



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 96 OF 2008

BETWEEN

BENSON KEDISIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kitale (Lady Justice Karanja)

dated 9th July, 2008

in

H.C.CR.C NO 25 of 2001

JUDGMENT OF THE COURT

Benson Kedisia, the appellant herein, was tried and convicted by Lady Justice Karanja sitting at Kitale 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 11th February, 2001 at Kamatira Reserve in West Pokot District of the Rift Valley Province, the appellant murdered Josephine Petang Julius. Josephine was the wife of Julius Kakuko (PW1).

On the day of the alleged murder, Julius had gone to the home of Wilson Sigei who is the brother of the appellant. Julius said he went there at 2pm; Wilson was not there but Julius found Wilson's wife Monica together with Julius' own wife Josephine, the deceased. Julius said he was feeling tired and sleepy since he had attended a party the previous night. He fell asleep under some shade and he slept there until about 6p.m when Josephine and Monica woke him up and took him into Monica's house. Julius was asked to sleep on a bed there. That bed apparently belonged to Monica and her husband. Though Julius himself denied that he was drunk, we think that on the recorded evidence, he must have been, at the very least, tipsy and that would explain his sleeping under the shade from 2 pm to 6 pm and continuing to go and sleep on the bed in the house.

Be that as it may, while Julius was lying on the bed, the appellant who was the brother of Wilson Sigei arrived in the home and he immediately read sexual mischief between Julius and Monica. The appellant attacked Monica and Julius intervened to separate them. The appellant then attacked Julius

biting him on the right thumb. Julius also bit the appellant on the right ear. The appellant said that by biting him on the ear, Julius wanted him (appellant) to remain ugly so that no woman would want to marry him. The appellant then ran to his home which was estimated to be one kilometer away, armed himself with a bow and arrows and returned to the scene of the fight. Julius, Monica and Josephine were warned that the appellant was returning to continue with the fight. The three then ran into the house of Monica's mother-in-law and as they were in the process of shutting the door to keep the appellant out, the appellant fired an arrow which caught Josephine on her lower abdomen. They somehow managed to escape from the room and continued to run away. Josephine was losing a lot of blood from the arrow-wound. She was put on a motor vehicle which took her to a hospital in Kapenguria. She succumbed to her injuries one week later.

Dr Chemwono carried out the post-mortem on the body of Josephine on 19th February 2001. The post-mortem report was produced in evidence on behalf of Dr Chemwono by Dr Juma Kibe (PW4). According to Dr Chemwono the cause of death was cardio-pulmonary failure secondary to the wound in the abdomen and septicemia.

The appellant made an unsworn statement in his defence denying having killed Josephine. Most of that statement concentrated on the date 12th February, 2001 when he was arrested. He said when he was arrested he admitted the fight between him and Julius but totally denied the killing. He said the witnesses who testified against him on the issue of his having killed Josephine were members of his family and could have fabricated the case against him. He did not, however, say what would make his own family fabricate a charge of murder against him.

At the end of the trial the learned Judge was satisfied that it was the appellant who had shot Josephine with an arrow which subsequently caused her death. On the recorded evidence, this finding cannot possibly be wrong. The appellant admitted fighting Julius on 11th February, 2001. Julius and Jane Chepokaptalam Michael (PW2) gave exactly the same story and Jane is the mother-in-law into whose house Julius, Monica and Josephine had run. Like the learned Judge, we are satisfied the appellant killed the deceased in the manner narrated by the witnesses and the appellant's denial that he killed the deceased was for rejection and was rightly rejected.

When the appellant's trial opened before the learned Judge, she selected three assessors to aid her in the trial. The law as at that time mandatorily required that such trials were to be held with the aid of assessors. The assessors heard the evidence of the first five witnesses but before PC Benson Remoy (PW6) could testify on 20th November, 2007 the learned Judge simply recorded:

“Assessor(sic) discharged”.

No explanation was offered for that discharge, but of course we now know that by 20th November, 2007 the law requiring that trials in the High Court be held with the aid of assessors had been repealed.

The crime charged against the appellant had been committed on 11th February, 2001. The trial of the appellant started before Karanja, J on 15th March, 2006. At the time the crime was committed and the time when the trial started, the appellant was entitled to a trial with the aid of assessors, and both Mr. Otieno, learned counsel for the appellant, and Mr Omutelema, the Senior Principal State Counsel agreed that there was no legal justification for the Judge's discharge of the assessors, particularly in view of the provisions of **section 23(3)** of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya. We agree with Mr. Otieno and Mr Omutelema on this aspect of the matter. We were asked by the two advocates to order a retrial of the appellant; in ordinary circumstances that, would be the correct position for us to take.

But before ordering a retrial, the Court is entitled to look at all the circumstances surrounding a particular case including the issue of whether a conviction is likely to be obtained, taking into account the admissible or potentially admissible evidence available.

In this case, we have pointed out that Julius himself was most likely drunk. When cross-examined by Mr. Wafula who represented the appellant in the trial before the High court, Julius admitted that when the appellant arrived at the home where the fight took place, the appellant was drunk. Evidence of drunkenness need not necessarily come from an accused person himself; such evidence can come from the prosecution witnesses and it cannot be simply ignored because it has only come from the prosecution witnesses. If the learned Judge had not wrongly discharged the assessors, it would have been her duty to direct the assessors on the issue of alleged drunkenness on the part of the appellant. In the case of **SAID KARISA KIMUNZU V REPUBLIC**, Criminal Appeal No 266 of 2006 (unreported) this Court dealt extensively with the question of drunkenness and its relationship to **section 13(4)** of the Penal Code. There, the Court stated as follows:-

“But under subsection (4) the court is required to take into account the issue of whether the drunkenness or intoxication deprived the person charged of the ability to form the specific intention required for the commission of a particular crime. In a charge of murder such as the one under consideration, the specific intention required to prove such an offence is malice aforethought as defined in section 206 of the Penal Code. If there be evidence of drunkenness or intoxication then under section 13(4) of the Penal Code, a trial court is required to take that into account for the purpose of determining whether the person charged was capable of forming any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. In the circumstance of this appeal, the learned trial Judge was required to take into account the appellant’s drinking spree of the previous night and even that morning in determining the issue of whether the appellant was capable of forming and had formed the intention to kill his son.

It was agreed before us that the learned Judge did not give any directions at all to the assessors on this issue and in his judgment the only reference to it is when the Judge was dealing with the verdict of the second assessor who, despite the total failure of the Judge to direct them on the issue of intoxication, had told the Judge that the appellant:-

‘... is guilty of manslaughter as he was drunk’

The first and third assessors found the appellant not guilty at all. In his judgment the learned Judge only said, with regard to intoxication:-

‘The second assessor returned a verdict of guilty to manslaughter. He based his finding on the fact that the accused was drunk when he committed the offence. First there was no evidence that the accused was drunk. In fact all the eye witnesses testified to the fact that although he had gone drinking, he did not appear drunk.’

That may be so but the learned Judge was still bound to take the issue of intoxication or drinking into account in determining whether he was capable of forming the specific intent to commit murder. He (i.e. the learned Judge) was also required to direct the assessors on the issue.”

As we have said, the assessors having been wrongly discharged we do not know what their verdict on the issue of drunkenness would have been had they been allowed to stay up to the end and had been properly directed on that issue. We must give the benefit of that doubt to the appellant. Again in her entire judgment, the learned Judge does not at all refer to that issue; we do not know what her conclusion on it would have been if she had dealt with it. The benefit of that doubt must also go to the appellant.

Accordingly, we allow the appellant’s appeal against the conviction and we set aside the conviction for murder and substitute it with a conviction for manslaughter under **section 202** of the Penal Code. Under **section 205** of the Penal Code we now sentence the appellant to seven years imprisonment, the sentence to run from 9th July, 2008 when he was sentenced by the High Court. It may well be that the appellant was one of those prisoners whose death sentences had been commuted to life imprisonment by His Excellency the President. Even if that is so, the President would have acted on the basis that the appellant had been rightly convicted for murder and was, therefore, rightly sentenced to death. We have found and held that the appellant was wrongly convicted of murder and wrongly sentenced to death.

Accordingly the orders of this Court must supersede any other orders which may be in force with regard to the appellant. We may take this opportunity to respectfully suggest to those whose duty it is to advise His Excellency the President to withhold any action or intervention by the President in respect of prisoners who have been sentenced to death and whose appeals are still pending in the courts.

Dated and delivered at Eldoret this 23rd day of October, 2009

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR