REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 87 of 2007

ANTONY KAHURA NDUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

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

Nakuru (Musinga, J)

dated 28th June, 2007

In

H.C. Cr. C. No. 72 of 2004)

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JUDGMENT OF THE COURT

The appellant, Antony Kahura Ndung'u, was convicted by the superior court (Musinga, J) for the offence of 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 May, 2004 at Mwariki farm in Nakuru District within the Rift Valley Province, he murdered Peter Matee ("the deceased").

According to the prosecution case, at about 5.00 p.m. on the material day, the appellant, who was in the business of washing cars, arrived at his place of business to find Dickson Ngige Njau (PW1) (Dickson) also in the car washing business, washing a lorry that belonged to his customer. He got annoyed and engaged Dickson into an argument that eventually led to a fight. The appellant then left and returned shortly with a knife. He started chasing Dickson, whereupon the deceased intervened in an attempt to separate the two. The appellant stabbed the deceased on the side and ran away, still holding the knife. Members of the public gave chase, and eventually caught up with him as he attempted to jump over a barbed wire fence. He was beaten up, and the knife was recovered.

Both the deceased and the appellant were taken to the hospital. The appellant was treated and discharged, while the deceased died upon arrival. The post-mortem was conducted by Dr. Philip Kamau, who found the body to have had a penetrating injury to the left side. Dr. Kamau concluded that the cause of death was excessive bleeding caused by a penetrating sharp object.

When he was put on his defence, the appellant testified under oath that on the material day he had been drinking alcohol with his friend Martin from 10.00 a.m. on that day. By the time he came to his place of business, he was very drunk. He found Dickson washing the lorry which he was supposed to wash. He got into an argument, that led to a fight with Dickson. They were separated by people and he decided to go to a bar. As he was headed to the bar, the deceased grabbed him from behind, and as he was holding him, Dickson stabbed him with a knife. According to the appellant, Dickson also stabbed the deceased. He managed to escape, but was caught by members of the public who beat him up.

The learned Judge, sitting with the aid of assessors, as was required by law at that time, did not accept the version given by the appellant, found him guilty of the offence of murder, and sentenced him to death. Two of the assessors returned a verdict of guilty of murder, while the third one was of the opinion that the appellant was guilty of manslaughter.

The learned Judge did indeed apply his mind to whether the appellant could be guilty of manslaughter as opposed to murder. Here is how he delivered himself:-

"***The question that this court has to resolve is whether the accused is guilty of murder or manslaughter. The accused denied having stabbed the deceased. He alleged that the deceased may have been stabbed by PW1. He further stated that he was very drunk on the material day. However, he could still vividly remember the events of the day. He was aware that he fought with PW1 and that they were separated after a short while. He said that they were not using any weapon. It is most likely that at the time of the fight, neither the accused nor PW1 was armed with any knife. I believe the accused decided to arm himself with the knife after he was separated from PW1. In arming himself with a knife, he must have intended to assault PW1 with it. PW1, PW3 and PW4 testified that they saw the accused removing a knife from his pocket and stabbing the deceased with the same. There was no evidence that PW1 had any knife in his possession. I do not therefore agree that it was PW1 who stabbed the deceased. Although the accused was intoxicated with alcohol at the material time, it is trite law that intoxication does not constitute a defence to any criminal charge except in circumstance as stated under*** *section 13 (2)* ***of the Penal Code. It was not shown that the accused was by reason of intoxication, insane, temporary or otherwise at the time he committed the offence or that he did not know what he was doing. With respect, the court was not persuaded by counsel's submissions as aforesaid because the submissions were not backed by any sufficient evidence in support thereof.***

According to *section 203* ***of the Penal Code, a person is guilty of murder, if, with malice aforethought causes the death of another person by an unlawful act or omission. On the other hand,*** *section 202 (1)* ***of the Penal Code states that:-***

"*any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter."*

It is therefore important to determine whether the accused had malice aforethought in causing the death of the deceased. *Section 206* ***of the Penal Code defines malice aforethought as follows:-***

"*206. Malice afterthought shall be deemed to be established by evidence proving any or more of the following circumstances –*

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony:

*(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**"***

From the foregoing, I am satisfied that the accused, with malice aforethought, caused the death of he deceased."

Aggrieved by the decision of the superior court, the appellant is before us in this final appeal against conviction and sentence. He has put forward four grounds of appeal in a supplementary memorandum of appeal filed by learned counsel for him, Mr. M.S. Mugo.

These are:-

1. The Learned Judge erred in law and in fact in finding that malice afterthought had been established without evidence to show an intention to cause death or to do grievous harm.

2. The Learned Judge erred in law and in fact by disregarding the defence of the Appellant that he was provoked without evidence in rebuttal and that the Appellant ought to have been given the benefit of doubt.

3. The Learned Judge erred in law and in fact in failing to weigh the discrepancy of the evidence of the prosecution witnesses to the benefit of the Appellant.

4. The Learned Judge erred in law and in fact in failing to establish without a shadow of doubt as to who exactly had the murder weapon given that the prosecution witness gave conflicting testimonies regarding the same."

However, counsel chose to argue only the first two grounds. His main argument centred around "*malice aforethought*." Mr. Mugo submitted that the appellant's quarrel was with Dickson; that the deceased was caught in the cross-fire; that the appellant had no intention, hence no malice aforethought to kill the deceased; that the appellant acted out of provocation; that he was intoxicated at the time; and finally that his defence was not properly evaluated.

In reply, Mr. T. G. Njogu, Senior State Counsel, submitted that there was overwhelming evidence that the appellant stabbed the deceased; that there was no provocation; and finally that the defence of intoxication was properly rejected by the superior court.

We have carefully re-examined the evidence afresh and also considered the grounds of appeal as well as the submissions of both counsel. In the end, we think, with respect , that there were reasonable doubts which negate *mens rea* on the part of the appellant, the benefit of which ought to have been given to him. It is clear from the evidence on record that the appellant and the deceased had no differences or issues as between themselves; that there had been no altercation or fight between them; that the appellant stabbed the deceased only once in the process of a fight he had with another person, who the deceased was trying to separate from the appellant. It was unfortunate that this incident happened especially when the deceased was only tying to help separate two fighting men, and became a victim. We do not accept that the appellant was all blameless, or that he was provoked or that he was intoxicated within the meaning of the law. The issue of drunkenness in this case may only be considered under section 13 (4) of the Evidence Act . Even if the appellant was drunk or provoked, he used excessive force to repulse the attack and must take responsibility for it. There is no evidence that the deceased was armed when the fight began. The appellant caused the death of the deceased unlawfully. Accordingly, we quash the conviction for the offence of murder and substitute therefor a conviction for manslaughter under ***section 202*** as read with ***section 205*** of the Penal Code. We also set aside the sentence of death imposed under section 204 of the Penal Code and substitute therefor a sentence of seven (7) years imprisonment to run from the date of his conviction by the trial court, that is to say, ***27th June, 2007***. To that extent the appeal is allowed.

Dated and delivered at Nakuru this 2nd day of October, 2009.

P.K. TUNOI

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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.