



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 448 of 2007**

CHARO KITSAO NGAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a conviction and sentence of the High Court of Kenya at Malindi*

*(Ouko, J) dated 31<sup>st</sup> May, 2006*

In

H.C. Cr. C. No. 16 of 2005)

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**JUDGMENT OF THE COURT**

The appellant was charged in the superior court with the offence of murder contrary to **section 203** of the Penal Code as read with **section 204** of the same code. The particulars of the charge were that on the 8<sup>th</sup> day of April, 2004 at Takaye village within Malindi District of the Coast Province murdered George Kazungu Karisa, herein the deceased. It was stated that on that day the deceased, McMillan Kitsao Kenga (PW2) and Charo Karisa Kitsao (PW1) met at a club known as Barkana where they consumed some drink, to wit, palm wine. Charo testified that they consumed two bottles and as they prepared to leave the appellant and one Wara joined them and offered them a further drink. As they continued, the appellant uttered derogatory words against the deceased and Charo and after a while they all left the club to go home but on the way the appellant continued to abuse Charo and the deceased. At some point Charo left the others and went ahead but the deceased called for help saying the appellant was beating him. When Charo came back he was attacked by the appellant who knocked him to the ground and there was a fight between the two. Wara is said to have separated the fight, then they dispersed but later Charo heard the deceased's wife screaming and when he went to find out he saw the deceased lying dead with a stab wound on his left side of the chest. His body was then removed and transferred to the mortuary at Malindi District Hospital.

Kitsao Kenga (PW2) was also in the group which took palm wine at Barkana club and he witnessed the quarrel and fight between the appellant, PW1 and the deceased. He also observed the deceased at the scene where he laid and discovered he had died. Dama Kahindi's (PW3's) pub was where PW1, appellant and the deceased drunk palm wine before leaving at about 9.30 p.m. PW2 saw and heard them quarrel before they left and that it was thereafter he learned the deceased had died. Lewa Karema (PW4) was called by Wara on the night of 8<sup>th</sup> April, 2005 to go and intervene in or separate a fight between the appellant and the deceased. He went to the scene with the deceased's wife but when they got there the deceased had already died. This witness observed a stab wound on the deceased's chest. Dr. Bwire Kizito Vitalis (PW6) a medical officer of Health at Malindi District Hospital conducted a post mortem examination on the deceased body which was identified to him by Councillor Philip Ali Yaa of Kisauni ward (PW5). The doctor observed a stab wound on the left hand side of the chest – 2 cm width which was deep under the breast. Internally the respiratory system in the right lung was alright but the left lung had blood and the apex of the heart had a stab-wound measuring 1 cm wide and deep laceration on the left side of the liver, 2 cm, colon had cuts and contents were seen on the surface. There was blood in the abdominal cavity. According to the doctor the possible cause of death was excessive hemorrhage as a result of the injuries to the heart.

The appellant denied the offence in his unsworn evidence and stated that he was at home on the day the offence was committed when he left to go and see Kitsao Kenga (PW2) who owed him money. That when Kenga paid him the money the two left for a drink at Charo's place and that after this they went to Barkana where they met the deceased and Charo Karisa Kitsao (PW1) where they joined in taking palm wine. Then these two started accusing him of being abusive towards his (appellant's) wife. They nearly came to blows but then they were separated. When they left the drinking place they separated and the appellant went to his home and it was on 13<sup>th</sup> May 2005 when police came and arrested him and charged him with the offence the subject of this appeal, which he said he did not commit.

