



**IN THE COURT OF APPEAL
AT NYERI
(CORAM: WAKI, AGANYANYA & VISRAM, J.J.A)
CRIMINAL APPEAL NO. 263 OF 2007**

BETWEEN

MOSES GITONGA MACHARIA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nyeri (Okwengu, J.) dated 20th July, 2007

**in
H. C. CR. C NO. 16 OF 2005)

JUDGMENT OF THE COURT

Upon his trial with the aid of assessors, the appellant herein, **Moses Gitonga Macharia**, was convicted by the High Court sitting in Nyeri (Okwengu, J.) for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. It had been alleged in the Information filed by the Attorney General, that on the night of 11th and 12th of May 2005 in Nyeri Township, he murdered **Margaret Muthoni Thiongo** (*the deceased*). He was sentenced to suffer death after offering no mitigation for the offence. The appellant was dissatisfied with the conviction and is now before us on first appeal and our duty, as we consider the grounds of appeal is to re-evaluate the evidence on record and arrive at our own conclusions in the matter, but always bearing in mind, and allowing for it, that we did not see or hear the witnesses. On matters of demeanor and credibility of witnesses therefore, we would ordinarily defer to the assessment made of them by the trial court.

There was no eyewitness to the killing of the deceased and indeed the appellant's defence was an *alibi* that on the night he was alleged to have committed the crime, he was in his house at Itemere, in Nyeri Municipality. What were the circumstances leading to the deceased's death?

The deceased was a commercial sex worker and was well known in Nyeri town. She was especially a frequent patron of two bars in the town: **South Tetu Bar & Restaurant** and **Seven Stars Bar**, which were about 200 meters apart, and she was known to the workers there. South Tetu Bar & Restaurant was in a storey building with a Restaurant section on the ground floor, a bar section above it called "Kanini Bar", and residential rooms upstairs.

At about 7 p.m. on 16th May 2005, **Bernard Kinyua Mwangi (PW3) (Bernard)**, who was the accountant cum Manager of South Tetu Bar & Restaurant, was at the Restaurant watching television when a man came there in the company of the deceased. He knew the deceased as a frequent customer at the bar but did not know the man. They sat at the same table where he was, about 2 – 3 feet on the opposite side. The man was wearing a “kofia” - a cap with a protrusion or canopy - and sat near some pillar. He ordered two beers, one for him and one for the deceased, and they started drinking. At some point the deceased removed the kofia worn by the man when she wanted to embrace him and that is when Bernard was able to get a good look at him. He saw that the man had a mark looking like a scar at the back of his head. He also noticed that the man had a goldish looking tooth, when he was laughing. His ears were also peculiar, as if they were facing the front. At about 8 p.m. the deceased and the man went out of the restaurant and Bernard remained there until closing time at 11 p.m. when he went home.

The following day, Bernard was called by one of the workers at the business and told to go to Room 12. There he found the body of a female lying on a bed with her tongue sticking out. He recognized her as the deceased. He also saw two condoms lying on the floor, and her clothes which were in the bathroom. He called the police who arrived at the scene.

It would appear that after the man and the deceased left the restaurant area, the deceased went upstairs to Kanini Bar where **Alice Wanjiru Mureithi (PW4) (Alice)** was selling beer at the counter. The deceased went up to her and asked for a packet of Trust condoms which she was given and went downstairs telling Alice she was going to look for a client. Afterwards, the deceased went back to Kanini bar holding a bottle of soda with a man holding a bottle of pilsner. He was also wearing a greenish shirt with a kofia. They sat in the bar and the man ordered two beers. He gave out Kshs.100/= but Alice took sometime to refund the change whereupon the man went upto her to demand his change. It was at that time that Alice noticed the man had a false tooth on the left upper side. By about 10 p.m. they left and Alice continued to serve other customers until closing time. The following day she was called by the cleaners in the building to go to Room 12. There she found the half naked deceased who did not respond to her calls and on touching her she found her cold. She saw used Trust condoms on the floor, and her clothes in the bathroom.

Another commercial sex worker in the town, **K.N.W (PW 6) (K)** also visited South Tetu Bar & Restaurant on 11th May 2005 at about 8.30 p.m. and found the deceased and the same man drinking. After about one hour she left to go Seven Stars Bar but returned to South Tetu Bar at about 11 p.m. and found the deceased and the man having moved from the ground floor to Kanini bar. At some point, K met the man at the urinal and asked him to buy her a soda. The man started beating her up saying Nyeri women think they are very smart but they are going to see. The watchman overheard the noise and cautioned them. K went back to Seven Stars Bar.

The watchman was **Thomas Owino Otieno (PW 9) (Owino)**. He recalled that on the day in question he was on duty and at about 9 p.m. he saw a man with the deceased whom he knew as a frequent visitor in their bar. They went in and started drinking. At some point the man tried to go out of the bar with a bottle of beer but Owino told him he could not do so. He even unsuccessfully tried to bribe Owino with some money. The man went back to Kanini bar where he was drinking with the deceased. Owino had seen them at the bar at 11 p.m. as he did security rounds but did not see them at 12 midnight when he went back there. He did not see them leave the premises through the main entrance which he was guarding that night. At about 7.10 a.m. the following morning Owino saw the man whom he had seen with the deceased the previous night leaving the premises and the man greeted him.

The room attendant who rented out Room 12 also testified. She was **Theresa Nduta Gichuhi (PW 5) (Theresa)**. She had been working for two weeks but used to see the deceased who used to frequent the bar with other patrons. At about 10 p.m. on the day in question, a man went up to her and asked for a room. She assigned him Room 12, took him there and showed him the room. He was accompanied by the deceased. The man had a fair complexion, and a shiny silverish false tooth. He also had a clean shaven head with a scar at the back of his head. He was not wearing a hat. His ears were also peculiar, bigger than normal. Theresa left the two in Room 12. The following morning, Theresa joined another room attendant in changing bedding in the rooms when upon reaching Room 12 they knocked several times

without response. On pushing the door open they found the lifeless body of the deceased and immediately informed the management which called the police.

Police officers led by Chief Inspector Joseph Choyo (PW 11) (CI Choyo) arrived at the scene and went to Room 12 where they found the lifeless body of the deceased. Her neck appeared to have been twisted. He also found used condoms and the deceased's clothes. He called scenes of crime officers who arrived under the command of Cpl. John Mugo (PW 2) and took photos of the body and the scene. The body was collected by Cpl. Martin Mureithi Murimi (PW 15) together with the used condoms and clothing for further investigations by the Government chemist. On 19th May, 2005 a post mortem was conducted by Dr. Andrew Kamau Ndaru (PW 1) (Dr. Ndaru). He found that all the tracheal rings in the respiratory system were crushed and the muscle on the neck and the fat tissue on the neck all had bruises. The muscles of the chest were also bruised and there was about 200 cc of blood in the right lung cavity. The ribs, lungs cardiovascular system and digestive system were normal. The anterior wall of the vagina was bruised in the genital urinary system. In his opinion the cause of death was asphyxia due to strangulation.

The investigating officer in the case was Sgt. **Muriuki Kamakia** (PW 1) (*Sgt Kamakia*) who took over from Cpl. **Murimi** (PW15). Initially Cpl. Murimi had questioned the workers at South Tetu Bar & Restaurant and had locked up for questioning: the Manager (*Bernard*), the Room attendant (Theresa) and the Kanini Bar attendant (Alice) who had all described the unknown man who was the last person to be seen with the deceased, and said they could identify him if they saw him again. They were released as investigations continued.

