



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

Criminal Appeal 354 of 2007

BETWEEN
ERICK KIPKURUI RONO.....APPELLANT

AND
REPUBLIC.....RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Kericho, (Koome, J) dated
15th October, 2007**

in

H.C.CR.C. NO 67 of 2003

JUDGMENT OF THE COURT

This is an appeal by ERICK KIPKURUI RONO, the appellant, against a conviction of murder contrary to section 203 as read with section 204 of the Penal Code entered against him by the High Court of Kenya at Kericho (Koome, J) on 15th October 2007 following a trial for the murder of Kennedy Kipkemoi Kirui, the deceased, on 6th March 2003 in a local bar at Ngoina Road trading centre in Bureti District of the Rift Valley Province.

The prosecution case is briefly as follows. On 6th March 2003 at about 7.00 p.m. the deceased, the appellant and about five or so other people were drinking an illicit brew commonly known as “miti ni dawa” in a bar within their trading centre when a commotion arose in the course of the drinking. The commotion was triggered by an apparently intoxicated youth known as Stephen who became quite rowdy and started kicking people everywhere within the bar. In the process he kicked Patrick Kiprotich (PW1), Bernard Langat (PW2), David Ngeno (PW3), Geoffrey Bii (PW4) and Bernard Yegon (PW7) who were also partaking of the illicit brew. These five named people testified before the learned trial Judge that as

the commotion escalated the appellant who was standing near the bar counter drew a knife and stabbed the deceased in the chest and in the stomach. The appellant, also, stabbed PW1 in the stomach occasioning him grave injuries for which he was hospitalized for a month.

These witnesses testified that all the bar patrons, including the appellant and the deceased were local villagers and they knew each other well. Again, the bar was well-lit with a pressure lamp.

The deceased was rushed to Kapkatet Hospital in Litein but, unfortunately, he died on the way. The postmortem performed on his body showed the cause of death as cardio- respiratory arrest as a result of haemorrhage following a stab wound in the chest.

The appellant in his defence before the trial court, although admitting being in the bar with the witnesses PW1, PW2, PW3, PW4 and PW7, denied stabbing the deceased.

The assessors in their unanimous opinion were of the view that the appellant was guilty of murder as charged. However, we note from the record that the learned trial Judge in her summing up to them failed to direct the assessors to also consider that the appellant might have been intoxicated at the time of the killing.

Ms Kimetto, the learned counsel for the appellant, has vigorously submitted that the learned Judge had misdirected herself in failing to address her mind on the elements of the offence charged and in convicting the appellant of murder when there was no proof of *mens rea*.

On his part, Mr. Nyakundi, the learned State Counsel, conceded that the facts as established before the trial court could not at all sustain conviction for murder; and that, the appellant may be convicted of the lesser charge of manslaughter due to intoxication.

There is no doubt whatsoever from the evidence on record that the appellant indeed, and no one else, did stab the deceased and caused his death in the circumstances narrated by PW1, and the other witnesses. The only question of real substance in this appeal, therefore, is whether malice aforethought was proved.

The stabbing of the deceased was at a bar where illicit brew was being consumed and it happened after a commotion involving the appellant and many other intoxicated patrons. It was a serious misdirection on the part of the learned trial Judge not to consider the effect of section 13(4) of the Penal Code and by failing to properly direct the assessors and herself on the issue of drunkenness or

intoxication.

In our view, it would be unsafe to allow the conviction for murder to stand. Accordingly, we allow this appeal to the extent that we set aside the conviction for murder under section 203 of the Penal Code and substitute that conviction with one of manslaughter contrary to section 202 as read with Section 205 of the Penal Code. We also set aside the sentence of death imposed under section 204 of the Penal Code and substitute it with a sentence of ten (10) years imprisonment to run from the date when the appellant was convicted and sentenced by the superior court.

Dated and delivered at Nakuru this 28th day of May 2010

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR