IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 234 OF 2009

PETER KURIA KABURU ………………………………………. APPELLANT

AND

REPUBLIC ………………………………………………….. RESPONDENT

(*Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Ochieng', J) dated 30th September, 2009*

In

H C CR C No. 58 of 2005)

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JUDGMENT OF THE COURT

The trial of **Peter Kuria Kaburu**, the appellant herein, opened before Mutungi, J, as he then was, on 18th September, 2007. As the law then required, the learned Judge was assisted in the trial by three assessors. The Information on which they tried the appellant charged him with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars contained in that Information were that on 8th May, 2005, at Sinai slums , Industrial Area, Nairobi, the appellant murdered Michael Mutua Waita, hereinafter, "*the deceased*." Mutungi, J heard a total of eleven prosecution witnesses and at the end of their evidence, the learned Judged ruled, on 11th December, 2008, that the appellant had a case to answer on the charge of murder. The Judge then directed that he would hear the case for the defence on 3rd February, 2009. The Judge eventually heard the sworn defence of the appellant on 31st March, 2009. Thereafter he again adjourned the hearing to 27th April, 2009 to hear the final submissions of counsel. On that day, Mr. Enonda who represented the appellant during the trial was ready to make his submissions; the Republic was not ready and requested for a further adjournment. The hearing was then adjourned to 6th May, 2009 when final submissions would be made. It appears that by 6th May, 2009, Mutungi, J, had retired from the bench. Ochieng', J eventually took over the hearing on 8th June, 2009, and he drew the attention of the appellant and his counsel, Mr. Enonda to the provisions of ***section 201***

(2) of the Criminal Procedure Code; that section was introduced into our law by Parliament through Act No. 7 of 2007, i.e. The Statute Law (Miscellaneous Amendments) Act, and provides that:-

"201 (2) The provisions of section 200 of this Act shall apply *mutalis mutandis* ***to trials held in the High Court."***

Section 200 of the Code is in four parts. ***Subsection (1)*** allows an incoming magistrate to deliver a judgment which has been signed but not delivered by his predecessor; it also allows the incoming magistrate to proceed with a trial which his predecessor had started but had not completed. ***Subsection (2)*** gives the incoming magistrate power to pass sentence on an accused person convicted by the predecessor of the incoming magistrate if the predecessor had not passed sentence. Then ***subsection (3)*** provides that:-

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

Sub-section (4) empowers the High Court , if it is of opinion that the accused person was materially prejudiced by the taking over of his case by the succeeding magistrate, to set aside the conviction and may order a retrial.

Those are the provisions which ***section 201 (2)*** applied to trials in the High Court. Ochieng', J, as we have seen, drew the attention of the appellant and his counsel particularly to ***section 200 (3)***; the learned Judge was under a duty to do so. The appellant and his counsel told the Judge to proceed from where Mutungi, J had left. They did not wish to have any of the witnesses who had testified before Mutungi, J re-summoned and reheard. In those circumstances, the appellant cannot now complain before this Court about the procedure adopted during his trial and Mr. Makoloo, who represented the appellant before us was right in abandoning Ground 3 in the appellant's Memorandum of Appeal wherein the complaint was that:-

"---------- the Honourable Judge erred in the proceedings adopted by the court in the he (sic) convened proceedings which were part-heard, a process which is gravely irregular."

After the final submissions, Ochieng' , J summed- up the case for the three assessors and when asked to give their verdict, they chose to do so through one of them though we note that the learned Judge called upon each one of them to speak. Their unanimous verdict was that the appellant was guilty of murder as charged. On 30th September, 2009, the learned Judge delivered his judgment in which he also found the appellant guilty of murder and duly sentenced him to death. The appellant now appeals to the Court against the conviction and sentence.

Mr. Mule, the learned state counsel, who represented the Republic before the Court conceded that the Republic had not proved the charge of murder against the appellant; Mr. Mule submitted that the appellant ought to have been convicted of the lesser charge of manslaughter.

Mr. Makoloo also concentrated most of his submissions before us on the issue of whether the appellant was guilty of murder or manslaughter. We think that is the issue we have to determine in this appeal.

There can be no doubt from the recorded evidence that there was a fight between the appellant and the deceased during the night of the offence. David Kania Waita (PW2) was the brother of the deceased. At about 10.00 p.m. while he was in his house, David heard the deceased and the appellant quarrelling over some matter; it really does not matter whether the two were quarrelling over delayed rent or something else. The two were outside and David also went outside to find out what the quarrel was about. The appellant and the deceased entered into a house and within five minutes David heard a struggle inside the house. David entered the house and got hold of the appellant in an attempt to separate the two. They were getting out of the house but in the process, the deceased was stabbed and David saw him bleeding. The appellant in his sworn version admitted the struggle between him and the deceased, but said it was the

deceased who had the knife, that the deceased fell down and was stabbed by the knife he (deceased) was holding. It was only then that the deceased said the appellant had hit him. That version could not possibly be correct in the light of the evidence on record. Dr. Peter Muriuki Ndegwa (PW9) performed the post mortem on the body of the deceased on 18th May, 2005. According to Dr. Ndegwa, the body had penetrating stab wounds on the large renal angle with bowels popping out, large anterior cervical region and on the lower back upto the spinal column. Those injuries could not have been caused by the deceased falling on his own knife as the appellant alleged and no such suggestion was made to Dr. Ndegwa when he was cross-examined. We are satisfied the learned Judge and the assessors were right in rejecting that theory and there is no reason for us to warrant our interfering with their conclusion on that point. Like the Judge and the assessors, we are satisfied the deceased died from the stab-wounds Dr. Ndegwa found on his body and that it was the appellant who inflicted the stab-wounds on the body of the deceased.

Right from the beginning of the prosecution's case, David (PW2) was asked if he knew whether the appellant and the deceased were drunk. David's answer with respect to that question was:-

"I don't know whether any of the two was drunk but it was a Sunday."

The incident had taken place after 10.00 p.m. and while not saying that either of the combatants, i.e. the appellant and deceased was drunk the implication from his answer that "*but it was a Sunday*" was that it was possible they could have been drunk. In his evidence, the appellant told the Judge and the assessors:-

"I had no intention of killing the deceased. I don't know why the deceased came to attack me. But he looked drunk.

I was also drunk – I had taken about 10 bottles. But I could recollect what was happening. There was no light as we fought."

When cross-examined, the appellant said:-

"I went to pay my debt to Kamau – but I did not pay. His debt was Kshs.50/-. I was with them for 30 minutes. Beer was Kshs.65/-. The deceased was my neighbour – 150 metres from my place when we met outside the bar, he asked me for a house. I did not think it was right for him to ask me about the house at the bar. He should have come to my house."

What this evidence, which was uncontroverted, shows is that at some stage the appellant and the deceased were at a bar. The appellant thought the deceased was drunk. The appellant said he himself had taken ten bottles of beer. When David heard the two quarrelling outside, David did not know where they had come from and hence David's answer that while he did not know if they were drunk, it was a Sunday. This evidence, we must point out, was given before Mutungi, J not before Ochieng' J who appears to have rejected it. In his summing-up to the assessors, the learned Judge told them:-

"In the course of considering the evidence, the assessors need to bear in mind that whilst the accused gave his own detailed version of events, he also later stated that he had been drunk, and that he could not recollect what was happening. You need to ask yourselves where from he proved the details of the provided evidence which he, in his defence, if he was so drunk at the material time as to be incapable of recollecting what was happening. ---------------."

This direction was not factually correct, unless the record we have before us is faulty. The appellant did not say that he was so drunk that he could not recollect what had happened. He said he had taken ten bottles of beer,

"---- But I could recollect what was happening. ----"

Again the question was not whether the appellant was so drunk that he could not recollect what had

happened. The questions which the learned Judge ought to have put to the assessors was, first:-

(i) Did they believe the appellant's evidence that he had taken ten bottles of beer?,

and next,

(ii) If they believed that evidence did it affect the appellant's mental capacity to form the specific intent necessary to constitute the offence of murder?

Section 13 (4) of the Penal Code puts it thus:-

"13 (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."

The learned Judge did not correctly direct the assessors on the question of intoxication. He was required to ask the assessors if they believed or did not believe the appellant that he (appellant) had taken ten bottles of beer; if the assessors did not believe him on that issue that could be the end of the matter on that point, as far as the assessors were concerned . But if the assessors believed that the appellant had consumed liquor, even if less than ten bottles, then it would have been the further duty of the Judge to direct the assessors to take into account the consumption of the liquor in deciding the question of whether the appellant was in a position to form the specific intent to kill the deceased. That is the requirement set out in ***section 13 (4)*** of the Penal Code.

In his judgment the learned Judge merely stated, with regard to the issue of intoxication:-

"But at the same time, the accused said that he was too drunk to recall exactly what had happened. In my considered opinion, the contention of drunkenness is nothing more than an attempt by the accused to try and escape the consequences of his action."

Once again this was not the correct question to consider. The learned Judge does not say that the appellant had not consumed any liquor that evening. It would be very difficult on the evidence on record to come to that conclusion. If the appellant had consumed some liquor, the learned Judge was bound to relate that to the provisions of ***section 13 (4)*** of the Penal Code . If the Judge had come to the conclusion that though the appellant might have consumed some liquor, he had taken that into consideration but nevertheless came to the conclusion that the appellant was still in a position to form the specific intent to commit murder, the issue for our consideration would have been wholly different.

Mr. Makoloo also submitted that the appellant was detained in police custody for twenty three days before he was brought to court and that his prosecution was, therefore, a nullity. That issue was raised before the Judge and the assessors. They rejected it; we may not necessarily agree with the reason or reasons for its rejection but it was considered and was rejected. We see no reason to reopen that issue in this appeal.

Accordingly, we allow the appeal to the extent that we set aside the conviction for murder under ***section 203*** as read with ***section 204*** of the Penal Code; we also set aside the sentence of death. We substitute therefor, a conviction for manslaughter under ***section 202*** and under ***section 205*** , we sentence the appellant to 15 (fifteen) years imprisonment to run from ***30th November, 2009*** when the appellant was convicted and sentenced by the High Court. Those shall be the orders of the Court in the appeal.

Dated and delivered at Nairobi this 19th day of March, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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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.