IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 350 of 2007

DAVID MBAU NJOROGE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Nyeri (Makhandia, J) dated 26th October, 2007

in

H.C.CR.A. NO. 174 OF 2004)

****

JUDGMENT OF THE COURT

This is the second and final appeal by *DAVID MBAU NJOROGE* against his conviction for the offence of manslaughter contrary to *Section 202* of the Penal Code. It was alleged in the charge sheet that on the 21st day of April, 2002 at Githembe village in Maragua District of Central Province, he unlawfully killed *John Nganga Kabaru.* He was tried and convicted for the offence by Murang'a Principal Magistrate, G.K. Mwaura, Esq, and the conviction was upheld by the superior court, *Makhandia J.* Upon his conviction the appellant was sentenced to serve 10 years in prison.

As this is a second appeal, only issues of law may be raised and considered - See *Section 361* of the Criminal Procedure Code. This court has also stated, times without number, that it will not interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence at all or on a misapprehension of it or no reasonable tribunal properly directing itself to the evidence would make such findings. In other words, where the findings are perverse.

The appellant was unrepresented before us. He drew up the memorandum of appeal in person and raised seven issues which may be summarized:

"*The learned judge erred in law in:-*

Ø failing to analyse the evidence of the passion (sic) of provocation in contravention of section 207 of the Penal Code.

Ø failing to analyse and evaluate the evidence of malice aforethought in contravention of section 206 Pc(sic).

Ø *failing to analyse (sic) the evidence of the investigating officer (which) was crucial but was not tendered – showing who had the knife – deceased or the appellant, in contravention of section 109 of the Evidence Act.*

Ø *finding the prosecution case was established but failed to observe that the prosecution did not meet the requirements of section 14 of the Evidence Act.*

Ø *finding that the appellant used more (sic) force but failed to observe that the stabbing was not with repetitions (sic).*

Ø *finding that the offence was premeditated whereas there was no evidence to show a grudge between the deceased and the appellant prior (sic) and it is the deceased who suddenly rose and started attacking the appellant.*

Ø *not evaluating and analyzing the entire evidence in the record adequately."*

We shall revert to those grounds of appeal shortly.

The prosecution case came through ten witnesses who established the following facts:-

On Sunday, the 21st April, 2002, *John Ng'ang'a Kabaru* ("the deceased") was at his small hotel business at Githembe shopping centre where he carried on the business of selling cow-heads. Present with him was his wife and partner in business *Joanina Wanjiku (PW1).* At about 4 p.m., the appellant came to the hotel and asked the deceased to sell him some cow-head meat. The deceased refused and a quarrel ensued between the two. *Wanjiku* had known the appellant since his childhood as they came from the same village, and she intervened in the quarrel. The deceased was calling the appellant a bad person while the appellant was threatening the deceased. The appellant walked away. Shortly after, the deceased also left the hotel and went to a bar within the shopping centre owned by one *Gachine.* There he met *Ndungu Njoroge (PW2),* a newspaper vendor, who was already seated in the bar and they began a discussion. There were a few other patrons in the bar, three of them, at the front of the bar, according to the barman, *Edward Kamau Gitau (PW6).* Shortly after the deceased settled down, the appellant came to the bar and *Edward Gitau*, who was at the counter saw him entering. *Ndung'u Njoroge* also saw him. Then the deceased left his seat and attacked the appellant as he entered the bar. He was beating the appellant using his hands. *Ndung'u Njoroge* and other patrons intervened in the fight to separate the two but then suddenly the deceased turned round holding his stomach and told them he had been stabbed by the appellant. The appellant simply walked away without talking to anyone. The deceased walked to his hotel holding his bleeding stomach and found his wife *Wanjiku.* He told her that he had been stabbed by the appellant with a knife at the bar. She saw the wound and it was bleeding profusely. The deceased's daughter, *Nancy Waithira Njenga (PW7),* who was attending a church crusade at the shopping centre and had seen her father in the bar, rushed to the scene and the deceased told her he was stabbed badly by the appellant. The family members and villagers, among them PW4, the deceased's son, and PW8, a teacher, arranged for transport to Maragua Hospital for first aid then on to Muranga District Hospital where the deceased died on arrival. Before his death he persistently identified and mentioned the appellant as his assailant.

The appellant was arrested the same day after being located at his mother's kitchen holding a panga. *Peter Njogu Kabaru (PW3), Benson Mburu, (PW4) a*nd other members of the public assisted *Charles Wanyoike Ngugi, (PW5)* the Assistant Chief of the area, to whom the incident had been reported, to make the arrest. He was then handed over to *Pc Washington Mwangi,* (*PW9)* of Saba Saba Police base who rearrested him before he was charged with the offence of manslaughter.

Dr. Macharia of Muranga District Hospital carried out a post mortem examination on the deceased on 30th April, 2002 and the report was produced in evidence by *Dr. Julius Kimani Mwago (PW10).* It was established that the deceased was stabbed twice; on the left sixth intercostal space and below the rib cage on the left. The left lung had been punctured and there was a penetrating wound injury to the spleen, causing intra-abdominal hemorrhage. In the opinion of the pathologist, the cause of death was shock due

to massive internal bleeding due to stab wounds.

In his defence, the appellant denied that he ever went to the bar owned by *Gachine* in Githembe shopping centre where the deceased was. He swore that he had gone to church early that morning and left three hours later to go to Hollywood bar in the shopping centre to play the game of pool. After that he went home only for some people to call him out at 9.00 p.m. and beat him up before taking him to the Chief's Camp. He was not at the bar where the offence was committed and the witnesses who said otherwise had lied. He never saw the deceased and never quarreled with him that day. He nevertheless, discounted any grudge between himself and the witnesses who had testified about his involvement in the offence. He asserted that there was no proof of the allegations made against him.

After reviewing the evidence on record, the learned trial Magistrate believed the prosecution witnesses and disbelieved the appellant. He found the case against the appellant proved beyond reasonable doubt, stating:

"*The testimonies of these witnesses are clear and consistent and I have no doubt that the accused and the deceased met at the bar. The deceased went to attack the accused. The witnesses saw the two men quarrel and fight. The deceased then emerged from the fight while stabbed. He told his people who were there and also his wife and the neighbours who visited him that he was stabbed by the accused. This dying declaration is fully and sufficiently corroborated by the evidence of the quarrel and the fight and the deceased coming off when stabbed.*

I have considered all the evidence in this case and find that the accused's evidence to the effect that he was not involved in stabbing the deceased is not true at all. I find that the accused stabbed the deceased when they were fighting. The deceased was using his bare hands but the accused decided to hit back with a knife. Also the attack was at the bar door and it was open to the accused to go back. He did not have to answer back with knife stabs at all. His act was grossly unlawful and I do not doubt the prosecution case at all."

Those findings were accepted by the superior court after re-evaluation of the evidence and the court was positive that the issue of mistaken identity could not arise. The offence was committed in broad daylight, slightly after 4 p.m., and there was evidence that the appellant and the deceased had been spoiling for a fight, the whole day having met twice earlier and quarreled before the third fatal encounter. The learned Judge fully analysed the information given by the deceased to the family and to other by-standers before his imminent death, and surmised that it amounted to a dying declaration under *Section 33(a)* of Evidence Act. He sought corroboration for the dying declaration, and found it in the evidence of *Wanjiku (PW1), Ndungu Njoroge (PW2)* and *Edward Gitau, (PW6).* The defence of the appellant was also analysed before it was rejected as improbable. In the end the learned Judge stated:-

"*There is no doubt at all that it is the appellant who stabbed the deceased. All the circumstances point to the appellant's involvement in the crime. It is clear to me that in stabbing the deceased the appellant used more force than was absolutely necessary. As correctly observed by the learned magistrate, the deceased in attacking the appellant was using his bare hands. However, the appellant hit back with a knife. Also the attack was at the door of the bar and it was open to the appellant to retreat. He did not. He should never have responded to the deceased's attack with a knife at all. His act was premeditated and reckless and resulted in the loss of life."*

As stated earlier, the appellant argued his appeal before us in person. He made no reference to the grounds as listed above but chose to address us globally on his complaints. He revisited the issue of malice aforethought which he argued before the superior court, submitting that the learned judge erred in finding that he had malice aforethought or premeditated the attack.

It was not clear whether the appellant appreciated the import of his submissions or the exposition of the issue by the superior court. We think however, that his contention was that he did not form any intention to harm the deceased and indeed he never had any knife and never came into contact with him. Much of that complaint relates to findings of fact which the two courts below concurred in and for good reason.

That is to say, the appellant and the deceased met, not once but thrice on the fateful day; that there was a quarrel and subsequently a fight; that the deceased attacked the appellant; and that it was the appellant who caused the stab wounds that resulted in the deceased's death. There was cogent evidence to form the basis of such findings and we are not at liberty to interfere with factual findings. The issue of malice aforethought was adequately dealt with by the superior court and we are satisfied that it was sufficiently dealt with. The learned judge stated:-

"*The appellant has also referred this court to section 206 of the penal code. That section deals with malice aforethought. Malice aforethought is relevant for purposes of a charge of murder. The appellant is presumably saying that there was no malice aforethought in his actions. However the appellant was not charged with murder but manslaughter so that the issue of malice forethought is irrelevant. But if it was required, one could easily have established the same by the appellant's conduct. He quarreled with the deceased, went away and 10 minutes later stabbed the appellant. It is possible that he walked to pick the knife if he did not have it and prepare to attack the deceased in the bar. By stabbing the deceased fatally, the appellant must have intended the death of the deceased. There then is the malice aforethought.*"

There is no justification for the complaint raised and we reject it.

Upon being asked by the court to amplify the references made in his memorandum of appeal to *sections 109* and *14* of the Evidence Act, the appellant submitted that *Section 109* requires proof of allegations made but the prosecution did not prove that he was the one who had the knife which stabbed the deceased or that he was the one who stabbed the deceased considering that there were many people with the deceased at the bar. The section provides as follows :-

"*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*."

There can be no quarrel about the provisions of that section. But, as we have stated above, there were concurrent findings of fact that the appellant was present with the appellant at the bar, and that he had the object that caused the stab wounds leading to the death of the deceased. There was proof of those facts beyond doubt and we have no reason to differ.

The appellant did not amplify his submissions on *Section 14* of the Evidence Act. The Section has three subsections, all relating to facts showing state of mind or feeling. These are declared relevant by the section wherever they are in issue. The only relevance we find in raising the matter in the memorandum of appeal is the claim before the superior court that he was not mentally stable. We think however that the issue was sufficiently dealt with and we find no reason to find otherwise. The learned judge stated:-

"*The appellant did in his petition of appeal allude to the fact that he was mentally sick and had been admitted previously at Mathare mental hospital. The record however does not show that they raised the issue during the trial. He did not even pursue the issue before this court. If indeed his allegation was true, certainly it was worth of consideration. Further when he appeared before me during the hearing of the appeal, he did not strike me as a person who was mentally sick. In my view the issue is a mere red herring and an afterthought.*"

We agree.

Finally the appellant complained about the sentence of 10 years which he said was harsh and excessive. Although this was not part of the grounds raised in his memorandum of appeal, it is not open for this Court to consider even if it had been raised, unless the legality of it was in issue. Severity of sentence is a question of fact. *Section 361(i)(a)* of the Criminal Procedure Code is clear on that.

As correctly observed by learned Senior Principal State Counsel *Mr. Orinda*, the issues raised by the appellant were on factual matters upon which the two courts below expressed themselves. There was thorough re-evaluation of the evidence by the superior court in admirable fashion and we find no reason

to interfere with the findings made.

The appeal has no merit and we order that it be and is hereby dismissed.

DATED and DELIVERED at NYERI this 22ND day of MAY, 2009.

P.K. TUNOI

……..

JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

J. G. NYAMU

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR