IK..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

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

(Rawal, J) dated 15th December, 2003

In

H.C. Cr. C. No. 80 of 2003)

****

JUDGMENT OF THE COURT

By its information dated 27th March, 2003, the Republic charged the appellant I.K. with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars of that charge were that on the 10th day of August, 2002 at Njiru shopping centre in Nairobi, the appellant murdered Robert Mulinge, hereinafter "the deceased."

Lady Justice Rawal, sitting with the aid of assessors as was then mandatory, tried the appellant on the charge. After summing-up the case to the two assessors who remained at the conclusion of the trial, the two unanimously returned a verdict of guilty as charged. In a reserved judgment dated and delivered on 15th December, 2003, the learned Judge also found the appellant guilty as charged and proceeded to sentence him to death, on the basis that:

"***As I do not have any discretion as to the sentence, I sentence him to death in accordance with law."***

That sentence was imposed despite the un-contradicted evidence before the Judge that at the time the appellant was said to have committed the crime of murder, he was aged sixteen (16) years and at the time of sentence he was seventeen years. In his sworn evidence before the Judge the appellant himself said:-

"***I am [IK]. I am seventeen years of age."***

It is not quite clear from the recorded evidence how the document came to be in the record of the trial Judge, but there is a "Medical Examination Report" (P3) signed by a Doctor Kamau who appeared to have examined the appellant on 28th October, 2002 and according to that report it is shown as follows:-

"**Age 16 years.**

Mentally fit."

We take it that the learned Judge had that document before her, but even if she did not have it the

appellant as we have seen, specifically told the Judge that he was seventeen years at the time he testified which was on 13th November, 2003.

The learned Judge thought that because she had convicted the appellant on the charge of murder, she had no discretion on the matter and had to sentence him to death. With the greatest respect to the learned Judge, the law did not in fact permit her to sentence the appellant to death.

First, ***section 25 (2)*** of the Penal Code provides and has always provided:-

"***25 (2). Sentence of death SHALL NOT be pronounced on or recorded against any person if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody."***

The learned Judge's assertion that she had no discretion on the question of sentence is directly contrary to this provision. The section, instead, mandatorily prevented her from imposing the death penalty on the appellant who was sixteen years at the time the offence was alleged to have been committed.

Secondly, the Children Act, i.e. ***Act No. 8*** of 2001, became operational on 1st March, 2002, long before the appellant was sentenced, indeed long before the date of commission of the offence. ***Section 190 (2)*** of that Act is categorical on the issue:-

"***No child shall be sentenced to death,"***

and section 2 of the Act defines child as

"***any human being under the age of eighteen years."***

Once again that section deprived the learned Judge of the jurisdiction to impose the death sentence on the appellant, even if the appellant was guilty of murder.

Was the appellant guilty of murder or any other offence? Mr. Ondieki, learned counsel for the appellant, argued, first that the appellant was not guilty of any offence because his fundamental rights under the Constitution had been violated and because of the violation of those rights, the appellant's trial was a nullity and the appellant was, *ipso facto,* entitled to an acquittal. The appellant's constitutional right which Mr. Ondieki alleged had been violated was his right to be produced in court within fourteen days after his arrest. For some reason which we do not quite understand, Mr. Ondieki appeared to think the police had kept the appellant in their custody for some ten months before producing him before any court. There is no factual basis for that contention. All we can do is to quote the sworn evidence of the appellant himself:-

"***On 21st October, 2002, I went to the shopping centre at Njiru as it was a big centre. I met persons called John Wambua and Aenea. I knew them. They told me I was with someone who is (sic) been seen. They were referring to the deceased. They told me as I was with him to report to the police station. We went to Kayole police station. When I went there I was asked to remove my shoes. I was there upto 28th October, 2002. On that day I was taken to Buru Buru police station. There I was informed by a police officer that I had murdered the deceased. I was then arraigned in court on 31st October, 2002. I did not kill the deceased. We parted on that day when I left him."***

What we gather from this extract is that the appellant went to Kayole Police Station on 21st October, 2002. He was kept in custody there until 28th October, 2002 when he was removed to Buru Buru Police Station. The police at Buru Buru kept him there until 31st October, 2002 when he was arraigned in court. Accordingly the appellant was in police custody between 21st October, 2002 and 30th October,

2002. He was produced in court on 31st October, 2002. Under ***section 72 (3)*** of the Constitution, the police were entitled to keep him in their custody for fourteen days. We do not appreciate what kind of arithmetic would make the period between 21st and 30th October, 2002 amount to ten months. In our calculation the appellant was kept in police custody for some ten days. We think Mr. Ondieki merely raised this point because it is his pet subject and would appear to think it must be raised in each and every appeal in which he appears. We agree with Mr. Kivihya, the learned Senior State Counsel, that the alleged issue of the violation of the appellant's constitutional rights under ***section 72 (3)*** of the Constitution is wholly irrelevant in the circumstances of this appeal and we reject it.

On the evidence itself it is quite clear to us, as it was to the learned Judge and the assessors that the deceased who was seventeen years old and the appellant had long periods of drinking liquor between 8th August, 2002 and 10th August, 2002. On the 10th August, 2002 they were at it again and when a dispute arose between them over some money, with the appellant demanding some Kshs.30/- from the deceased. From their drinking place, the appellant and the deceased joined Robert Muthiani (PW1), Wambua Mutunga (PW2) and Aenea Asiki Biboi (PW3) at the place where these witnesses were working loading sand in lorries. The dispute between the appellant and the deceased continued and it was the evidence of those witnesses that the appellant ran away from the place but returned after fifteen or so minutes armed with a knife. The appellant attacked and stabbed the deceased with the knife and it was the evidence of the three witnesses that they saw the appellant attack the deceased with the knife. The doctor who carried out the post-mortem on the body of the deceased saw a laceration on the right lung with heamothorax and also ruptured right ventricle. The doctor was of the opinion that the cause of death was due to penetrating chest injury caused by a sharp object. That assessment agreed with the evidence of the three prosecution witnesses that they saw the appellant stab the deceased with a knife. That evidence was perfectly credible and was accepted by the learned Judge and the assessors. Nothing was shown to us in the submissions of Mr. Ondieki which would make us depart from the conclusion that it was the appellant who caused the death of the deceased by stabbing the deceased on his chest with a knife . We confirm that finding.

There was, nevertheless, evidence from both sides of the divide that at the time the appellant stabbed the deceased, he was drunk. The learned Judge put it thus in her judgment:-

"***Both the prosecution and defence told the court that there ensued a quarrel between the two over money. Both were drunk. ------"***

In her summing up to the assessors, the learned Judge made no attempt at all to explain to them the issue of drunkenness and how they were to treat it. In her own judgment she dealt with the issue of drunkenness in this fashion:-

"***I thus find the accused person, after the quarrel left the scene vowing to come back. He came back after 10 to 15 minutes along with his brother and armed with a knife. From his sworn evidence before me, I can find that he was not that much drunk not to understand or know the consequences of his act."***

We think it was the duty of the learned Judge to direct the assessors and herself on the provisions of ***section 13 (4)*** of the Penal Code. That section provides:-

"***13 (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."***

We think the learned Judge ought to have asked the assessors to take into account the issue of admitted drunkenness of the appellant and whether, in spite of that drunkenness the appellant was still in a position to form any intention, specific or otherwise, to kill the deceased. If the assessors had been so directed it might well be that they would have come to the conclusion that the appellant was only guilty of manslaughter. Mr. Kivihya submitted that even though the Judge did not so direct the assessors, she would not have been bound to agree with their opinion. That is correct but if she did disagree with them

on the point she would have been obliged to give reason(s) for so disagreeing . In the end Mr. Kivihya did concede that the appellant ought to have been convicted of the offence of manslaughter rather than murder. We also agree.

Accordingly we allow the appeal against the conviction to the extent that we set aside the conviction for murder under ***section 203*** of the Penal Code and substitute it with a conviction for manslaughter under ***section 202*** of the Code. We also set aside the sentence of death, which was, in any case unlawful even if the appeal against the conviction had been rejected by the Court.

What sentence should we impose upon the appellant? As we have seen, he was arrested on 21st October, 2002 and has been in custody since then. He was "a child" in terms of the provisions of ***section 2*** of the Children Act. ***Section 191 (1)*** of that Act sets out the penalties which a court may impose upon a child offender. These are:-

"***(a) by discharging the offender under section 35 (1) of the***

Penal Code;

(b) by discharging the offender on his entering into a recognize, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act;

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments.

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counselor.

(i)by ordering him to be placed in an educational institution or a vocational training programe;

(j)by ordering him to be placed in a probation hostel under the provisions of the Probation of Offenders Act;

(k) by making a community service order; or

(l)in any other lawful manner."

We have already pointed out that the appellant has been in custody since 21st October, 2002; that is a period of some seven years now. The offence he committed is serious but we think that he has been sufficiently punished for it and we are accordingly minded to invoke the provisions of ***section 35 (1)*** of the Penal Code. We accordingly discharge the appellant under that section but on condition that he shall commit no other offence within a period of twelve months from the date of this discharge. In accordance with ***section 35 (2)*** of the Code, the Court has explained to the appellant the terms of his discharge. These shall be the Court's orders in the appeal.

Dated and delivered at Nairobi this 16th day of October, 2009.

R.S.C. OMOLO

……

JUDGE OF APPEAL

S.E.O. BOSIRE

……

JUDGE OF APPEAL

ALNASHIR VISRAM

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.