IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & OKWENGU, JJ.A)

CRIMINAL APPEAL NO. 194 OF 2004

BETWEEN

RICHARD KAMINDU NGUNGU……..…….....APPELLANT

AND

REPUBLIC …….....…..RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Machakos (Mwera, J.) dated 20th July, 1999

in

H.C.CR.C. NO. 15 OF 1999)
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JUDGMENT OF THE COURT

1. **Richard Kamindu Ngungu** hereinafter referred to as the appellant, was tried and convicted by the superior court (**Mwera, J**.), for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. He was alleged to have murdered **Jane Kamindu** on the 2nd November 1996. During the trial in the superior court, nine witnesses testified in proof of the prosecution case whilst the appellant was the only witness for the defence.

2. Briefly the prosecution evidence was as follows: The appellant and **Elizabeth Kamindu** (Beth) PW1, had been married for about 9 years. The two had 3 children including 12 year old **J.K** (hereinafter referred to as the deceased). The deceased who was born before the appellant and Beth got married, was apparently not fathered by the appellant. On 2nd November 1996, the appellant arrived at his house at about 8.00 p.m. He was in the company of his older brother **Ndonye Ngungu** (Ndonye) PW2. They found Beth and her 3 children in the house. The appellant's mother **Nthambi Ngungu Lena** (PW3) was in her house, which was near that of the appellant.

3. The appellant asked for chairs to be brought outside for them to sit. The deceased brought some stools from the house. The appellant asked for a hurricane lamp, and the deceased brought a lamp from the house. The appellant then sat down, and started questioning the deceased as to why she keeps running away to her maternal grandparents whenever she was beaten. Beth, who was at that point inside her house, heard the appellant's question. She urged the deceased who had not responded to the appellant's question, to ask for forgiveness from the appellant. However, before the deceased could speak, the appellant got hold of her by the waist, lifted her up and hit her head twice on the ground. Beth tried to go

to the deceased's aid but the appellant restrained her and locked her inside the house. Beth forced her way out and ran to a nearby road, from where she looked back and saw the appellant putting the deceased on a bed inside the house. By this time, **Ndonye** had also run away on seeing the appellant hit the deceased's head against the ground.

4. Due to the commotion and Beth's screaming, the appellant's mother came out of her house, and at that point saw the appellant holding the deceased and hitting the deceased's head against the ground. She then saw the appellant carry the deceased into the house and put her on the bed. The appellant's mother tried to intervene but the appellant threatened her and she ran away.

5. Kitheka Nzoka Mutomo (**Kitheka**) PW4, a watchman at the neighbouring Kyeni School, also heard the screams. He blew his whistle and directed people who responded to the alarm, to the home of the appellant. By this time the appellant had ran away, and the people were unable to locate him. Later at around 1.00 a.m. **Kitheka** was going to a nearby stream to draw water, when he saw the appellant appear from the bushes. The appellant was naked and was holding a piece of wood. **Kitheka** ran back to the appellant's home and alerted the people who were still gathered in the home. Shortly thereafter the appellant appeared and scared off the people. The appellant was however overcome and apprehended by the public who administered mob justice upon him.

6. Munyoki Malombe (PW5) an uncle to the appellant, together with Beth reported the matter to the area chief who gave them a note referring them to Kitui police station. The two went to the police station where they made a report and were accompanied back to the scene by **IP Sammy Musili -** the officer in charge of crime section at Kitui police station. **IP Musili** noted that the deceased who was lying on a bed in the appellant's house was dead. She had head injuries and her skull appeared depressed. **IP Musili** also noted that the appellant who had been apprehended by members of the public, had injuries and burns on his body. **IP Musili** re-arrested the appellant and took him to hospital for treatment.

7. On 4th November 1996 the appellant was examined by **Dr. John Mutunga** = a medical officer attached to Kitui District Hospital. **Dr. Mutunga** noted that the appellant had superficial burns on the forehead, scattered bruises on neck, swelling left arm, and tenderness on both lower limbs. **Dr. Mutunga** assessed the age of the injuries as two days.

8. On 12th November 1996, **P.C. Alfred Charo** (PW7) accompanied **Munyoki Malombe** (PW5) to Kitui District Hospital, where **Munyoki Malombe** identified the body of the deceased to **Dr. Sore** who performed a post mortem examination. **Dr. Sore** prepared a post mortem report in which he noted that the deceased had a depressed skull fracture on the left temporal bone. **Dr. Sore** indicated the cause of death of the deceased as intra cranial bleeding due to head injury. The report was produced in court by **Dr. Mutunga**, as Dr. Sore was not available to testify, having moved to the University of Nairobi for post graduate studies.

9. In his defence, the appellant gave a sworn statement in which he explained that he arrived at his house at around 9.45 p.m. He knocked at the door as his wife and children appeared to be asleep. The door was opened but when the appellant was about to enter, a person emerged from inside the house, and hit the appellant on the chest. There was a struggle as the appellant tried to hold the person and both fell outside the house. They continued struggling, the appellant trying to push the man into the house. It was then that the man hit the deceased who was right at the door. The deceased fell down hitting the brick wall.

10. As the appellant and the man continued struggling, Beth came with a firebrand and through the flame, the appellant recognized the person with whom he was struggling as **Kitheka** (i.e. PW4). The appellant asked **Kitheka** why he would wait for him in his house even if he had an affair with his wife. In response, **Kitheka** cut the appellant with a panga on his right side of the face, and the appellant fell down. **Kitheka** then ran away. Thereafter Beth ran out of the house screaming that it was the appellant who had killed the deceased. Members of the public responded to the screams and found the appellant lying on the ground.

11. The appellant maintained that neither his brother **Ndonye** nor his mother witnessed the incident, as both only came after other villagers had arrived. The appellant stated that he believed that the deceased

was his own child, as Beth had informed him when the deceased was conceived that he was responsible for her pregnancy. He had therefore been paying the deceased's school fees and treating her as his own child. Under cross-examination the appellant conceded having taken some "changaa", but denied having taken a lot as he did not feel tired or drunk. All the three assessors returned an opinion of guilty to the charge of murder.

12. In his judgment the trial judge found that **Beth, Ndonye** and the appellant's mother, all saw the appellant seize the deceased and hurl her down twice, head first. The Judge formed the opinion that the three witnesses were honest and reliable. He rejected the appellant's defence that **Kitheka** was his wife's lover or that there was a struggle between the appellant and **Kitheka** resulting in the deceased being injured. He therefore convicted the appellant of the offence of murder.

13. Being dissatisfied with the judgment the appellant lodged this appeal raising four grounds. Upon taking over the appellant's defence, learned counsel Mr. Wamwayi filed a supplementary memorandum of appeal raising four grounds. The grounds in the supplementary memorandum of appeal which were the ones relied upon during the hearing of the appeal were as follows:

(i) That the learned Judge of the High Court erred in law in imposing death sentence whereas the appellant was never asked whether he had anything to say in mitigation and his answer if any was not recorded.

(ii) That the learned Judge of the High Court erred in law in convicting the appellant whereas the prosecution case was riddled with contradictions, discrepancies and inconsistencies.

(iii) That the learned judge of the High Court erred in fact and in law by convicting the appellant whereas the prosecution failed to establish that the appellant had malice aforethought.

(iv) That the learned Judge of the High Court erred in law in imposing death sentence whereas such sentence was neither mandatory nor the only one available.

14. The highlights of **Mr. Wamwayi's** submissions, were that no malice aforethought was established; that the evidence showed that the appellant was drunk, and was not in full control of his faculties; that the appellant had accepted the deceased as his child and was paying school fees for her and treating her just like his other children; and that under the above circumstances the court should have made a finding of guilty of manslaughter. **Mr. Wamwayi** also pointed out that the appellant was sentenced without being given an opportunity to mitigate. Thus the court did not exercise the option of considering any other alternative sentence.

15. On his part, learned Principal State Counsel **Mr. Monda** submitted that there was proof of malice aforethought, as the appellant had previously issued threats and therefore malice could be implied. He pointed out that the appellant in his own evidence denied having been drunk, and therefore intoxication as a defence was not available to him. He urged the court to uphold the conviction of the appellant and confirm the sentence.

16. This being a first appeal from the superior court, we are mindful of our duty which was succinctly put in **Okeno vs. Republic [1972] EA 32** at page 36 as follows:
"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.*** *(Shantilal M Ruwala 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 conclusion; 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."***

17. In this case we have reconsidered and evaluated the evidence which was adduced before the trial judge. **Ndonye** and **Beth** both gave consistent evidence that the appellant and **Ndonye** arrived at the appellant's house together. The evidence of these two eye witnesses was consistent that the appellant first asked the deceased why she keeps running to her maternal grandparents whenever she was beaten. Both testified that as a follow up to this question or comment, the appellant seized the deceased and hurled her onto the ground, hitting her head on the ground twice. The evidence of these two eye witnesses was corroborated by that of the appellant's mother, who stated that she heard the commotion and on coming out, saw the appellant hurl the deceased to the ground. The superior court Judge who saw the witnesses testify and assessed their demeanours believed the evidence of **Beth**, **Ndonye** and the appellant's mother, and rejected the appellant's defence that he found **Kitheka** in his house or that **Kitheka** was a lover of Beth. The three eye witnesses are all related to the appellant and there was no reason for them to lie.

18. On our own independent evaluation of the evidence, we find that there was overwhelming evidence that the deceased died as a result of the injuries which she sustained after her head was hit against the ground by the appellant. The question that has disturbed us is whether the appellant had the necessary *mens rea* to cause the death of the deceased. Under **section 206** of the Penal Code, malice aforethought may be inferred from evidence proving one or more of the following:

"(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

19. In this case, although Beth claimed that the appellant had threatened to kill the deceased because she was born out of wedlock, that evidence did not appear to be consistent with Beth's own evidence that the appellant had lived with the deceased for about nine years as his child, and was paying school fees for the deceased. Indeed the appellant's question to the deceased as to why she kept running to her maternal grandparents whenever he beat her reflects an element of concern from a parent who wanted to assert his authority over his child. The appellant did not use any weapon and there is no evidence upon which it can be concluded that the appellant intended to cause the death of the deceased or to cause grievous harm to her. It is clear even from Beth's prompting to the deceased to apologize to the appellant, that the appellant's intention was simply to discipline the deceased. The appellant appears to have gone overboard in his attempt to discipline the deceased.

20. It was not disputed that the appellant had taken some alcohol. By **section 13(4)** of the **Penal Code**, intoxication is a factor to be taken into account in determining in this case whether the appellant had formed an intention to kill. The alcohol may not have been so excessive as to interfere with the appellant's mental faculties. Nonetheless, the alcohol appears to have been enough to produce in the appellant some element of aggression. We come to the conclusion that although the deceased died as a result of the appellant's action, the appellant did not have the intention to kill her. We find that the superior court erred in convicting the appellant of the offence of murder when no malice aforethought was established.

21. Further, we note with concern that the record of the superior court reveals that during the proceedings which were conducted with the aid of assessors (in accordance with the law then in force), the hearing of the evidence of one witness, **Dr. John Mutunga** was partly taken in the absence of one of the assessors, **Francis Nzioka. Nzioka** appears to have arrived late when the witness was halfway through his evidence. The assessor was nonetheless allowed to continue and was one of the assessors whose opinion

was taken by the court. Although this was a serious irregularity, we are satisfied that no injustice or prejudice was caused by this irregularity because apart from **Nzioka**, there were two other competent assessors whose opinion was unanimous. Moreover, the evidence which was given in the absence of assessor **Nzioka** was formal evidence dealing with the medical examination of the appellant and this was not crucial evidence.

22. The second issue of concern is the fact that the record of the superior court reflects that the trial Judge sentenced the appellant without giving the appellant any opportunity to say something in mitigation. In this regard, we can put the matter no better than stated by this Court in ***Godfrey Ngotho Mutiso vs. Republic***, whilst dealing with a similar situation:

"The appellant in this case was entitled to have his antecedents and other mitigating factors recorded for purposes of assisting the President in exercise of the prerogative of mercy but no information was recorded. The learned Judge of the superior court simply imposed the death penalty upon convicting the appellant. In doing so the learned Judge was in error because under section 329 of the Criminal Procedure Code, he was entitled, before passing sentence, to receive such evidence as he thought fit in order to inform himself as to the proper sentence to pass. The consequence is that we have no information on which we can assess the correct sentence. We are informed that the death sentence was commuted to life imprisonment, but again that is not because of any information supplied by the court. The appellant may well be deserving of the death penalty or life imprisonment in view of the gravity of the offence committed and the circumstances of the deceased's death, or a lesser penalty, but then again, making such findings would be arbitrary. We must re-emphasize that in appropriate cases, the courts will continue to impose the death penalty. But that will only be done after the court has heard submissions relevant to the circumstances of each particular case."

23. Thus the omission to give the appellant an opportunity to explain his mitigating circumstances to the court, was a serious blunder. We have agonized as to whether in this case it would be appropriate to remit the case back to the superior court judge for the appellant's mitigation to be taken, and appropriate sentence imposed. We do note however that the appellant was arrested on 2nd November 1996. Following committal proceedings in the subordinate court, the appellant was arraigned before the superior court on 31st July 1997. The appellant remained in custody from the date of his arrest until 20th July 1999 when he was convicted and sentenced to death by the superior court. This means that the appellant has been in custody for a period of over 15½ years. It would neither be fair nor just to delay the finalization of the matter any longer by referring the appellant back to the superior court. Under **Rule 31** of the Court of Appeal Rules, this court has powers to make any necessary incidental or consequential orders in dealing with the matter before it. Given the circumstances of this case, and taking into account the relatively long period of confinement, we think that it would be fair and just that we bring this matter to conclusion by imposing a term of 15 years imprisonment upon the appellant for the offence of manslaughter.

24. The upshot of the above is that we allow the appellant's appeal to the extent that we set aside the appellant's conviction and sentence for the offence of murder contrary to **section 204** and substitute therefor a conviction for the offence of manslaughter contrary **section 202(1**) of the Penal Code as read with **section 205** of the Penal Code. We sentence the appellant to a term of 15 years imprisonment from the date of the appellant's conviction in the superior court.

Dated and delivered at NAIROBI on this 2nd day of March 2012.

E. M. GITHINJI
……
JUDGE OF APPEAL

M. K. KOOME
……
JUDGE OF APPEAL

H. M. OKWENGU
……
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR