



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

**Criminal Appeal 276 of 2006**

**DAVID KIPKEMBOI NGETICH.....1<sup>ST</sup> APPELLANT**  
**PAUL KIBET NGETICH.....2<sup>ND</sup> APPELLANT**  
**AND**  
**REPUBLIC.....RESPONDENT**

*(Appeal from a conviction, judgment, decree, order, or as the case may be) of the High Court of Kenya at Nakuru  
(Kimaru J.) dated 31<sup>st</sup> August 2006*

in

**H.C.CR.C. NO. 6 OF 2004)**

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**JUDGEMENT OF THE COURT**

The two appellants herein, **David Kipkemboi Ngetich** (*David*) and **Paul Kibet Ngetich** (*Paul*) were convicted by the superior court (Kimaru J.) for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. It had been alleged in an Information filed by the Attorney General on 22<sup>nd</sup> January 2004, that the two appellants:-  
**“On the 26<sup>th</sup> day of December, 2003 at Sirikwa Settlement Scheme Molo in Nakuru District of the Rift Valley Province jointly with others not before court murdered EZEKIEL KIPKURUI KOSKE”.**

Upon a full trial with the aid of assessors, as the law then required, the three assessors were of the unanimous opinion that the appellants were not guilty of the offence charged, but the learned Judge differed with them. He convicted the appellants and sentenced them to suffer death as by law provided. The appellants now come before on this first and final appeal.

As this is a first appeal this Court is under a duty to examine the evidence on record afresh, re-evaluate it, and come to its own conclusions on both matters of fact and law, but always remembering and giving allowance for it, that the superior court had the advantage of hearing and seeing the witnesses testify before it. The facts of the case which came from seven prosecution witnesses are by no means clear and consistent, but the totality of the evidence on record establishes the following:

The first appellant, David, was a farmer in Sirikwa Settlement Scheme in Molo and brewed and sold illicit potent liquor known as “*chang’aa*” in his homestead. The second appellant, Paul, was apparently residing within the same homestead but their relationship is not clear. On 26<sup>th</sup> December 2003 a group of revellers met at another *chang’aa*-brewing den belonging to one Jane in the same neighbourhood. It was all in celebration of Christmas and Boxing Day. One reveller was **Margaret Chemweno Maina** (PW2) (*Margaret*), a house wife, who arrived there at 2 p.m. and started drinking *chang’aa*. She was later joined by her friends, **Dennis Kiplangat Rono** (PW3) (*Dennis*) who was a cattle trader, **Vincent Kipkurui Chirchir** (PW5) (*Vincent*), a cattle trader, and **Ezekiel Kipkurui Koske** (*the Deceased*).

The *chang’aa* at Jane’s den ran out by 7 pm and so the group moved on to David’s den. There they found David and his wife, one Rose, one Johana, and one Simon. Shortly thereafter other revellers arrived in the house, among them, a “*Kisii Man*” **Moses Samuel Maranga** (PW4) (*Moses*), two other unnamed persons and one Richard Rono. David’s house was small and had two rooms, two windows and one outer door. The group of Margaret, Dennis, Vincent and the deceased arrived at about 7 pm when it was getting dark. A hurricane lamp had been lit and was on a wall above the sitting room. It was dark outside, although Margaret and Dennis recalled there was some moonlight. All the *chang’aa* drinkers were seated on small sofa sets inside the sitting room. For the next one hour, the *chang’aa* drinking was uneventful until Margaret and her group of four decided to leave at about 8 pm. Before they could reach the main road, one Richard Rono called them back saying that some people wanted to beat him (Richard Rono) and yet he had not

finished taking his alcohol. He wanted them to come back and plead with David to allow him to finish his drink before chasing him away. They went back and three of them, Richard Rono, Dennis and the deceased re-entered the house while Margaret and Vincent were left standing at a distance away from the house. According to Margaret, David's wife, Rose, came out of the house and bolted it from outside. Then she called a child to go and call Paul. According to Dennis, as soon as they re-entered the house, they found David quarreling with Moses and was infact beating Moses on his knees using a metal rod. At that moment, Richard Rono escaped through the window and ran away. Dennis also decided to go out through the same window but was stuck at the waist. He was hit on the head with a piece of wood by someone he says he identified by voice as Paul, and he fell through the window on the outside. Margaret also says it was Paul who had arrived on the scene and hit Dennis on the head with a stick. On seeing that she left and went to drink another potent brew known as "busaa" in the same neighbourhood. The deceased then, according to Dennis, popped out his head through the same window asking Denis what was wrong but he was hit on the forehead by Paul and he withdrew his head. By that time the lantern inside the house was off. Paul opened the house and went inside. Dennis overheard the deceased crying out why they were killing him and he heard sounds of beatings. It is then that Dennis took off into a maize plantation and hid there until 5 a.m when he went to the deceased's house which was about 150 meters from David's house. He learned about the deceased's death that morning and he went for treatment at Molo District Hospital where he was admitted for one month.

The third eyewitness was Moses, a farmer in Sirikwa. He had gone to David's house 7.30 pm to drink chang'aa and he was served by the wife of David, Rose. There were other chang'aa drinkers at the time, all Kalenjin except him. He gave out Shs.100 expecting a change of Shs.40. He was told that David, who was not there at the time, would give him the change. When David came at about 8 pm he asked for his change because he wanted to go home as it was already dark, but instead of giving him the change, David sat on his knees and slapped him severally. He wanted to run away but the door was bolted from outside. He tried the window but it was too small for him. He turned round and saw darkness as the hurricane lamp was put off. He was hit on his chest and head by David, who was shouting in his Kalenjin mother tongue, until he hid under a sofa set and became unconscious. He never saw anyone else being beaten. According to him the deceased had left the house before David started beating him (Moses). Much later, he came to, found the door open, and crawled outside. He found Paul and Rose who spoke to him and helped him to his feet. He left for his home and only learned later that the deceased had died inside the house of David. At first he was arrested by police as a suspect but was released to testify as a prosecution witness.

The only other witness called as an eyewitness was Vincent but his recollection was that David was not in his house when Margaret and her group arrived to take chang'aa. It was Rose who was selling it and David arrived at about 8.10 pm. All he heard David say at the time was that they (chang'aa drinkers) had bothered him, without addressing anyone in particular. David also said he was going to cut someone and he ran outside attempting to lock the door. His wife, Rose, prevented him from shutting the door and he left it. He went outside followed by Rose. Vincent also went outside and then David grabbed his hand, picked a piece of firewood and hit him once on the left shoulder. Rose told him not to beat him again and Vincent left to go home. He was not injured. He never saw anyone else being beaten. He recalled that it was all dark outside.

On the morning of 27<sup>th</sup> December 2003 , 7.30 am, David went to the home of the area Chief Paul Kipkurui Tanui (PW6) (Chief Tanui) and told him that the deceased was lying in a comma in his house after having been hit by Richard Rono. Before Chief Tanui finished advising him to seek assistance to take the deceased to hospital, a village elder arrived and told Chief Tanui that the deceased had died. He then called Molo Police who visited the scene and collected the body. Police investigations were led by **Pc Kizito Mutuma** (PW7) (Pc Mutuma). He found the body of the deceased lying on the ground in David's house with an injury on his head. The left side of the skull had been crushed. There was blood all over the house and household items were scattered on the floor suggesting a struggle or a fight inside the house. He established that there were people drinking chang'aa in the house the previous night when a fight took place. According to Pc Mutuma, he also established that David was annoyed because the chang'aa drinkers were complaining that he had put water in the chang'aa. He then locked them inside, called Paul and both armed themselves with a piece of wood and an iron pipe which they used to beat up all those present and in the process fatally injured the deceased. Shortly thereafter, David and Paul were arrested and arraigned in court for murder. The piece of wood and iron pipe were produced as exhibits in court.

In his defence, David, a farmer in Molo, said he was taking chang'aa in his house on the material day when a fight broke out among the chang'aa drinkers at about 7.30 p.m. One of the chang'aa drinkers was Richard Rono who ran out and locked up the room. He then stood outside to await those who wanted to jump out through the window and beat them. He then heard the deceased say he had been hit on the head but advised him not to go home at night since the person who beat him might waylay him. David offered him his house to sleep and he went to bed. He was woken up the following morning by another neighbour and told that a person had died at the doorstep of his house. David was shocked and went out at once to report the incident to the chief. Later he and other persons who had been drinking chang'aa were arrested by the police but he was charged with murder. He denied responsibility. For his part Paul denied that he was anywhere near the scene until 9 p.m when he found Moses in David's house. Moses told him that he had been beaten by a person called Richard Rono. He escorted Moses up to the road and returned to his house. The following day he was going to visit his sister when he was arrested together with Moses.

There was no doubt that the deceased died on the 26<sup>th</sup> December, 2003. The cause of death as confirmed by **Dr. Joseph Gaturu Wambui** (PW1) (Dr. Wambui) who carried out a post mortem on the bod, was cardio pulmonary arrest due to severe head injury caused by a blunt object. The doctor observed that there was a cut wound from the temporal region to the occipital region on the left side exposing the skull and brain matter. Blood was oozing from the nose and

ears. In his opinion only one blow was inflicted with a blunt object, made of wood or metal.

All that evidence was summed up for the three assessors assisting the learned Judge and they were directed, correctly in our view, to consider and give their separate opinions on whether the two appellants did have an intention to cause the death or grievous harm to the deceased, in which event they would be guilty of murder; or alternatively if there was no such intention but the appellants caused his death, then such finding would lead to an offence of manslaughter. Finally if the assessors found that the prosecution had failed to prove the charge of murder beyond reasonable doubt, then the appellants would be entitled to acquittal. As stated earlier, the separate opinions of all three assessors were unanimous that the prosecution did not prove the charge of murder, or even manslaughter, since the death occurred during fighting between drunkards. They advised the learned Judge to acquit them. The first assessor in particular gave a fairly detailed reasoning in her opinion emphasizing that the main prosecution witnesses were all drunk on chang'aa and were not worthy of belief and that investigations were insufficient. She stated in part:

**“The investigation officer not (sic) sure of what as (sic) written in the statement. The fight was between PW4 and the others over the claim by PW4 that the changaa had been diluted. The fight took place, unfortunately, at the house of the 1<sup>st</sup> accused. He did not participate. The fight was a free for all. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons are not guilty as charged. They are innocent.”**

The learned Judge believed the evidence of **Margaret (PW2), Dennis (PW3) and Moses (PW4)** as eye witnesses, and that of **Vincent (PW5) and Chief Tanui (PW6)** as supportive and concluded:

**“The evidence that was adduced by the prosecution witnesses clearly pointed to the fact that the accused persons attacked the deceased, PW3, PW4 and PW5 viciously with a stick with the intention to (sic) grievously harm or injure them. Indeed PW3 survived by the grace of God. He was similarly hit on the head with a heavy stick to the extent that he was admitted in hospital for a period of over one month. This court saw the stick that was used to assault the deceased and PW3. It was a heavy stick and it is actually miraculous that PW3 survived after he was hit on the head with it. Taking into totality the evidence that was adduced by the prosecution, and the alibi defence which was offered by the accused persons, it is clear that the accused persons were the aggressors. There was no evidence that the deceased, PW3, PW4 and PW5 reacted by fighting back. It is the accused persons who were doing the beating. The evidence adduced further establishes to the required standard of proof beyond reasonable doubt that the deceased, PW3, PW4, and PW5 were at the time slightly drunk and could not hit back when they were assaulted by the accused persons.”**

In rejecting the opinions of the assessors, as he was entitled to do, the learned Judge explained himself as follows:

**“The assessors who assisted this court during the hearing of this murder trial delivered verdicts finding the accused persons not guilty of the charge of murder. According to the reasons which the assessors presented to the court, they were convinced that the prosecution had not proved its case to the required standard of proof because some of the critical witnesses in this case were drunk to the extent that they could not properly recollect the events that took place on the material night. They further raised the issue of the non-availability of light which would have enabled the said witnesses to identify the accused persons as the persons who assaulted the deceased and caused him to sustain fatal injuries. The said two reasons put forward by the assessors, does not (sic) hold water. The said assessors put undue weight to the fact that the incident leading to the death of the deceased took place when the deceased and his friends were in a drinking spree.”**

Those are the findings which the appellants challenge in seven grounds each as set out in their home-made memorandums of appeal, but which learned counsel for them. Mr. Wambeyi, argued as two main grounds. In the first ground, Mr. Wambeyi submitted that the learned Judge was in error in dismissing the evidence, confirmed by the witnesses themselves, that the death occurred during a drinking spree and fighting involving more than seven people. It was therefore unsafe to unquestioningly believe the evidence of such witnesses. He submitted that there was no reliable evidence to connect any of the appellants with the assault on the deceased as the injury sustained could have been inflicted by anyone of those in the fracas, including one Richard Rono who was never arrested or called as a witness. Furthermore, on the second ground, it was not possible to identify any of the appellants as having inflicted the one fatal blow since the room where the fighting took place was dark, the hurricane lamp having been blown off, and the night outside the room was dark, despite unsupported evidence from Margaret that there was moonlight. Mr. Wambeyi concluded that the weight of evidence was against the conviction and that there was no basis for the finding made by the learned Judge that the deceased and his friends had been set up for elimination by the appellants.

The State, through learned Assistant Director of Public Prosecutions, Mr. Gumo, supported the learned Judge submitting that the appellants were well known to the witnesses and there could be no mistaken identity. Margaret was categorical about what she saw and was not shaken in cross-examination. So did Dennis. The fighting that took place, he submitted, was provoked by David, who hit the hurricane lamp and sought Paul's assistance to assault the people they caused injuries to. The fact that the door was locked from outside, and that the fatal blow was caused by a blunt object could only attest to an intention to cause death or grievous harm. Mr. Gumo ruled out any finding that the witnesses were drunk.

We have reconsidered the matter fully and it is our view that the circumstances under which the offence was committed were not properly appreciated and evaluated by the superior court. We are in no doubt, and we agree with the

finding of the superior court that the deceased died from the effect of one fatal blow inflicted by a blunt object in the house of the first appellant. We accept the evidence that the appellants and all the prosecution witnesses were familiar with each other as they are residents of the same neighbourhood in Sirikwa Settlement Scheme. The evidence of recognition is therefore more reassuring than that of identification of a stranger in difficult circumstances. The prosecution witnesses Margaret, Dennis, Moses and Vincent placed the two appellants at the scene of the crime and their credibility was accepted by the learned Judge who saw their demeanour at the trial. We have no reason to depart from that finding. The same witnesses also testified to seeing the appellants and each of them assaulting some of the witnesses and the deceased. That evidence puts paid the denials by the two appellants that they were nowhere near the deceased and that responsibility for his death lay elsewhere. The main issue to determine is whether in all the circumstances, there was an intention to kill or cause grievous harm to the deceased.

The learned Judge of the superior court made a finding and we confirm it, that the motive for the evident assault inflicted on Dennis, Moses, Vincent and the deceased was not clear. It was either, as stated by Dennis because they returned with Richard Rono to assist him in pleading with David so that Richard Rono may finish drinking his alcohol; or stated out of the blue, as stated by Vincent when David said he had been disturbed by all of them and he would beat them; or as stated by Moses because he insisted on having his change back; or because as the investigating officer stated, David was annoyed by allegations that he had diluted the chang'aa he was selling to his customers. None of those individual statements has any support from any other witness hence the difficulty in tracing any motive for attack. We are fully aware that motive is irrelevant in assigning criminal responsibility. That is the import of **section 9 (3)** of the Penal Code. The relevance of it in this case is to contextualize the circumstances in which the offence charged was committed. We have no doubt in our minds that the prosecution witness who gave evidence had been on a drinking spree for much of the day before the fateful evening. The evidence of Margaret that she had been drinking chang'aa at a different venue from 2 p.m. and was joined by her three friends who included the deceased, and that they moved on to the 1<sup>st</sup> appellant's home in search of more chang'aa does not support the finding by the superior court that these witnesses were not drunk. The 1<sup>st</sup> appellant testified that he was also drinking chang'aa in his house. In all probability a quarrel erupted in the process of that drinking and fighting erupted. In those circumstances the provisions of **section 13 (4)** of the Penal Code ought to have been examined closely to test whether the appellants or any other person not before court as stated in the Information filed by the Attorney General committed the offence "*of malice aforethought.*" In past decisions where similar circumstances obtained and **section 13** became relevant, this Court had occasion to state:

**But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant's drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son.**

- see **Said Karisa Kimunzu v Republic, Cr. Appeal No. 266/2006 (ur)**.

With respect the learned Judge did not direct the assessors as appropriate or at all in respect of that section. Nor do we find support for the finding made by the superior court that the two appellants "*went into a rage and assaulted the people who were drinking traditional liquor in the house of the 1<sup>st</sup> accused with an intention of grievously wounding them, if not in fact, causing their death.*" On the contrary, we find reasonable doubts arising from the state of sobriety of those involved in the fight and would give the benefit of that doubt to the appellants.

As stated earlier, we do not doubt the presence of the appellants on the scene or their complicity, together with others not before the court, assaulting the appellant. The assault, which was by a blunt object resulted in the death of the deceased and it was an unlawful death. In the circumstances, we would allow this appeal to the extent that the conviction for the offence of murder is quashed and the sentence of death is set aside. We substitute therefor conviction for the lesser and cognate offence of manslaughter and sentence the two appellants and each of them to serve ten (10) years imprisonment. The term shall run from the date of their conviction in the superior court, that is 31<sup>st</sup> day of August, 2006. Those shall be our orders in the appeal.

**Dated and delivered at Nakuru this 16<sup>th</sup> day of April, 2010.**

**R.S.C. OMOLO**

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**