IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 345 OF2006

GEORGE KIPTOO…….....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction & sentence of the High Court of Kenya at

Kitale (W. Karanja, J) dated 22/11/2006

in

H.C.CR.C. NO. 29 OF 2000)

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JUDGMENT OF THE COURT

GEORGE KIPTOO, the appellant herein, was tried before *Karanja, J*, sitting with assessors on an information that charged him with murder contrary to *Section 203* as read with *Section 204* of the Penal Code. The particulars contained in the information were that on 26th December, 1999 at Soy Location in Lugari District within Western Province, the appellant murdered *Rebecca Chelegat*, hereinafter "the deceased".

At the end of all the evidence the learned trial Judge summed-up the case for the three assessors who thereafter returned a unanimous verdict that the appellant was guilty of the offence charged. Thereafter, the learned Judge, in her considered judgment dated and delivered on 22nd November, 2006 found the appellant guilty, convicted him as charged and duly sentenced him to death. The appellant now appeals to this Court against both conviction and sentence and though the appellant had himself filed a memorandum of appeal with five grounds, his learned counsel *Mr. Tarus* abandoned all those grounds and only argued the four grounds contained in the "Supplementary Memorandum of Appeal" filed by *Mr. Tarus* himself. Those grounds are that:-

"*1. There was a violation of the appellant's fundamental rights enshrined in Section 72 of the Constitution of Kenya.*

2. The 1st Appellate (sic) court erred in law in upholding the judgment of the trial court and the conviction of the appellant despite the fact that the case was not proved beyond reasonable doubt.

3. The superior court confirmed the conviction and sentence without itself analyzing and evaluating the evidence afresh as required of it by law.

4. The trial court had ignored the Appellant (sic) defence".

Grounds 2 and 3 were wholly irrelevant to the circumstances of the appeal and were rightly abandoned. This is a first appeal to us and there was no intermediate court before the appeal came to this Court. *Mr. Tarus* largely concentrated on ground one in which he submitted that the appellant was arrested on 26th December, 1999 when the offence was alleged to have been committed but that according to the record of proceedings before this Court the appellant first appeared in the High Court on 23rd or 24th April, 2001, a period of over one year. There is no factual basis for that contention. *Mr. Tarus* was wholly unable to tell us when the appellant first appeared before a magistrate for the then mandatory committal proceedings. We see from the record that the appellant first appeared before a magistrate on 14th January, 2000 and in between 26th December, 1999 and 14th January, 2000, we do not know which dates were public holidays and which ones fell over week-ends

when the courts do not function. It is just not enough for a party to allege constitutional violation; there must be some *prima facie* evidence from which it can be said that the rights of an accused person under *Section 77 (3)* of the Constitution have been violated. Mere speculation will not do. Ground one of the grounds of appeal must fail.

As to ground four, we agree with *Mr. Omutelema,* the learned Senior Principal State Counsel, that had the learned Judge correctly directed herself and the assessors, they would have found that the appellant was guilty of the lesser offence of manslaughter rather than murder. The appellant stated in his unsworn statement that he was so drunk that he did not even know how he came to be arrested. Under *Section 13(1)* of the Penal Code, intoxication as such, by itself, is not a defence to a criminal charge unless certain conditions are met but under *Section 13(4)* of the Code,

"*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 direct the assessors to consider the appellant's assertion that he had been drunk so much that he did not even know how he had come to be arrested and if that was so, whether he was in a position to form any intention, specific or otherwise, when he attacked his deceased grand-mother. The attack on *Richard Waringa (P.W.1)* for example, was so uncalled for and came, as it were, out of the blue. The attack could only be explained on the basis that either the appellant had for some unexplained reason, gone berserk or that he was drunk as he himself said in his unsworn statement. The learned Judge having failed to direct herself or the assessors on these issues, we cannot now make a finding on them one way or the other. We must, accordingly, give the benefit of doubt on these unresolved issues to the appellant with the result that we set aside the conviction for murder as well as the sentence of death and in their stead substitute a conviction for manslaughter under *Section 202* of the Penal Code and under *Section 205* of the Code, sentence the appellant to fifteen (15) years imprisonment to run from 22nd November, 2006 when he was convicted by the learned trial Judge. Those shall be the Court's orders in the appeal.

DATED and DELIVERED at ELDORET this 27th day of February, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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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