



IN THE COURT OF APPEAL  
AT KISUMU

(CORAM: OMOLO, GITHINJI & ONYANGO OTIENO, JJ.A)

CRIMINAL APPEAL NO. 131 OF 2009

BETWEEN

GEOFFREY MANOTI OBAIGWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a conviction and sentence of the High Court of Kenya at Kisii (Musinga, J) dated 15<sup>th</sup> May, 2009*

In

**H.C. Cr. C. No. 1 of 2008)**

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JUDGMENT OF THE COURT

Musinga, J sitting in the High Court of Kenya at Kisii, tried and convicted Geoffrey Manoti Obaigwa, the appellant herein, on an Information that had charged the appellant with the offence 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 15<sup>th</sup> day of December, 2007 at Omonono sub-location in Nyamira District of the Nyanza Province, the appellant murdered Charles Ocharo, hereinafter “*the deceased*”.

A total of five witnesses testified on behalf of the Republic, but the evidence relevant to the charge was really that of Dr. Michael Dulo (PW1), Joseph Okiema Mose, (PW2) and Richard Momanyi Samoita (PW3). Joseph alleged he saw the appellant fighting one James Osogo or Onsongo. Because of the confusion in the names, we shall refer to him only as James. The time was about 6.30 p.m. and both the appellant and James appeared to be drunk. The fighting was on a nearby road. The witness separated the two combatants and the two went to their respective homes. Shortly thereafter, Joseph saw the appellant running from his home carrying a knife; James also run from his home carrying a panga. They met again and the appellant attempted to stab James with the knife; James evaded the knife and cut the appellant on the back with the panga he had. The appellant ran to his home and James also ran away. There was only a fence separating the homes of the appellant and James. Joseph was standing some 20 – 30 metres away. Joseph then saw the appellant leave his home for the home of James; the appellant was not armed. The appellant did not find James at his home. He left for the home of Charles Oncharo, the deceased, who was the brother of James. The appellant was obviously looking for James. The appellant kicked the door of the deceased and went in. But soon thereafter the appellant came out and proceeded to a nearby kiosk that belonged to the deceased. Prior to going inside the house, the appellant had accosted an old man called Richard Momanyi Samoita (PW3), wrestled him down and took away from him a

wooden jembe handle. He then proceeded to the kiosk of the deceased carrying the jembe handle. According to Joseph, inside the kiosk, the appellant poured sugar on the ground and started to break soda bottles. The deceased went to the kiosk to save his property. When entering the kiosk, he met the appellant at the door. The appellant hit him twice on the back of the head with the jembe handle. The deceased collapsed and Joseph grabbed the jembe handle from the appellant. The appellant ran away. The deceased was taken to hospital but died during the night. The appellant was arrested from some clinic the following day. It is to be remembered that Joseph said James had cut the appellant with a panga.

Richard (PW3) is an uncle of the deceased, i.e. the deceased was his brother's son. Richard went to his brother's home on the 15<sup>th</sup> December, 2007 at about 6.00p.m. He had a wooden jembe handle which he wanted to fix into a jembe. The appellant then came there and Richard swore:-

***“He wrestled me to the ground without saying anything. He took the handle.”***

The appellant went away with the jembe handle and thereafter Richard heard about the attack on the deceased.

Dr. Dulo performed the post-mortem on the body of the deceased on 20<sup>th</sup> December, 2007. The deceased's clothing was blood-stained though the body was well preserved. There was a cut wound on the back of the head 6 cm long and there was blood clot in the area. The skull was fractured and there was bleeding in the brain. The cause of death was severe head injury. Police Constable, Micah Kipkoech (PW5) visited the home of the deceased and found his body still in the home. Though the deceased had died in some clinic, the body was apparently returned to his home and it was P.C. Kipkoech who took it to Nyamira District Hospital where Dr. Dulo performed the post mortem. P.C. Kipkoech also saw the kiosk which had been broken into and he also took in his possession the wooden jembe handle which he subsequently produced as an exhibit. It was questioned by counsel both during the trial and also before us why the wooden jembe handle was not dusted for finger prints of the appellant. We are not aware that finger prints can be left on a wooden surface.

When put to his defence, the appellant told the Judge in an unsworn statement that he was attacked by the deceased and James who had the jembe handle. One of them stabbed him; James had a knife and the jembe handle. James raised the jembe handle to hit him (appellant). He ducked and James hit the deceased on the head. He got a chance to escape and was subsequently arrested from a hospital where he had been taken to. The appellant's counsel took the unusual step of making written submissions. He argued that the case had not been proved beyond reasonable doubt; that no other person had been called to say the appellant had fought with James and questioned why James had not been called as a witness.

Having considered all these matters, the learned Judge concluded that on the material day, there was a fight between the appellant and James which Joseph (PW2) witnessed. He held that it was the appellant who hit the deceased on the head with the jembe handle and that the evidence of Joseph was supported by that of Richard (PW3) who narrated how the appellant took away the jembe handle from him. The learned Judge rejected the appellant's unsworn contention that it was James who had hit the deceased with the jembe handle. The Judge in fact accepted the evidence of Joseph and Richard, and rejected the version given by the appellant. He then found the appellant guilty of the charge of murder, convicted him and sentenced him to death. The appellant now appeals to the Court against the conviction and sentence.

In his submissions before us, Mr. Kenneth Amondi, learned counsel for the appellant, contended first that no malice aforethought was proved. He appeared to contend that James fought with the appellant and it was not proved that the appellant had any reason for attacking the deceased. He also questioned why James was not called to come and testify as James prominently featured in the proceedings. He also submitted that the appellant and James were drunk.

Mr. Kivihya, Principal State Counsel, contended on behalf of the Republic that the charge of murder had been proved. The attack on the deceased, contended Mr. Kivihya, was a misplaced aggression. Joseph saw the appellant attack the deceased and his evidence found support in the evidence of Richard from whom the appellant took the jembe handle. According to Mr. Kivihya, there was no evidence that the

appellant was drunk.

This was essentially a case dependent on the facts placed before the court. Richard swore that the appellant wrestled him down and took away the jembe handle from him. Joseph also swore that he saw the appellant take away the jembe handle from Richard. Joseph had given a detailed account as to what had occurred between the appellant and James before Richard came into the scene; i.e. how the appellant and James had fought on the road; how he had separated the two; how each one of them had run to his home and came back armed, the appellant with a knife and James with a panga. Joseph explained faithfully how the appellant failed in his attempt to stab James with the knife and how James succeeded in cutting the appellant on the back with his panga. Joseph did not seek to hide anything which was in favour of the appellant. He even said he thought the appellant and James were drunk. At no stage was it ever suggested to Joseph that it was James who had accidentally hit the deceased on the head with the jembe handle. The learned Judge had the advantage of seeing Joseph and Richard on the one hand, and the appellant, on the other hand, testify before him. The Judge believed Joseph and Richard and rejected the unsworn statement of the appellant. Based on the record before us, the learned Judge was entitled to come to the conclusions he arrived at and there is no basis upon which we can interfere with his findings. We agree with the Judge that it was the appellant who took away the jembe handle from Richard as stated by Joseph and Richard, and that the appellant used the jembe handle to hit the deceased twice at the back of his head. The deceased subsequently died from the injuries the appellant inflicted on him.

On the question of why James was not called to come and testify, the evidence which the Judge accepted and which we have also accepted is that while it was proved that the original fight was between the appellant and James, the latter had long gone out of the scene by the time the deceased was being attacked. All he (James) could have testified on was his earlier fight with the appellant. He could not have given any useful evidence regarding the attack on the deceased. In fact the appellant went to the home of the deceased to look for James. The appellant did not find him there and started destroying the property of the deceased. The deceased was killed when he attempted to save his property. By then, James was not at the scene, otherwise the appellant would have attacked him.

However, the prosecution themselves through their main witness Joseph specifically said that James and the appellant appeared to be drunk. The evidence of Joseph on this point was as follows:-

***“On 15/12/2007 at about 6.30 p.m. I was at my home, saw the accused quarrelling with James Osogo. They were on the road. I separated them. I went back to my home. Later they fought. I went back and separated them. They went to their respective homes. They both appeared drunk. -----.”***

So to Joseph both the appellant and James appeared drunk. In his judgment the learned Judge referred to the issue of drunkenness in this fashion:-

***“After a short while PW2 saw the accused running from his home holding a knife. He also saw James Osogo running from his home holding a panga. The two were drunk with alcohol. -----.”***

That was the only reference the learned Judge made in his entire judgment to the issue of drunkenness. What does the Penal Code, Chapter 63 Laws of Kenya, say about intoxication?

**Section 13** of that statute is in these terms:-

***“13 (1). Save as provided in this section, intoxication shall not constitute a defence to a criminal charge.***

***(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –***

***(a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or***

**(b) The person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**

**(3) Where the defence under subsection (2) is established then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code relating to insanity shall apply.**

**(4) 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.**

**(5) For the purpose of this section ‘intoxication’ includes a state produced by narcotics or drugs.”**

The starting point is that intoxication *per se* is not a defence to a criminal charge except as stated in **subsection (2) of section 13**. In the circumstances of the appeal before us, the provisions of **subsections (2) and (3)** are really not relevant. But **subsection (4)** is clearly relevant. The charge of murder requires the specific intent to kill as stated in **section 206** of the Penal Code. In the absence of the specific intent to kill one would not be guilty of murder. **Subsection (4) of section 13** of the Penal Code requires that a court should take intoxication into account when deciding whether or not the person charged, despite his intoxication, was still able to form the specific intent necessary to commit the crime of murder. If a judge has taken into account the fact that though the person charged was intoxicated, he was, nevertheless still in a position to form the specific intent to kill, then of course intoxication would be irrelevant. In the appeal before us, Musinga J, apart from saying that :-

**“----- the two were drunk with alcohol,”**

did not consider the issue of whether being drunk with alcohol, the appellant was still capable of forming the specific intent to kill the deceased. We do not know what conclusion the learned Judge would have come to, had he considered the matter. It may be the Judge could have held that despite intoxication, the appellant was still capable of forming and did form the specific intention to kill or it may be the Judge could have held that due to intoxication, the appellant was incapable of forming the specific intention to kill. We must give the benefit of that doubt to the appellant. Accordingly, we allow the appeal to the extent that we set aside the conviction for murder under **section 203** of the Penal Code and we substitute it with a conviction for manslaughter under **section 202** of the Code. We also set aside the sentence of death imposed under **section 204** of the Code and substitute that sentence with one of fifteen (15) years imprisonment under **section 205** of the Penal Code. The sentence of imprisonment shall run from the date on which the Judge had imposed the sentence of death. Those shall be our final orders in the appeal.

Dated and delivered at Kisumu this 2<sup>nd</sup> day of November, 2011.

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**