IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, WAKI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 189 OF 2009

BETWEEN

JACOB KOSKEI ALIAS CHEMUTUT.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a sentence and conviction of the High Court of Kenya at Kitale (Karanja, J) dated 23rd July, 2009
In
H.C. CR. C. NO. 22 OF 2004)
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JUDGMENT OF THE COURT

Jackob Kosgei Kayab, alias Chemutut, the appellant herein, was tried before Wanjiru Karanja, J on a charge of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars contained in the information were that on the 17th April, 2004 at Sekuti Village in Trans-Nzoia District within Rift Valley Province, the appellant, jointly with another person not before the court, murdered William Serem Chebii, hereinafter "*the deceased*". After hearing a total of ten witnesses brought by the prosecution and the appellant's defence made by way of an unsworn statement, the learned Judge found the appellant guilty as charged and sentenced him to death. The appellant now appeals to this Court against the conviction and sentence.

We are aware that as a first appellate court the appellant is entitled to expect of us a fresh re-evaluation and re-assessment of the entire evidence which was brought against him by the prosecution and his own unsworn statement. In discharging that obligation on the Court's part, we must bear in mind the fact that the trial Judge had the advantage of hearing and seeing the parties testify before her. On an appeal this Court does not have such an advantage and must give due allowance for that.

At the time of the incident the appellant was a GSU serviceman attached to some station in Tharaka; the deceased was also a police officer attached to some station in Bondo.As at the date of the incident both of them were apparently on leave or off-duty and were at their village in Trans-Nzoia District. There was overwhelming evidence that on the 17th April, 2004 the appellant and the deceased moved from one home to the other consuming alcohol, at one home "***changaa***" and at another "***busaa***". They eventually ended up in the home of one Longorina whose other names were given by witnesses as Samuel Kanda. In that home both the appellant and the deceased consumed more "***changaa***" and at some stage, a quarrel developed between them.Thomas Komen Yego (PW2) saw the appellant in the home of Kanda and left

him there. On the way out, Thomas met the deceased going to that home and after sometime Thomas saw the deceased and the appellant "*chasing each other*;" the appellant had a slab of wood and used it to hit the deceased on the head.The deceased fell down and help was called for. Apparently the appellant was with another person called David Kipkorir, and hence the averment in the information that the appellant jointly killed the deceased with another person not before the court. Apart from Thomas (PW2), Lukach Kemboi (PW3), Musa Toroitich (PW4), John Kemboi Chebii (PW6), the widow of the deceased Elda Chepchumba Serem (PW7) and Chepkasion Kibor (PW9) all swore that they saw the appellant attack the deceased using a piece of wood which was itself produced in court as an exhibit. The appellant in his unsworn statement stated that he had taken "***changaa***" that day but he denied ever attacking the deceased. The incident took place between 1.00 p.m. and 3.00 p.m. and most of these witnesses were from the same village and they knew each other well. They knew the appellant and the deceased. The home of Musa Toroitich (PW4) is in between the home of Samuel Kanda and that of the deceased. He swore that while he was resting in his house which was on the road, he saw the appellant and another person who was running come from the direction in which the deceased had been attacked and when he went there, he found the deceased lying on the ground. The widow Elda (PW7) swore that she found the appellant attacking her husband. The appellant was dragging her husband on the ground using the husband's male organ and the appellant also had a piece of wood. Dr. Kosilova (PW1) of Moi University School of Medicine performed the post-mortem on the body of the deceased and found the skull smashed; she testified that the cause of death was severe destruction of the head, including body tissue. In the face of the overwhelming evidence, we must reject, and we do so, grounds 2 and 3 of the appellant's grounds of appeal in which Mr. Ntenga Maruhe, learned counsel for the appellant had argued that the learned Judge's conclusions were not supported by the evidence on record. The learned Judge's judgment was fully supported by the evidence except to the extent which we must deal with now.
There was unchallenged evidence that the deceased, the appellant and even some of the witnesses who gave evidence in the case had consumed a lot of illicit liquor, "***changaa***", "***busaa***" and so on. Under ***section 13 (1)*** of the Penal Code:-

"Save as provided in this section, intoxication shall not be a defence to any criminal charge,"

yet ***section 13 (4)*** proceeds to state that:-

"Intoxication shall be taken into account for the purpose of determining whether the person charged had formed an intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

The learned trial Judge had discharged the assessors before the trial was concluded, so the issue of her failure to direct the assessors on the question of intoxication does not arise. But the Judge was still under a duty to direct herself on the issue of intoxication for as we have said it was agreed on the evidence that the appellant had consumed "***changaa***" and "***busaa***." Apart from accepting the evidence of the prosecution witnesses and rejecting the appellant's unsworn defence, as she was entitled to do, the learned Judge said absolutely nothing about the issue of intoxication. It is true the appellant himself did not raise the issue as a defence but that issue was clearly raised in the evidence of the prosecution witnesses and it was the Judge's duty to consider and take into account the issue of intoxication to determine whether, in spite of the intoxication, the appellant was still in a position to form the specific intention to commit the offence of murder. We do not know the conclusion to which the Judge would have come had she considered the issue. Mr. Oluoch, the Senior Deputy Prosecution Counsel, conceded that the facts proved by them only proved a charge of manslaughter, not murder. We agree with Mr. Oluoch on that point. It is, therefore, unnecessary for us to consider the issue of pre-mature discharge of the assessors by the learned Judge; one did not need assessors to try a charge of manslaughter. Even if we had agreed with Mr. Marube that the assessors were wrongly discharged, all that would have happened is that we would most likely have ordered a retrial. There is no reason for us to do so in view of the Republic's concession that the appellant ought to have been convicted of manslaughter and not murder.
We accordingly allow the appeal to the extent that we set aside the conviction for murder under ***section 203*** as read with ***section 204*** of the Penal Code, and substitute it with a conviction for manslaughter under ***section 202*** as read with ***section 205*** of the Penal Code. The appellant was sentenced to death but we were told that the President had commuted that sentence to one of life imprisonment. The commutation

must have been on the basis that the conviction for murder was right. We have held that that conviction was wrong and that gives us the discretion to impose upon the appellant an appropriate sentence under ***section 205*** of the Penal Code. We now sentence the appellant to fifteen years imprisonment to run from ***23rd July, 2009*** when he was sentenced to death by the High Court. Those shall be the orders of the Court.

Dated and delivered at Eldoret this 25th day of March, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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