



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 295 OF 2008

HENRY KATAP KIPKEU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Eldoret (Ibrahim, J.) dated 7th day of July, 2008

in

H.C.CR.C. NO. 19 OF 2002)

JUDGMENT OF THE COURT

The appellant, **HENRY KATAP KIPKEU**, was tried by the High Court at Eldoret (*Ibrahim, J.*) with the aid of assessors (*as the law then provided*) on information which 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 the 27th day of February, 1999 at Kipkaren Estate in Eldoret Municipality of Uasin Gishu District of the Rift Valley Province the appellant murdered **JOHN CHERUIYOT SUTER** “*the deceased*”. The learned Judge and the assessors heard evidence from a total of eight witnesses called by the prosecution. After the close of the prosecution case and before the appellant had been called upon to defend himself, the learned Judge discharged the assessors on 6th March, 2008 by recording the following order:-

“I do hereby discharge the Assessors in the light of the amended law. We shall proceed without assessors.”

After the foregoing order, the appellant proceeded to defend himself by giving sworn evidence.

After a full trial the appellant was, on 7th July, 2008, found guilty as charged and accordingly convicted. He was sentenced to the mandatory death sentence.

Being aggrieved by that conviction and sentence, the appellant now comes to us by way of first appeal. That being so the appellant is entitled to expect the evidence tendered in the superior court to be submitted to a fresh and exhaustive examination and to have this Court’s own decision on that evidence – see ***OKENO V. R. [1972] E.A. 32 and MWANGI V. R. [2004] 2 KLR 28.***

In the superior court the prosecution called a total of eight witnesses as already stated earlier in this judgment. The crucial evidence was that of **Reuben Koech Kipkoskey (PW1)** who testified that on 27th February, 1999 the deceased visited him at his place in Kipakren and that at about 5:00 p.m. the deceased asked him to go for a walk. As the two men went out they met the appellant at the gate. The appellant was holding a knife. The deceased asked the appellant what the knife was for and in response the appellant said “*hata wewe ni mwingine*” and stabbed the deceased in the stomach. The deceased started bleeding and he was rushed to Memorial Hospital where he succumbed to death on 5th March, 1999. After this incident the appellant disappeared from Eldoret only to be arrested at Chokor in Marakwet on 12th December, 2001.

Benjamin Kiptoo Chebonice (PW2) a brother of the deceased testified that on 27th February, 1999 at about 4:00 p.m. he was at home when he was informed that his brother had been stabbed and that he was undergoing treatment at Memorial Hospital. As a result of this report, Benjamin proceeded to the hospital where he found the deceased. Benjamin talked to the deceased who told him that he (**deceased**) had been stabbed by the appellant.

Benjamin Kiptanui Baroret (PW3) (Kiptanui) testified that on the material day at about 4:00 p.m., he was in his house at Kipkaren when he heard banging of a door and when he looked through the window he was surprised to see the appellant’s wife Phyllis who said that the deceased had been stabbed. Kiptanui saw the appellant wielding a knife saying that he can kill somebody. When the appellant saw the deceased bleeding, he (appellant) ran through the gate and disappeared only to be arrested a year later. It was the evidence of Kiptanui that he witnessed the incident after the appellant had stabbed the deceased.

Michael Kipkorir Suter (PW4) was merely informed about his brother the deceased having been stabbed but did not witness the incident.

Paul Chebet Chemweno (PW5) was a sub-chief of Kipyebbo Sub-location who arrested the appellant on 12th December, 2001 since the appellant was wanted in connection with the murder of the deceased.

P.C. Elias Kiptum (PW6) was the investigating officer to whom the incident was reported on 5th March, 1999. He conducted the investigations, arranged for post mortem examination and finally received the appellant who had been arrested by the sub-chief **Chemweno (PW5)**.

Michael Kipkorir Suter (PW7) was another brother of the deceased who was also informed that his brother had been stabbed but he (**PW7**) did not witness the incident.

Finally, **Dr. Koslova (PW8)** testified how he conducted post mortem examination on the body of the deceased. According to **Dr. Koslova** there was a stab wound which caused a big hole leading to the damage of the intestine.

In his sworn evidence, the appellant told the superior court that on 27th February, 1999 at about 5:00 p.m. he was at his home in Marakwet and that on 7th March, 1999 his wife gave birth to a baby girl but the baby died. He got busy with funeral arrangements after which he remained in his Marakwet home looking after his children. As regards the death of the deceased the appellant said:-

“John Cheruiyot was a good friend of mine. We worked at Municipal Council Eldoret in different departments. Cheruiyot was employed permanently while I was a casual. I had not disagreed with John Cheruiyot. I did not stay with him. We lived in the same estate at Kipkaren. He was my friend. I do not know why they charged (sic). We drank and ate together. I was not with Cheruiyot when he died. I did not say that Cheruiyot was having an affair with my wife. I had no grudge with him. I do not know anything about the death of John Cheruiyot. We never disagreed. I am not a violent person. I am not called Wasiwasi.”

The learned Judge considered the evidence, the submissions by learned counsel and came to the

conclusion that the prosecution had proved its case against the appellant. In concluding his judgment, the learned Judge stated:-

“I find that the accused attacked the deceased. After quarreling with the deceased, they parted ways. He had time to cool down if at all the alcohol was affecting him. Later after a period where he could have cooled down his anger, he went and armed himself. He then left whenever (sic) he was and went all the way to look for the deceased. He found him in his compound. He was wielding the knife. All this conduct shows preparation and malice aforethought. He then went to the deceased and stabbed him declaring his intention to kill somebody. The accused knew what he was doing. He had malice aforethought.

I find and hold that the prosecution had proved offence of murder beyond any reasonable doubt. I find that John Cheruiyot Suter is dead. His death was caused by severe and grievous injuries sustained from stabbing by the accused using a knife. He died from the said injuries. He was killed. He was killed by the accused Henry Katap Kipkeu.

I therefore do hereby convict the accused with the offence of murder under Section 203 of the Penal Code. There is only one sentence for this offence as set out in Section 204 of the Penal Code. The accused is hereby sentenced to death.”

When this appeal came up for hearing before us on 23rd April, 2009 Miss. J.A. Wanjala appeared for the appellant while Mr. A.J. Omutelema (*Senior Principal State Counsel*) appeared for the State. Miss Wanjala relied on the Supplementary Memorandum of Appeal in which she set out the following grounds:-

- “1. The learned Judge erred in law and fact by misdirecting himself to the insufficient prosecution and proceeded to convict and sentence the appellant.***
- 2. The learned Judge erred in law and fact by finding that the ingredients of murder had been established as required by law.***
- 3. The learned Judge erred in law and fact by upholding that a prima facie case had been established beyond reasonable doubt against the appellant.***
- 4. The learned Judge erred in law and fact by failing to consider the appellant defence that they were friends and had been drinking at the time of crime.”***

Combining **grounds 1, 2 and 3** Miss Wanjala submitted that there was no proof of intention to kill and that all the witnesses said that they did not hear any quarrel.

On **ground 4** of the supplementary memorandum of appeal Miss Wanjala asked us to consider the appellant’s defence. She submitted that the appellant and the deceased had been drinking the whole day and hence the learned Judge should have considered intoxication which would have resulted into a conviction on a lesser charge of manslaughter. To buttress her submissions, Miss Wanjala relied on three decisions of this Court in which intoxication was considered in reducing conviction of murder to manslaughter.

On his part Mr. Omutelema supported both the conviction and sentence of the appellant. He submitted that the prosecution had established that the act of killing was deliberate and that the appellant knew what he was doing. He further pointed out that the appellant absconded after the incident and was arrested in Marakwet two years later. On the issue of intoxication, Mr. Omutelema submitted that the evidence on record did not show that the appellant had been drinking the whole day, and therefore the defence of intoxication was not available to the appellant. It was Mr. Omutelema’s contention that this appeal lacked merits and that it ought to be dismissed.

We have gone over the evidence and the submissions by counsel appearing and in our view the crucial

evidence implicating the appellant was given by **Kipkoskey (PW1)**. In the course of his evidence in chief, **Kipkoskey** testified as follows:-

“I had a cousin called JOHN CHERUIYOT SUTER. He visited me. He asked me that, we go for a walk. When we reached the gate, we met Henry Katap Kipkeu. He had a knife, 1 foot long. He had it he raised hand.

JOHN CHERUIYOT SUTER asked what is the knife for? Kipkeu said that “hata wewe ni mwingine” and stabbed him in the stomach. Henry left with the knife. I helped John. He was bleeding I took a taxi. I took him to Memorial Hospital. He was admitted and surgery carried out. On 5th March, 1999 at about 1:00 p.m., John Cheruiyot Suter died.”

In concluding his evidence in chief the witness said:-

“I know Henry, we lived on the same plot. We had single rooms. Henry Kipkeu is in court – (identified the accused). We lived with accused for two years. The deceased was in another plot, about 100 metres away. The deceased and the accused were friends. There was no problem, quarrel between them. John Suter used to drink. He had drank that day but not much. I had drank busaa. I was not with him. Henry had drank. He was drunk. I think he knew what he was doing.

