



IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 346 of 2008

CHARLES HEHO NDIRANGU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a sentence and conviction of the High Court of Kenya at Nakuru (Koome, J)

dated 14th November, 2008

In

H.C. Cr. C. No. 4 of 2006)

JUDGMENT OF THE COURT

CHARLES HEHO NDIRANGU, the appellant, was convicted of murder contrary to *section 203* as read with *section 204* of the Penal Code and sentenced to death.

On the Christmas day of 2005 there was a feast at Ndaiga village of Laikipia District to celebrate and mark the circumcision ceremony for the appellant's brother who had been initiated. The family had slaughtered a goat and prepared food and drinks for villagers and other guests. In the course of the celebrations the appellant became unruly and assaulted the initiate. Due to his unbecoming behaviour in what was deemed to be a solemn ceremony the appellant who had suddenly become wild, was removed by force from the homestead. Sensing danger, Simon Wambugu (PW1), Joseph Wanjohi (PW2) and Perminas Kigo (PW3) decided to leave the home of the appellant. On their way home they met the deceased, John Gaichuihie Wambugu. Suddenly the appellant appeared and charged at them alleging that one Gichimu had bewitched him. The appellant then produced a knife and tried to stab Gichimu but PW1 restrained him. Gichimu then got a chance to run away. The appellant still seething with rage charged at the deceased and knifed him occasioning him grave injuries to which he succumbed.

A post mortem performed on the body of the deceased at Nanyuki District Hospital showed the cause of death as cardio-pulmonary arrest due to arterial injury due to penetrating wound at supra-scapular region. The appellant was also treated for some injuries allegedly sustained during the altercation with the witnesses.

During his trial with the aid of assessors, the appellant's defence was that he had partaken of some illicit brew which he had bought in the quantity of five litres. The young visitors together with Gichimu were so drunk that he had to escort some of them home. While returning to his home Gichimu wanted to stab

him with a knife. During the scuffle he wrestled the knife from him and stabbed him.

However, the learned trial Judge in convicting the appellant of murder as charged held that:-

“This defence is however sharply contrasted by the evidence on record from PW1, PW2 and PW3 who were categorical that it was the accused person who started creating disturbances while at his home. He followed Gichimo (sic) who ran to his home to call the mother. The deceased was trying to help Gichimo (sic) when the accused person stabbed him without any provocation. Against this evidence, I find the defence raised by the accused person is preposterous.”

In rejecting the defence of intoxication, the learned Judge held:-

“Under the law, intoxication is not a defence unless the accused person can prove that it was caused on him without his consent through malice or by negligence of another. In this particular case, who caused the intoxication of the accused person? Secondly by reason of the said intoxication, did it cause insanity on the part of the accused person when he killed the deceased person? It is trite law that every person in the normal course of things is expected to foresee the natural causes of his actions. In other words if somebody intoxicates himself willingly he must bear the consequences of his actions.”

The learned Judge concluded that the appellant was reckless when he used a knife to stab the deceased person without any provocation.

Before this Court the appellant through his counsel Mr. Kipkoech Ng'etich relies mainly on two grounds of appeal, firstly, that the learned trial Judge erred in law in convicting the appellant when malice aforethought was not proved; and secondly, that the defence of intoxication ought not to have been rejected.

Mr. Njogu, the Senior State Counsel, did not support the conviction for murder and conceded that no malice aforethought had been established on the part of the appellant when he killed the deceased. However, he urged us to find the appellant guilty of the lesser offence of manslaughter.

It is trite that as the first appellate court we have a duty to consider the evidence, re-evaluate it and draw our own independent conclusions in order to satisfy ourselves that there was no failure of justice. See **Ngui v. Republic [1984] KLR 279.**

There is evidence that the appellant, the deceased and the witnesses PW1, PW2 and PW3 and other guests to the initiation ceremony were in a celebratory mood and they consumed a lot of hard liquor. They all became drunk and a fight ensued in the course of which the deceased was fatally stabbed. The appellant also sustained injuries for which he was treated. We would, in the circumstances, agree with both Mr. Ng'etich and the Senior State Counsel that the prosecution did not prove malice aforethought and that in actual fact the offence that was proved was manslaughter.

Under **section 13 (4)** of the Penal Code the trial court was required to take into account the issue of whether the drunkenness or intoxication deprived the appellant of the ability to form the specific intention required for the commission of a particular crime. In the circumstances relating to the killing herein, the learned trial Judge was required to take into account the appellant's heavy consumption of hard liquor during the ceremony in determining whether the appellant was capable of forming and had formed the intention to kill the deceased. Lamentably, her judgment is silent on this.

For the foregoing reasons we would think that the conviction for the offence of murder, in the particular circumstances of this case, was and is unsafe. We accordingly allow the appeal against the conviction for murder, set it aside and substitute it with the conviction for manslaughter under **section 202** 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 when the appellant was convicted and sentenced by the superior court.

Those shall be our orders in the appeal.

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

P.K. TUNOI

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.