:-

***“Intoxication shall be taken into account for the purpose of determining whether the person charged***

***had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.”***

The offence of murder requires the formation of a specific intent as set out in the various paragraphs under section 206 of the Penal Code. There was evidence that the appellant had taken some liquor and the learned Judge was required to take into account that factor before concluding that the appellant, despite the liquor he had taken, was still in a position to form the specific intent to commit the crime of murder. In her judgment, the learned Judge made no mention at all about this issue. We do not know what conclusion she would have come to had she directed her mind to this point. It may well be that she would have concluded that, despite the alcohol, the appellant was still able to and did form the specific intention as set out in **section 206** of the Code. It may also be that she would have reached a contrary conclusion. We must give the benefit of this doubt to the appellant.

Accordingly, we allow the appellant’s appeal to the extent that we set aside the conviction for murder under **section 203** of the Code and substitute therefor a conviction for manslaughter under **section 202** of the Code. We also set aside the sentence of death imposed under **section 204** of the Code and substitute it with a sentence of ten (10) years imprisonment to run from the **15<sup>th</sup> March, 2010** when he was sentenced by the learned Judge. Those shall be the Court’s orders in the appeal.

Dated and delivered at Nakuru this 23<sup>rd</sup> day of February, 2012.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

.....  
**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**