



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAKURU  
(CORAM: TUNOI, O’KUBASU & AGANYANYA, J.J.A.)  
CRIMINAL APPEAL NO. 144 OF 2009**

**BETWEEN**

**GEOFFREY KIPROTICH BOEN .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from a conviction and sentence of the High Court of Kenya at Kericho (Musinga, J.) dated 3<sup>rd</sup> July, 2009*

**in**

**H.C.Cr.C. No. 11 of 2009)**

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**JUDGMENT OF THE COURT**

**Geoffrey Kipkoech Boen**, the appellant was on 29<sup>th</sup> July, 2003 arraigned before the High Court at Kericho with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that on the 4<sup>th</sup> day of August, 2002 at Singoroni Village of Kericho District in Rift Valley Province he murdered **Sarah Chepkemoi Tiony**, the deceased. It was alleged that on 4<sup>th</sup> August, 2002, the appellant and the deceased were amongst a group of people who were drinking local brew otherwise known as ‘chang’aa’, at the house of **Javan Kiprotich** (PW1) and **Lily Chebet Too** (PW2). They left the house at around 9.00 p.m. Next morning PW1 was informed of a body of somebody lying on a footpath and when he woke up and went to the scene he saw the body which he identified as that of the deceased. He went to report the matter to the area Chief **Nelson Bor** (PW7). The appellant who was found at the scene was identified as the person who left the house of PW1 with the deceased the previous night. He was arrested by PW7 and taken to Sosiot Police Station where **Pc. Robert Mutai** (PW3) re-arrested him and took-over the investigations of the case. After the investigations the appellant was arraigned in Court as herein before stated.

When the appellant was placed on his defence he made an unsworn statement and said that on 4<sup>th</sup> August, 2002 he went to take alcohol at a place where there were many people drinking. After a while he

left and went to his house where he slept until next day; and when he woke up next morning he was still drunk and did not know what happened. He denied seeing the deceased where he was taking the alcohol on the day of the incident.

The superior court (*Musinga, J.*) heard the case with the aid of assessors and wrote his judgment which was delivered on 3<sup>rd</sup> July, 2009. In it the learned Judge said *inter alia*:-

***“It is trite law that in a case depending exclusively upon circumstantial evidence, the court must, before deciding on a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of any other explanation upon any other hypothesis than of guilt. See Mwita vs Republic – [2004] 2 KLR 60. In this case, the accused though he did not have the burden of proof, did not explain how his clothes were all muddy, just as the scene of the crime. He also did not give any explanation as to why his trouser and underpants had faeces just as there were faeces at the scene. The accused was the last person to be seen with the deceased alive. The deceased was found dead about 50 metres from the accused house. He was arrested shortly after discovery of the deceased body; a few hours after her death. All the evidence on record points to the accused person as the only one who caused the death of the deceased.”***

The learned Judge then found the appellant guilty and convicted him for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. He was then sentenced to death as provided by law. He now appeals to this Court through the memorandum and a supplementary memorandum of appeal lodged herein on 12<sup>th</sup> April, 2011 with 10 and 6 grounds of appeal respectively. However when **Mr. Motanya**, learned counsel for the appellant submitted before us on 20<sup>th</sup> April, 2011 he relied on the supplementary memorandum of appeal. He submitted that the murder charge was not proved against the appellant because of absence of malice aforethought or that if the appellant killed the deceased at all, then he was under the influence of drink. According to him it had rained and naturally the area would be muddy. He said that if there was any offence committed it was that of manslaughter.

**Mr. Nyakundi**, learned State Counsel for the State supported the appellant’s conviction and stated that the appellant and the deceased left the house of PW1 together at around 11.00 p.m. That when the appellant’s house was visited the clothes recovered from there had similar mud and faeces as that found at the scene where the deceased body was found. According to his submissions the appellant’s conviction was safe.

This is a first appeal and as such it is our duty to re-evaluate the evidence adduced before the trial court and draw our own conclusions bearing in mind that, unlike the trial Judge, we did not see and hear the witnesses testify in order to assess their credibility and make due allowance for this, see ***Okeno v Republic [1972] EA 32***. According to the evidence of PW1, the appellant and the deceased came to his house almost together. The deceased came first but was immediately followed by the appellant. They sat together and bought two cups of chang’aa which they shared. After they finished drinking they left at either 9.00 p.m. or 11.00 p.m. The deceased left first followed immediately by the appellant. It was dark outside and there were also some drizzles. The evidence of PW1 was supported by that of PW2 except for the time they left the house of PW1. PW3 visited the scene where the deceased body was lying. He drew the sketch plan of the scene and contacted the scenes of crimes personnel to come and take photographs. He also testified that before the deceased body was taken to the mortuary he visited the house of the appellant and found him wearing dirty clothes which had mud similar to that he had observed at the scene where the body of the deceased was recovered. The evidence of PW7 supported that of PW3 about the muddy clothes and added that apart from this there was also a trouser and underpants from under the appellant’s bed which had faeces similar to those this witness had observed at the scene where the deceased body was recovered.

The learned Judge considered this evidence with that of PW1 and PW2 that the appellant had left the drinking den together with the deceased and held the appellant responsible for her death. The police would have done much better if they had taken the mud and the faeces found on the appellant’s clothes and at the scene to the government chemist for analysis and comparison, but this was not done. However, the evidence adduced was sufficient to determine this case either way.

As a general rule, an accused person assumes no legal burden of establishing his innocence but in limited cases the law places a burden on him to explain matters which are peculiarly within his own personal knowledge. **Section 111** of the Evidence Act, Cap. 80 Laws of Kenya provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters of facts which are peculiarly within his knowledge. But that section is silent on what would happen if he fails to do so. However, under **section 119** of the same Act the court is entitled to raise a presumption of fact from the circumstances of the case. This presumption is rebuttable, see ***Mkendeshwo v Republic [2002] KLR 461***.

The appellant denied the offence but the evidence of PW1 and PW2, which the trial court believed shows that the appellant was the last person seen with the deceased alive when they left the house of PW1 and PW2. He did not explain as to where or how he parted company with the deceased. This raises a rebuttable presumption that he or some other person he knew was responsible for the deceased death.

Mr. Motanya argued that the prosecution did not prove the motive or *mens rea*, for the deceased killing by the appellant. We agree with this submission because the evidence of PW1 and PW2 was to the effect that at the time the appellant and the deceased left the house they were very drunk. At the same time while in that house the two were talking to one another as they drunk the chang'aa. In fact each of them bought a round during their stay in the house of PW1. In the circumstances a reasonable doubt is created as to whether the appellant formed any intention to kill the deceased. In view of this, we quash the appellant's conviction for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code and set aside the sentence of death imposed on him. In its place we substitute a conviction on the charge of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and sentence him to 15 years imprisonment from the date of conviction. It is so ordered.

***Dated and delivered at Nakuru this 9<sup>th</sup> day of June, 2011.***

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**