I later learnt that the two had drunk together and left each other earlier. Henry was not a calm man. He was a “mgaidi”. He liked fighting and quarreling people. I saw Henry. It was daylight. I saw him stab the deceased.”

The other witness at the scene was **Barote (PW3)** who in the course of his evidence in chief stated, inter alia:-

“I heard a door banging and I saw Henry’s wife, Phyllis. She came in. I was surprised. She said that “Kipkunur”, John had been stabbed. I looked through the window. I saw John pull up his shirt. He had a wound on his stomach. I saw Henry. He had a knife. He was wielding it in the air. He said I can kill somebody (mimi naweza ua mtu) it was one foot long. (identifies the accused). When he saw the deceased starting to bleed, he ran away through the gate. They were like six feet away from the window. It was in front of my house. I went outside. The deceased asked for water. I gave him water in a plastic bottle. We went to look for a vehicle. We did not get. We came back and found that he had been taken. I went to Memorial hospital the next day. The deceased died four days later.

I was the landlord. The accused ran away. He was arrested a year or two later. More than a year. There was no dispute between the deceased and the accused. I never heard them quarrel. I did not know if they were drunk.”

In view of the foregoing it cannot be denied that the appellant stabbed the deceased on the material day. The incident took place in broad daylight and the appellant and the deceased were people well known to the eyewitnesses (**PW1 and PW3**).

Having so stated, the next issue to be considered is the defence of intoxication. In her submission Miss Wanjala contended that the appellant had been drinking “*the whole day*”. We have carefully perused the record of the superior court but we could not find the basis of this submission of “*drinking the whole day*”. Not even the appellant said in his defence that he had been drinking the whole day – indeed the appellant’s defence was that on the material day he was away in Marakwet!

Section 13 of the Penal Code reads as follows:-

“(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at

the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-

- (a) *the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
- (b) *the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.*
- (3) *Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provision of this Code and of the Criminal Procedure Code relating to insanity shall apply.***
- (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.***
- (5) *For the purpose of this section, “intoxication” includes a state produced by narcotics or drugs.”***

In our view the evidence on record does not come anywhere near the foregoing provisions. We are therefore satisfied that the learned Judge was right in rejecting the defence of intoxication.

Having carefully considered the evidence adduced in the superior court, the submissions both in the superior court and in this Court, we are of the firm view that the appellant was convicted on very sound evidence and that his conviction was, indeed, inevitable.

Before we conclude this judgment we must say something about the manner the learned Judge dealt with the sentence. We note that the learned Judge sentenced the appellant to death in his main judgment without recording mitigating factors, if any. This was not proper. As we have stated previously, after the judgment is read out and in case of a conviction, the court must take down mitigating circumstances from the accused person before sentencing him/her. This obtains even in the cases where death penalty is mandatory and the reasons for this requirement are clear. Some of the reasons are first that when the matter goes to appeal as this matter has now come before us, there are chances that the appellate Court may reduce the offence to a lesser charge such as that of manslaughter, grievous harm or assault. In such circumstances, mitigating factors would become relevant in assessing the sentence to be awarded. Secondly, even if the matter does not come to this Court on appeal or if it comes to this Court and the appeal is dismissed, such mitigating factors would still be required when the matter is placed before another body for consideration of clemency. Thirdly, matters such as age, pregnancy in cases of women convicts, may well affect the sentence. It is thus necessary that mitigating factors be recorded even in capital offences.

In ***JOHN MUOKI MBATHA V. R. – Criminal Appeal No. 72 of 2007*** (unreported) this Court stated:-

“As we have stated over and over again when considering sentences in respect of murder cases, the sentences should be reserved and pronounced only after mitigating factors are known. This is important because, in mitigation, matters such as age, and pregnancy in cases of women convicts, may affect the sentence even in cases where death sentence is mandatory. In our view, no sentence should be made part of the main judgment. Sentencing should be reserved and be pronounced only after the Court receives mitigating circumstances if any are offered.”

In conclusion, we are of the view that apart from the error in sentencing the appellant in the main judgment we decipher no other error on the part of the learned Judge. He was right in convicting the appellant since, as we have already stated, the appellant’s conviction was inevitable as it was based on very sound evidence. We agree with Mr. Omuletema that this appeal ought to be dismissed. Accordingly

the appeal is dismissed.

Dated and delivered at Eldoret this 29th day of May, 2009.

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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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