



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO, GITHINJI & NYAMU, JJ.A.)**

**CRIMINAL APPEAL NO. 122 OF 2007**

**JOSEPH KARANJA KINUTHIA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from an order of the High Court of Kenya at Nairobi (Ombija, J.) dated 13<sup>th</sup> April, 2007***

***in***

***H.C.C.R.C.NO.3 OF 2003)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

In an information filed in the High Court the appellant ***Joseph Karanja Kinuthia*** was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code.

The prosecution case was that on 22<sup>nd</sup> March 2001 at Kirathane Village in Thika District of the Central Province the appellant murdered ***George Karanja Kinuthia*** (the deceased). The deceased together with two others were having supper in their grandmother's house when the appellant, a brother to the deceased joined them and the two brothers exchanged words concerning the appellant giving the deceased money to cover his fare and the deceased indicated that he was ready to go if given the fare by the appellant. Immediately after the exchange the two brothers left the house and while outside the house one of the two brothers was overheard to have told the other ***"stop being stupid"*** and thereafter the appellant entered the kitchen which was three metres away armed himself with an axe and hit the deceased with the axe. There was evidence that both the deceased and the appellant were under the influence of alcohol at the material time. The incident was reported to Kirathani Police Post and when the police officers came to the scene they ferried the deceased to Thika District Hospital where the deceased was admitted and treated but as fate would have it, the deceased passed on after a week. A postmortem report conducted thereafter revealed that the injuries which caused the deceased's death were inflicted using a blunt and sharp object. In all, six witnesses testified and at the conclusion of the trial the superior court (***Ombija, J.***) convicted the appellant of the offence of murder but all the three (3) assessors returned a verdict of not guilty to murder but guilty of manslaughter. The appellant was sentenced to death.

Aggrieved by the said verdict the appellant appealed to this Court by filing grounds of appeal on 24<sup>th</sup> April 2007 and supplementary grounds of appeal on 19<sup>th</sup> January 2001 respectively. One of the grounds of appeal is that the ingredient of malice aforethought was absent in the circumstances of the case.

When the appeal came before us, the learned Senior State Counsel **Mr Monda** was quick to concede that the offence committed was that of manslaughter whereupon both the appellant and his counsel **Mr Ratemo Oira** accepted the concession.

We agree with Mr Monda. With respect, we think that the learned Judge ought to have directed himself on the surrounding circumstances, that is, the attack was not planned in advance; that there was an instantaneous fight and that both the deceased and the appellant were under the influence of alcohol immediately before the fight. Had the Judge addressed this background, we think he could have been persuaded to reach a finding that the circumstances and the evidence pointed to the commission of the lesser offence of manslaughter instead of murder. Mr Monda, learned Senior State Counsel, quite rightly in our view, conceded that the totality of the evidence supported the lesser charge of manslaughter. In mitigation Mr Oira repeated that the appellant and the deceased were brothers and that the appellant regretted the incident which will indelibly remain in his memory for a long time; that he was a married man; and that the appellant had already served ten (10) years in prison and that he was keen to start his life afresh. In reaching this conclusion we have been mindful of section 13(4) of the Penal Code which states as follows:-

***“(4) Intoxication shall be taken into account for the purposes 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.”***

We accordingly allow the appeal to the extent that we set aside the conviction for the offence of murder under **section 203** as read with **section 204**, and we substitute therefor a conviction for the offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. We also set aside the sentence of death and substitute therefor a sentence of fifteen (15) years imprisonment to run from 13<sup>th</sup> April 2007 when the appellant was convicted and sentenced by the Judge.

Those shall be our orders in the appeal.

***DATED and delivered at Nairobi this 11<sup>th</sup> day of March, 2011.***

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

**J.G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**