



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA PEAL AT MOMBASA**  
**Criminal Appeal 219 of 2007**

**ALEX MZEE LANDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from conviction and sentence of the High Court of Kenya**

**Malindi (Ouko J) dated 30<sup>th</sup> May, 2005**

**in**

**H.C.CR.C. NO. 11 OF 2004)**

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**JUDGMENT OF THE COURT**

ALEX MZEE LANDI, the appellant, was after a trial conducted with the aid of assessors convicted of murder contrary to *section 203* as read with *section 204* of the Penal Code and sentenced to death by the High Court of Kenya at Malindi (Ouko J) on 30<sup>th</sup> May, 2005. This is his first and final appeal.

According to the Information filed by the Attorney General, the appellant on the 8<sup>th</sup> of March, 2004 at 9.00 p.m. at Mpeketoni Trading Centre, Mpeketoni Location in Lamu District within Coast Province murdered *Sammy Muraga Kariuki*, the deceased.

The evidence against the appellant which was accepted by the trial Judge consists firstly of a statement by the deceased naming the appellant to his (deceased) father *James Kariuki* (PW4) and to other witnesses as his assailant; and secondly, the eye witnesses' account of a brawl and the subsequent stabbing of the deceased.

It was the prosecution's case that on the fateful evening four teachers went to a local pub known as Rocky Junior for a drink. The teachers included *Erick Mbaya* (PW1), *Kavulu* (PW2) and the deceased amongst others. They sat together on benches outside the pub and ordered for their drinks. Shortly after 8.00 p.m. the group was joined by the deceased who was an unemployed youth then aged about 24 years.

It is common ground that a disagreement arose between the appellant and PW2 regarding certain affairs of a local Teachers Co-operative Society. It is apparent that the disagreement degenerated into a fight between the two during which the appellant's shirt was torn. The appellant was enraged and attacked PW2 and floored him. The deceased who was standing nearby intervened by getting hold of the appellant. In the process, the two fell down but continued with the struggle. When the deceased eventually got up, he was seen bleeding from the back of his body. He was rushed to the nearby local

health centre and was later transferred to Lamu District Hospital where he succumbed to his injuries.

During the trial, **Erick Mbaya** (PW1) testified:

***“The deceased and the accused were holding each other. While trying to separate the two the accused’s shirt got torn. He was very annoyed and demanded for a new shirt. I asked the deceased to leave the counter area as we negotiated with the accused .....***

***..... I noticed he was bleeding from the back .....*”.**

The appellant in his defence admitted being engaged in a confrontation with PW2 leading to the appellant being splashed with liquor and being ordered to leave the pub. However, he denied attacking the deceased.

The learned trial Judge in his judgment found that the appellant was the person who inflicted the fatal stab wound on the deceased and that the nature of the injury showed that the appellant intended to cause the death of the deceased or do him grievous harm and that the intensity and force with which the pressure was exerted clearly pointed to malice aforethought on the part of the appellant.

On the question of intoxication, which had been raised by one of the assessors in his opinion, the learned Judge held:

***“It may appear from his conduct and the zeal to pick a fight with people that the accused was intoxicated. First, the accused has not raised this in his defence. Second, intoxication as a general rule is not a defence to any criminal charge. It will, however, be a defence only where the accused was so intoxicated at the time of the offence that he did not know what he was doing or that it was wrong. Secondly, it is only a defence where the state of intoxication was caused without his consent by the negligent or malicious act of another person. The defence of intoxication, finally would be available if it was shown that by reason of it the accused was temporarily insane. None of these circumstances are present in the instant case”.***

The learned trial Judge then found the appellant guilty of murder as charged and convicted him.

The appellant’s main complaints raised in his memorandum of appeal against his conviction and which were vigorously and persuasively urged before us by Mr. Bosire related to the alleged inaccuracy of the dying declaration and the insufficiency of recognition of the appellant as the assailant of the deceased.

We would agree with Mr. Bosire that it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. See ***Okethi Okale and Others v. Republic*** [1965] EA 555. But, the learned trial Judge did not base the conviction of the appellant solely on the dying declaration.

It is plain from the record of the appeal that the defence of intoxication, amongst other defences, was considered and rejected by the learned trial Judge though it had not been raised by the appellant. However, our consideration of the entire evidence on record shows that the appellant had yet another defence which was not considered by the trial court. This is provocation. There was a fierce quarrel between the appellant and the deceased over the latter’s torn shirt. The two fought and fell down where they continued the struggle. There is no evidence of how the stabbing occurred but from the nature of the injury sustained by the deceased and as indicated by the medical report, it must have occurred when the deceased and the appellant were struggling on the ground and when they were rolling on and off each other.

In the circumstances, we accept the submission that the deceased’s acts amounted to sufficient provocation to reduce the killing to manslaughter. We think that the learned trial Judge should have considered the defence of provocation and sought the opinion of the assessors as to whether the quarrel

between the deceased and the appellant prior to the stabbing was in the particular circumstances of this case provocation sufficient to have reduced the offence from murder to manslaughter. His failure to direct himself to this issue constituted a serious misdirection. However, we note that two assessors seem to have been aware of that possibility.

We would therefore think that it would be unsafe to allow the conviction for murder to stand.

We accordingly quash the conviction for murder and set aside the sentence of death. We substitute therefor a conviction for manslaughter and a sentence of twelve (12) years imprisonment from the date of conviction.

**Dated and delivered at Mombasa this 18<sup>th</sup> day of January, 2008.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR