



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT KISUMU  
CRIMINAL APPEAL 336 OF 2009

Nemwel Ombogo Nyambariga.....APPELLANT

AND

REPUBLIC.....RESPONDENT

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

*at Kisii (Musinga, J) dated 10<sup>th</sup> November, 2009*

In

**H.C. Cr. C. No. 52 of 2008)**

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**JUDGMENT OF THE COURT**

Nemwel Ombogo Nyambariga, the appellant herein, was tried and convicted in the High Court at Kisii (Musinga, 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 14<sup>th</sup> day of November, 2008, in South Gucha District of the then Nyanza Province, the appellant murdered T.N.A, hereinafter “*the deceased*.”

The deceased was a widow, her husband having died in 2006. Her 14 year old daughter R.A (PW1) was staying with her. After the death of her husband, the appellant had inherited the deceased in accordance with their custom. He had also inherited R.M.A (PW2) who appears to have been a co-wife to the deceased. M swore that the appellant was a violent man and would beat her particularly after he had taken liquor. Both R.A and R.M.A were unanimous that the appellant was in the habit of assaulting the deceased and that he had even been tried, convicted and sentenced to a term of imprisonment for assaulting the deceased. We do not know the basis on which this evidence was admitted, i.e. whether it was admitted as forming part of the **Res Gestae**, to the events leading to the fatal assault on the deceased on the 14<sup>th</sup> November, 2008 – see **section 6** of the Evidence Act, **Chapter 80** Laws of Kenya. **Under section 57 (1)** of the same Act, evidence of a previous conviction is inadmissible unless certain conditions set down therein are met.

Be that as it may, there was no dispute at all on the evidence that in the evening in question, the appellant came to the house of the deceased at 8.00 p.m and found the deceased with R.A. According to R.A:

**“----- He was offered a chair but he answered rudely, saying he did not have to be offered a chair, he then grabbed a jembe and hit her on the head. The accused was a bit drunk. Since about 1.00 p.m he had been saying that he will hit her because she had not given him lunch. -----.”**

When cross-examined, R.A stated:

***“The accused was not very drunk when he came to our house. In my statement, I said he was very drunk.”***

R.M.A said in cross-examination that the appellant used to take alcohol. In his unsworn statement, the appellant himself told the Judge:

***“On 14/11/2008, I went home between 6.00 and 7.00 p.m. I was drunk. Even the deceased had also taken liquor. I don’t know how we disagreed. The deceased pushed me. I landed at the door. I picked up a jembe and hit her. I don’t know the cause of our disagreement.”***

The appellant agreed he attacked the deceased and that attack led to her demise. There was, however, evidence from both the prosecution and the defence that the appellant had taken liquor. In the whole of his judgment, Musinga, J did not at all mention the issue of the possibility that the appellant might have been drunk at the time he assaulted the deceased. 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 **GEOFFREY MANOTI OBAIGWA VS. REPUBLIC**, Criminal Appeal No. 131 of 2009 (unreported). It is no wonder that in his “*Supplementary Memorandum of Appeal*” dated 21<sup>st</sup> November, 2011 and lodged in the Court on 22<sup>nd</sup> November, 2011, the appellant merely complained that:-

***“1. The learned trial Judge erred in law by sentencing the accused person to death.***

***2. The learned trial Judge erred in meting out a sentence which is inhuman and degrading to the accused person.***

***3. The learned Judge erred in meting out a sentence which is inordinately high in the circumstances.”***

Elaborating on these points, Mr. Tom Mark Olando, 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.

With respect, we agree. It was clearly the duty of the learned trial Judge to consider the question of intoxication and make a finding, one way or the other, on whether the appellant, though he might have been intoxicated, was still in a position to form the specific intent necessary to prove a charge of murder. Mr. Olando was right in submitting that malice aforethought was not proved.

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 and substitute therefore a conviction for manslaughter under **section 202** of the Penal Code. We also set aside the sentence of death imposed pursuant to **section 204** of the Code. The appellant had a persistent history of violence and in our view; he must be given a deterrent sentence. Under **section 205** of the Penal Code, we sentence the appellant to fifteen (15) years imprisonment. The sentence shall run from 10<sup>th</sup> November, 2009 when he was sentenced to death. Those shall be the orders of the Court.

Dated and delivered at Kisumu this 22<sup>nd</sup> day of March, 2012.

**R.S.C. OMOLO**

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

**E.M. GITHINJI**

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

**ALNASHIR VISRAM**

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

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

**DEPUTY REGISTRAR**