



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Criminal Appeal 266 of 2006

SAID KARISA KIMUNZU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High court of Kenya at Malindi (Ouko, J.) dated 8th July, 2006

in

H.C.CR. C. NO. 8 OF 2003

JUDGMENT OF THE COURT

Said Karisa Kimunzu, the appellant herein, was tried before Ouko, J. with the aid of assessors on an Information charging him with the crime of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in that Information were that on the 6th of January, 2002 at an unknown time at Murya Chakwe Village in Kilifi District of the Coast Province, the appellant murdered Kahindi Said Kimunzu, “the deceased” hereinafter.

The deceased was the appellant’s own son and he was aged only 3 years at the time of his death. The mother of the deceased was the appellant’s only wife **Sina Saidi Karisa (PW6)**. The appellant and his wife and their deceased son lived in the compound of the father of the appellant, one **Karisa Kimunzi (PW7)**. The record of the learned trial Judge shows that at the time Karisa Kimunzu gave evidence, he was about eighty years old and was blind. The mother of the appellant had been separated from this old man and the separation was clearly a bone of contention between the appellant and his old father. The appellant wanted his father to get back the mother; the father’s position was that the appellant himself should go out, look for his mother and bring her back. In the meantime, the old man had another wife Kache Nyiro (PW5) and the appellant was apparently insisting that if his mother was not brought back, then Kache Nyiro must also go away.

It was agreed on the recorded evidence that the appellant left his father’s home in the evening of 5th January, 2002 and he did not return home until the morning of 6th January, 2002. It appears from the prosecution evidence that during his absence from home, the appellant had been taking liquor. In cross-examination, the appellant’s step-mother (PW5) put it thus:-

“.....**the accused had come from a drinking spree. He had spent the night outside his**

home. He returned in the morning and joined us. He did not appear drunk. He did not go to his house when he returned to sleep.....”

The appellant’s wife, for her part, stated as follows when cross-examined:-

“The night prior to the incident the accused had not slept in our house. I do not know where he had spent the night. He returned home at 6a.m. He did not come into our house. He remained outside. I did not notice whether or not he was drunk. I gave him a meal outside the house and returned to continue sleeping.....”

The old father also stated, first in examination in chief:-

“The accused is my son. The deceased was the accused’s son. I can, recall the events leading to his death. The previous day the accused had gone drinking. He returned the following day at 7a.m.....”

And in cross-examination, the old man said:-

“...I was told that the accused was drunk. The accused brought home a bottle of palm-wine which he shared with the accused(sic). We were all seated outside the house. It is Kahonzi, my daughter who escorted me to the house. The accused did not go to bed when he returned. He joined us until the events in question started.....”

So there was some evidence from the prosecution witnesses themselves that when the appellant was away from home, he had been drinking. The appellant’s step-mother said the appellant had been on a drinking spree while the appellant’s father went as far as saying the appellant had brought home a bottle of palm wine and they had shared it. We shall return to the issue of drinking or being drunk or intoxication later on in this judgment.

It was agreed on the recorded evidence that when the appellant came home in the morning of 6th January, 2002, there was an altercation between him and his father over the issue of the appellant’s mother being brought back to the home. While this was going on, the appellant’s father-in-law Kahindi Shombo (PW1) arrived at the home but before this witness’ arrival, the appellant had attempted twice and each time unsuccessfully to set his own house on fire. After failing to set the house on fire the appellant set upon the house with a panga and cut the roof down into pieces. No explanation is apparent from the record for this sort of behaviour, and we think the behaviour was more likely to have been brought about by drunkenness, rather than by the dispute between him and his father over his separation with the mother.

Be that as it may, when the father-in-law arrived, other problems arose. According to the father-in-law (PW1) the appellant asked him to take away his (PW1’s) daughter together with the deceased. But according to the appellant, the father-in law had come to take away his daughter and the deceased because of outstanding balance of dowry. But all the witnesses, except the appellant, were agreed that the appellant took away the deceased from his mother and went away with the boy. The father-in-law went away with his daughter. The following day, i.e. 7th January, 2002, the father-in-law went back to the appellant’s home to check if the appellant had returned the deceased home. Neither the appellant, nor the deceased was at home and the father-in-law reported the matter to the local authorities. A search was mounted and the father-in-law found the body of the deceased hanging on a tree with a piece of cloth around the neck. Dr Michael Peter Mwita (PW8) testified that when he saw the body, it had a bed-sheet around the neck and was strangling the neck. The eyes were protruding from the socket and the tongue from the mouth. The Doctor was of the opinion that there would not have been any other cause of death other than strangulation by the neck. The Doctor also thought the deceased could not have hanged himself because of his age, namely three years.

On the recorded evidence, all the witnesses who were at the home of the appellant, i.e PW1, PW5, PW6 and PW7 testified that it was the appellant who went away with the deceased, though the appellant’s

unsworn contention was that it was PW1 who went away with the deceased and PW6. Mr. Oguk, learned counsel for the appellant, invited us to find, contrary to the finding by the learned trial Judge, that these witnesses had problems with the appellant. The father of the appellant (PW7) had problems with the appellant over the separation with the appellant's mother. The step-mother had problems with the appellant because the appellant was insisting that unless his mother was brought back, the step-mother must also go away. So, according to Mr Oguk, if the appellant could be got out of the way, say through a murder charge, the father and the step-mother would live happily ever after. As for the wife (PW6) and the father-in-law (PW1) Mr Oguk appeared to contend that the father-in-law was going to look for another husband for PW6 and she would be more marketable as a bride if she did not have the deceased. This would also be a benefit to the mother of the deceased. We think these submissions are far-fetched and have no reality on the recorded evidence. The appellant was represented by counsel during the trial in the superior court and we note with satisfaction that none of these startling propositions were suggested to any of the witnesses who testified that it was the appellant who took away the deceased with him. The learned Judge was satisfied, having seen and heard the witnesses, that the appellant, and not PW1, took away the deceased with him. We agree that:-

“An appeal from the High Court is by way of a re-trial and the Court of Appeal is not bound to, follow the trial Judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.....” – see SELLE AND ANOTHER VS ASSOCIATED MOTOR BOAT COMPANY LIMITED AND OTHERS [1968] EA 123,” but in exercising that jurisdiction the Court of Appeal must bear in mind the caution to be found in PETERS VS THE SUNDAY POST LIMITED, [1958] EA 424:-

“whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.....”

The same principle is to be found differently stated in the often cited case of OKENO VS REPUBLIC [1972] EA 32. wherein the cases of SELLE & PETERS, supra, are specifically cited. Mr Oguk did not contend before us that there was no evidence before the learned trial Judge from which he could come to the conclusion that it was the appellant who took away the deceased with him. Nor was it contended that the learned trial Judge failed to appreciate the weight or bearing of any circumstances admitted or proved or that the Judge was plainly wrong and in what respect. As we have already pointed out, none of the theories which Mr Oguk has now raised before us was ever raised before the learned trial Judge. In our view, there was credible evidence from PW1, PW 5, PW6 and PW7 that the appellant took away the deceased with him during the morning of 6th January, 2002. The fact that the appellant said in his unsworn statement that it was PW1 who took away the deceased and the fact that the learned Judge accepted the version put forward by the prosecution but rejected the version put forward by the appellant cannot be a ground for our interfering with the learned Judge’s findings of facts. Nor does it matter that the bed-sheet or piece of cloth used to hang the deceased and the suit-case said to have been found at the scene of the crime were not produced carry the matter any further. The Judge referred to the failure to produce those items and concluded:

“Contrary to the submissions of Miss Njoroge, counsel for the accused, I find evidence of the eye witnesses credible and consistent. The fact that the exhibits in this case were not produced is not, in my view, fatal.”

It would have been much better if the exhibits were produced, but we agree with the learned Judge that in the circumstances of this case, the failure to produce the exhibits did not affect the substance of the case put forward by the prosecution. There may, however, be cases in which such failure might well be fatal.

The appellant left the home with the deceased on 6th January, 2002. The following day, the deceased was found hanging on a tree by his neck. Under those circumstances, the appellant was required to

explain, of course, upon a balance of probabilities, what happened after he left home with the deceased. His explanation that it was PW1 who took away the deceased was rejected. The irresistible inference to be drawn from these circumstances was and must be that it was him who hanged the deceased on the tree and caused his death. We agree with the findings of the learned Judge on that aspect of the matter.

Did the appellant kill the deceased with malice aforethought? That now brings us back to the issue of drunkenness or intoxication.

We have already cited the relevant passages from the evidence of the prosecution witnesses who talked about the appellant having been on a drinking spree the previous night and coming home with a bottle of palm wine which he shared with his father.

Drunkenness as such is not a defence to a charge of murder but **section 13** of the Penal Code provides as follows:-

“13 (1) save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and:-

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person, or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(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.

(5) For the purpose of this section “intoxication” includes a state produced by narcotic or drugs”

The intendment of the section is clear. If it be shown in a trial for any offence that at the time the person charged committed the act or made the omission complained of, did not know, by reason of drunkenness or intoxication that such act or omission was wrong or did not know what he was doing and further that the drunkenness or intoxication was brought upon him without his consent, by the malicious or negligent act of a third party, then in such an event, though it be proved that the person charged committed the act or made the omission, yet because of the drunkenness or intoxication, he is entitled to a complete discharge. But if it be shown that the drunkenness or intoxication made him insane, temporarily or otherwise, then he is not entitled to a discharge but is only entitled to have the provisions relating to insane persons applied to him, namely that he committed the act or made the omission but was at the time of doing so was insane.

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. The position here is different from that which obtained in the case of **NYAKITE s/o OYUGI v R [1959] EA 322**. There the trial Judge had given directions to the assessors and had directed himself though the directions given were wrong. In this one no directions were given at all, though the second assessor somehow realized the issue of intoxication was relevant in the case.

We have said enough, we think, to show that the conviction for the offence of murder, in the circumstances of this case, was and is unsafe. We would once again draw the attention of trial Judges to the remarks the Court made on the recent case of **KENGA FOTO MANGI V. REPUBLIC, Criminal Appeal No. 259 of 2006 (unreported)** with regard to passing a sentence of death on a convicted person without hearing him first on that issue. As we pointed out in that judgment, there may well be legal reasons why a sentence of death ought not to be passed, e.g where the convicted person is a pregnant woman. We accordingly allow the appeal against the conviction for murder under **section 203** of the Penal Code, set it aside and substitute it with a conviction for manslaughter under **section 202** of the Penal Code. We set aside the sentence of death imposed under **section 204** of the Penal Code and substitute therefor a sentence of fifteen (15) 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 Mombasa this 26th day of January, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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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