About one month later on 8th June 2005, **C.N.K** (PW 12) (C), another commercial sex worker in Nyeri met a man at Seven Stars Bar. It was 6 a.m. in the morning. The man called her and told her to order whatever she wanted from the bar. Before C could do so, K (PW 6) arrived at the bar and saw them together. K called C outside and warned her that the man was not good as he was suspected of having killed a girl at South Tetu Bar. They rushed to South Tetu Bar and summoned Owino (PW9) and they headed to Seven Stars Bar. Owino found the man seated alone at a corner with ½ a bottle of beer. There were other people at the counter. Owino patted the man's shoulders, he looked up and Owino greeted him. He asked him whether he knew him and the man said yes he had been seeing him. Owino noticed that the man had the same silverish tooth he had seen earlier. C also noticed the shiny tooth. Owino asked the man to accompany him. Fortunately, a police officer in plain clothes was among the customers in the bar that morning, PC Simon Ruto Mutahi (PW 14) (PC Ruto). He was on crime observation duties when Owino approached him and told him he needed assistance to take the man to the Police Station. Ruto found the man dozing on his chair in a drunken state and observed that he had a glittering tooth. The man gave his names as Moses Gitonga. With the assistance of Owino, PC Ruto arrested the man and they led him towards Nyeri Police Station. On arrival at the station, however, the silverish tooth had disappeared!

Identification parades were organized by Inspector David Cheruiyot (PW 8) and Inspector Gerald Mwangi (PW 13) on 9th and 10th June, 2005 respectively and identifying witnesses among them Bernard (PW 3), Alice (PW 4), K (PW 6), Owino (PW 9), C (PW 12) and Theresa (PW 5) were called. All of them, except K and Alice, were consistent that the man they saw and described as having a false golden or shiny silverish tooth, with a scar at the back of his head, and peculiar ears, was one and the same man they all identified at the parade. He was the appellant. K and Alice did not identify him at the parade explaining that they were scared of the man. The appellant was charged with the offence of murder.

In his sworn defence the appellant stated that he was a charcoal dealer from Murang'a but was living in Nyeri Municipality. On the night in question he was at his house alone in Itemere since his wife had left him after marital disagreements, and there was nothing abnormal that happened that night. He had never been to South Tetu Bar & Restaurant, although he remembered going to Seven Stars Bar on 9th June, 2005 when he was arrested. He was very drunk and was sleeping on the table after beating up a woman who had stolen Kshs.400/= from him at midnight. The woman was PW 6 (K). He was taken to the police in the presence of K who was alleging that he was a freemason and devil worshipper who sucked blood from women. He denied those allegations as well as allegations that he ever went to South Tetu Bar & Restaurant, or saw Owino, or had a shiny false tooth. He admitted he had a scar at the back of his head

and normally wore a cap. As he had never seen all the witnesses who had testified against him before, he contended that they merely framed him up to cover up for the real killer.

The trial Judge summed up all the evidence from 16 prosecution witnesses and the appellant, for the assessors. The assessors were of the unanimous but separate opinions that the appellant was guilty of murder. The learned Judge further analysed the evidence on record and believed the prosecution evidence as truthful, thus displacing the *alibi* put forward by the appellant. The Judge found proved as facts, that the deceased was a commercial sex worker who went to South Tetu Bar & Restaurant with a man, she drunk some beer with the man, she bought some condoms, and ended up in Room 12 where she had sex with the man before she was strangled to death by the same man. As to whether the man identified was the appellant, the learned Judge believed Bernard, Theresa and Owino as crucial and truthful witnesses, stating thus:-

“P.W.3, P.W.5 and P.W.9 each positively identified the Accused person at the Identification Parade as the person who was in the company of the deceased on the fateful night. P.W.3 explained clearly how he had the opportunity to observe the man and gave a clear description that the man had a mark at the back of his head, a goldish tooth and peculiar ears.

This was an accountant cum Manager at the South Tetu Bar and it is understandable that he would take an interest in the customers patroning (sic) the Bar. I believe and accept the evidence of P.W.3 that the accused person was the same person he saw in the company of the deceased on the night that the deceased was murdered.”

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The other witnesses who successfully identified the Accused at the Identification Parade was PW 9. This was a watchman at South Tetu Bar. He explained how he came into contact with the Accused at the Bar and how he observed the movements of Accused and the deceased. He also gave a description of the Accused which was similar to that given by other identifying witnesses. It is evident that some witnesses described the glittering tooth as silverfish (sic) and others as goldish. In my view this was not a material contradiction as the purport of the evidence was that the person had a shiny or glittering tooth.

Although the witnesses initially described the tooth as a false tooth, it is apparent from the evidence of PW 9 and PW 14, that it was just something glittering which the Accused was apparently able to get rid off between the time of his arrest and his arrival at the police station. I notice that PW 9 who was one of the witnesses who identified the Accused person, participated in his arrest and even escorted the Accused person to the police station. Under these circumstances the identification parade was not useful in so far as PW 9 was concerned as he had already identified the Accused and facilitated his arrest. I was nevertheless impressed by the evidence of PW 9 who struck me as a hawk eyed watchman who even noticed the Accused person leaving the Bar the next morning.

The evidence of PW 9 taken together with that of PW 3 leaves me in no doubt that the Accused was the person who was in company of the deceased, and that he was the same person to whom PW 5 hired out Room Number 12. I therefore reject the alibi of the Accused person and find that he was indeed present at South Tetu Bar on the night of 11th and 12th May, 2005 and retired into Room Number 12 with the deceased. The body of the deceased was recovered in the same room the next morning after the Accused had been seen leaving the Bar, the circumstances point irresistibly to the Accused person having been the one who strangled the deceased.”

It is those findings that the appellant challenges before us on eight grounds stated in a memorandum of appeal filed by his Advocates on record. In urging the appeal however, learned counsel Mr. Macharia combined them into three grounds: firstly, that there was no proof of *mens rea* or malice aforethought which was a necessary ingredient of the offence charged; secondly, that the circumstantial evidence on record did not irresistibly point to the appellant as the killer or exclude other hypothesis pointing to the appellant's innocence; and thirdly, that prosecution evidence which was favourable to the appellant including his defence, was not considered.

On the first ground of appeal Mr. Macharia submitted that **section 206** of the Penal Code which defines “malice aforethought” was not fully appreciated by the trial court, and there was therefore no finding that the appellant formed any intention to cause grievous harm or cause the death of the deceased. He further submitted that the evidence of intoxication which was on record was not considered at all although there was a duty on the part of the trial court to do so under **section 13 (4)** of the Penal Code. Furthermore, the post mortem report merely expressed the opinion of “strangulation” without providing proof that force was used. Mr. Macharia took issue with the finding made by the trial court that:

“There is no evidence of any motive on the part of the Accused to cause the death of the deceased. The circumstances in which the deceased was killed however leave no doubt that death was intended and malice aforethought must therefore be inferred.

He submitted that malice aforethought should not have been “inferred” but proved beyond reasonable doubt.

In response to that ground of appeal, learned State Counsel Mr. Kaigai submitted that there is no evidence of intoxication and therefore there was no invitation to the trial court to consider the issue. Secondly malice aforethought may always be deduced from circumstances surrounding the commission of the offence of murder. The deceased here was strangled to death, and therefore whoever committed the offence must have intended that consequence.

We have considered the ground of appeal and we do not, with respect, find any merit in it. **Section 206** of the Penal Code defines malice aforethought as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

There was medical evidence from Dr. Ndaru who performed the post mortem on the deceased that the act of “strangulation” crushed all tracheal rings of the respiratory system and caused bruises on the neck and chest. It also caused bleeding which went into the lung cavity. Whoever it was that committed that act, was not, in our view, merely engaged in a love embrace which went awry. He intended to cause grievous harm or death as defined in **section 206** and we find no impropriety in the trial court drawing that conclusion from the facts of the case. Malice aforethought is subject of the human mind which is difficult to prove by direct evidence because what is in the mind of one is difficult to discern by another, but can be inferred from surrounding circumstances of the incident under investigation. See ***R v Tubere [1945] 12 EACA 63***. Malice aforethought was established from the circumstances in this case.

It is further contended that the appellant on the facts on record was incapable of forming any intention because of intoxication. Intoxication is not defined in the Penal Code and it is expressly provided under **section 13** that it does not constitute a defence to any criminal charge, save on restricted parameters thereunder which may earn the offender a discharge or declaration of insanity. **Section 13 (4)** however provides that:

“(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.”

Whenever intoxication of the offender is in evidence therefore, it is the duty of the court to take it into account in determining whether the mental capacity of the offender was so impaired that he was incapable of forming the intention or *mens rea* necessary for commission of the offence charged. The proper approach we think is that expressed in the English Court of Appeal case of **R v Sheehan & Moore** 60 Cr. App. R. 308 at 312, thus:

“(1) In cases where drunkenness and its possible effect upon the defendant’s mens rea is in issue, ... the proper direction to a jury is, first to warn them that the mere fact that the defendant’s mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent.”

The trial Judge in this case had the presence of mind to sum up to the assessors the issue of intoxication in terms expressed under **section 13** of the Penal Code. The issue however did not feature in the Judgment of the trial Judge, as correctly observed by Mr. Macharia. We think the reason for that is fairly obvious and understandable. The evidence on record from the prosecution was that on the material day the appellant and the deceased bought two beers at the South Tetu Restaurant and two others at Kanini Bar of the same premises. The effect of that drinking did not feature in the submissions of counsel or in the defence of the appellant. In our own evaluation, there was evidence of drinking but no evidence of “intoxication”, - a state, in ordinary parlance, which would “*cause one to lose control of their faculties*”. See Oxford English Dictionary. The appellant was not intoxicated, and we so find. That ground of appeal fails.

On the second and third grounds of appeal which are related, Mr. Macharia submitted that the circumstantial evidence admitted on record included evidence which was exculpatory to the appellant but this was not considered by the trial court. He cited evidence on record that the deceased was seen with a man by one of the witnesses, K, at midnight when another witness, Theresa, said she left them in Room 12 at 10 p.m. In his view, the possibility that the deceased was flirting with several men was not eliminated. The *alibi* pleaded by the appellant was also not given sufficient consideration. Finally, Mr. Macharia criticized the admission of negative evidence on the character of the appellant through the witness K (PW 6) who alleged that he was a devil worshipper who sucked women’s blood.

For his part Mr. Kaigai submitted that the circumstantial evidence was totally inconsistent with the innocence of the appellant and irresistibly pointed at him and no other. His *alibi* was displaced by that evidence.

The law on circumstantial evidence is now old hat. It is as good as any direct evidence when it can show that the inculpatory facts are incompatible with the innocence of the appellant and incapable of explanation upon other reasonable hypothesis than that of guilt. That is the classic principle established in **Kipkering Arap Koske [1949] 16 EACA 135**. The principle was developed further in **Simoni Musoke v Uganda [1958] EA 715** and other subsequent decisions, to require that there are no other co-existing circumstances which would weaken or destroy the inference of guilt.

In this case, the consistency of the description made of the man who was last seen in the company of the deceased leaves no reasonable doubt in our minds that the appellant was the man who met that description. Three of those witnesses, Bernard, Theresa and Owino were found by the trial court to be truthful and we have no reason to impugn their credibility. The appellant was the last person to be seen with the deceased when she was alive and he had a duty under **section 111** of the Evidence Act to explain what happened to her. His *alibi* was obviously self-serving and therefore amounts to no explanation. On

our own assessment of the circumstantial evidence on record we come to the conclusion that the offence was committed by the appellant as charged and we dismiss the two grounds of appeal.

The upshot is that this appeal has no merit and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 1st day of December, 2011.

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR