



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: OMOLO, GITHINJI & VISRAM, J.J.A)**

**CRIMINAL APPEAL NO. 42 OF 2006**

**BETWEEN**

**JOSEPH CHERUIYOT CHEPKWONY ..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from conviction and sentence of the High Court of Kenya at Kericho (Musinga, J.)*

*dated 27<sup>th</sup> January, 2006*

*in*

*H. C. Cr. C. No. 17 of 2002)*

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**JUDGMENT OF THE COURT**

The appellant herein, **Joseph Cheruiyot Chepkwony**, was, after trial, convicted of the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced to death.

According to the information filed by the Republic the appellant murdered Mike Kipruto Kemboi (the deceased) on the 2<sup>nd</sup> January, 2001 at Talanet Village in Kericho.

The prosecution presented the following facts before the superior court. On the evening of 1<sup>st</sup> January, 2001 David Kipkurui Cheruiyot (PW 2) (David) hosted a new year's party at his home in Talanet Vilage, where several friends and neighbours had been invited. The event started at 6.00 pm, with tea and *busaa*, a local brew, being served. At about 10.00 pm, while the party was in progress, the appellant arrived, uninvited. He was already drunk, and began quarreling with, and abusing, guests. In particular, he started a quarrel with the sisters of another guest, Kennedy Cheruiyot Kemboi (PW 1) (Kennedy). On seeing this, Kennedy slapped the appellant, and an altercation followed. David (the host) came and separated the two. The appellant continued to be a nuisance, and at about 11.00 pm, when he was completely drunk, David and Kennedy decided to escort him to Kennedy's house, which was in the neighbourhood. Kennedy opened up his kitchen, and laid the appellant to rest there. Kennedy's wife and

child, aged three, were asleep in the house. Kennedy informed his wife that the appellant was asleep in the kitchen. Thereafter he and David returned to the party. At some point thereafter, Kennedy's wife, Everlyne Chepngeno Kemboi (PW 6) (Everlyne) heard the appellant shouting from the kitchen that "somebody will see me today", then heard the kitchen door opened, and saw the appellant leaving the kitchen. The dogs started barking. She dashed to David's house, reported what had happened to her husband, and both decided to check on the appellant. As they were headed to their house, they saw the same on fire, and it was too late to save their little boy who was asleep there, and who eventually died in the fire, and in respect of whose death the appellant was charged with the offence of murder.

According to Dr. A. Ochieng who conducted the post-mortem examination on the deceased child's body, he observed that the death had resulted from extensive burns.

In his unsworn statement, the appellant admitted being drunk but denied causing the fire which killed the child. The prosecution called nine witnesses, and after a full trial, the appellant was found guilty of murder and sentenced to death.

At the hearing before us, Mr. Motanya 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 (Musinga, 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.

Having considered the evidence on record herein, we are satisfied that the appellant could not have formed the specific intention to kill.

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 **27<sup>th</sup> of January, 2006** when the appellant was convicted and sentenced to death by Musinga, J. Those shall be the orders of the Court in the appeal.

**Dated and delivered at Nakuru this 21<sup>st</sup> 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**