



REPUBLIC OF KENYA
IN THE COURT OF APPEAL

AT NAKURU

(CORAM: OMOLO, GITHINJI & VISRAM, JJA)

CRIMINAL APPEAL NO. 411 OF 2007

BETWEEN

ISAAC WACHIRA THUO.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a sentence and conviction of the High Court of Kenya at Nakuru (Kimaru, J) dated 3rd August, 2007

In

H. C. Cr. C. No. 126 of 2003)

JUDGMENT OF THE COURT

Isaac Wachira Thuo, the appellant herein, repeatedly stabbed his brother, the late Stephen Maina during the evening of 9th June, 2003 at Kihoto Farm in Subukia, Nakuru District. The two brothers lived in the same house which had belonged to the deceased. The appellant had moved to the house to live with the deceased because it was said the appellant could not afford to pay for his own accommodation. The appellant was apparently a habitual drunkard and the deceased always complained that the appellant would sell house-hold items in order to get money to indulge in drinking. The deceased also complained that though the appellant contributed nothing towards the up-keep of the house, the appellant consumed a lot of food and this was a burden upon the deceased. Accordingly, there was always friction between the appellant and the deceased.

On the day on which the deceased was killed, i.e. on the 9th June, 2003, their brother Peter Njoroge Thuo (PW1) had visited the two with a view to bringing peace between the two. After talking to the two, Peter went to a neighbouring house but the trouble between the appellant and the deceased continued. A fight must have started and it was during that fight that the deceased was stabbed.

It was, however, obvious that the appellant was a habitual drunkard and had consumed liquor during that evening. It was in view of this that Mr. Karanja Mbugua, the learned counsel for the appellant, submitted that the offence which the prosecution had proved against the appellant was one of manslaughter rather than murder. Mr. Omwega, the learned Principal State Counsel, agreed with that submission and asked us to substitute a conviction for manslaughter instead of the murder one recorded against the appellant.

Under **section 13 (1)** of the Penal Code-----

“Save as provided in this section, intoxication shall not constitute a defence to any criminal charge”,

but **section 13 (4)** then provides:-

“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.”

In spite of the admitted fact that the appellant might well have been drunk when he committed the offence, the learned trial Judge(Kimaru, J) in his summing-up to the assessors said absolutely nothing to the assessors on the issue of the appellant having been drunk and whether in spite of that fact the appellant was still in a position to form the specific intention to kill. The learned Judge again said absolutely nothing on that matter in his final judgment. The learned Judge’s failure to direct himself and the assessors on this point was clearly prejudicial to the appellant and we are not surprised that the Republic conceded the appeal to that extent and asked us to find the appellant guilty of the offence of manslaughter.

In the event, we allow the appellant’s appeal to the extent that we set aside the conviction for murder under **section 203** of the Penal Code, and substitute it with a conviction for manslaughter under **section 202** of the Penal Code. We set aside the sentence of death and under **section 205** of the Code, we sentence the appellant to **fifteen** (15) years imprisonment to run from the **3rd** of **August, 2007** when the appellant was convicted and sentenced to death by Kimaru, J. Those shall be the orders of the Court in the appeal.

Dated & delivered at Nakuru this 21st day of April, 2011

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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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.