Counsel for the parties made their respective submissions on the case whereupon the learned Judge (W.Ouko, J) summed up to the assessors on 12<sup>th</sup> May 2006. The two assessors present returned a verdict of "not guilty" for the appellant for lack of direct evidence. However, when the learned Judge wrote and delivered his judgment he concluded:-

***"Taking the prosecution evidence together it is clear to me that the quarrel was mainly between the deceased and the accused. As they walked home, according to Kitsao, the accused and the deceased were behind him. He heard the deceased call out that the accused was beating him. When he arrived, a fight ensued between him and the appellant. He did not see the deceased but Macmillan went and called Lewa. They found the deceased still lying down but dead. From this I find that only the accused had the opportunity to inflict the injuries from which the deceased died. He was the last, indeed the only person who engaged the deceased in a physical confrontation. It was simultaneously with that confrontation that the deceased called out for help. It was at that very time that McMillan saw the deceased lying down. That there were no other people at the scene except the four and only the accused had been fighting with the deceased. For these reasons I find that there is sufficient circumstantial evidence which point irresistibly to the accused person to the exclusion of all the other who were present.***

***It was at night but that alone does not diminish his responsibility. The two assessors were unanimous that the accused is not guilty. They based their finding on the fact that there was no evidence that the accused actually stabbed the deceased as it was dark. I have stated that it was dark but from the surrounding events it was only the accused who had the reason and opportunity to commit the murder.***

***Bearing in mind that the knife or whatever sharp object was used was aimed at the chest and ended up piercing the heart, the accused must have intended to cause grievous harm to the deceased.***

***For the reasons stated above, I find the accused guilty of murder and convict him accordingly. He is sentenced to death in accordance with the law."***

The appellant was aggrieved by this decision and on 12<sup>th</sup> June 2006 he filed an appeal to this Court in a home made memorandum of appeal which listed 4 grounds of appeal. However, his counsel, Messrs Marende Birir & Company Advocates filed a supplementary memorandum of appeal on 18<sup>th</sup> June, 2008 which also listed four grounds of appeal, namely:-

1. That the learned Judge erred in law and fact by sentencing the appellant to suffer death against the evidence adduced by the prosecution witnesses.
2. That the learned Judge erred in law by misconstruing the principles on circumstantial evidence hence misdirecting himself and arrived at a wrong conclusion.
3. That the learned Judge misdirected himself when he passed the maximum sentence of death without considering a lesser sentence of manslaughter which would suffice considering the circumstances in which the deceased died,
4. That the appellant should have the benefit of the doubt since no investigations was done by the police and if it was, the same was rendered to the court.

When the appeal was placed before this Court for hearing Mr. Ng'eno, learned counsel for the appellant, after briefly consulting the appellant submitted and stated that the appellant, the deceased and two others who were related to one another through marriage went out on a drinking spree in course of which they exchanged harsh words and a fight ensued in which the deceased sustained fatal injuries; that it was not known what weapon was used though it was a sharp weapon according to the medical report. That investigations report was not tendered before the court and there was no evidence of malice aforethought; that the appellant was not seen with any knife and it is not known where he got the object he used to inflict fatal injuries upon the deceased; that counsel had discussed with the appellant who had conceded to a plea of guilty to the lesser charge of manslaughter and asked the Court to consider an appropriate custodial sentence rather than the sentence of death.

Mr. Ondari, learned Assistant Deputy Public Prosecutor, conceded that the facts of the case supported the offence of manslaughter. He added that there was no doubt that the appellant had killed the deceased after drinking palm wine for about 3 hours and a fight had ensued. However, that it was the appellant who started it all by abusing PW1 and PW2 and using derogatory words. He asked the court to give the appellant the maximum custodial sentence.

We agree with both counsel that the evidence on record supports the lesser offence of manslaughter and we must therefore allow the appeal against conviction for the offence of murder. Accordingly, we set aside the conviction for offence of murder and set aside the sentence of death and substitute therefor a conviction for manslaughter contrary to **section 202 (1)** as read with **section 205** of the Penal Code.

By **section 205** of the same code, any person who commits the felony of manslaughter is liable to imprisonment for life. The submissions of counsel for the appellants in this appeal, we think, falls in the nature of mitigating circumstances. We have considered them alongside those of the learned Assistant Deputy Public Prosecutor.

Considering the seriousness of this offence, that the parties to the incident were close relatives and that they will live with the stigma of this incident for the rest of their lives we consider it appropriate that the appellant should serve a custodial sentence of 15 years imprisonment from the date of his conviction by the superior court. We so order.

Dated and delivered at Mombasa this 23<sup>rd</sup> day of January, 2009.

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**