REPUBLIC OF KENYA

COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 111 OF 2004

LUCIANA JUMA FARJALA …….…… APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

***(An appeal from a conviction and sentence of the High Court of Kenya Mombasa (Khaminwa, J.) dated 23rd June, 2004* in H.C.CR.C. NO. 6 OF 2000)**

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JUDGMENT OF THE COURT

Luciano Juma Farjala, the appellant, a driver, was charged and tried with the aid of assessors, with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. He was convicted and was thereafter sentenced to the mandatory death sentence provided for the offence. He was aggrieved and hence the appeal before us.

This being a first appeal we are obliged to re-evaluate the evidence, analyse it and come to our own conclusions, without of course overlooking the conclusions of the trial court which, not only saw and heard the witnesses testify but was also better placed to draw inferences on credibility of witnesses. (See Okeno v. R [1972] EA 32).

During the hearing of this appeal Mr. Aboubakar, learned counsel for the appellant, did not challenge the trial court's finding that the appellant is actually the person who caused the death of one *Mohamed Shamash* (the deceased). In his submission he contended, that the circumstances of the case, pointed to the fact that the appellant was under the influence of alcohol which made him incapable of understanding what he was doing. That being the case, it will be important to consider the detailed background facts of the case.

The appellant was employed by *Abbas Gulam Hussein* (PW1) as a driver, with, among other responsibilities, the responsibility of taking his employer's children to school in the mornings and collecting them later after school. The deceased was one of those children. On 12th March, 1999, he reported on duty as usual, took motor vehicle registration No. KAN 018D a Subaru, took the deceased in it and drove off on the understanding that he was to drop him at Jaffrey Academy. PW1 lived at Kizingo, on Mombasa Island. By 9 a.m. the deceased had not reported at his school. He had left home with the appellant before 7.30 a.m., as that was the reporting time. PW1 telephoned the school, and was informed by the headmistress *Estaphania Videt Gomes* (PW3) that the deceased had not reported.

PW1 and his wife, *Marzia A. Khakha* (PW2) testified that the appellant was supposed to drop the

deceased at school by 7.30 a.m. and return home to again drop his sister at another school. The appellant needed about half an hour to make a return journey to the deceased's school. But the appellant did not return until after 9 a.m. He did not have the car. He told PW2 that the car had broken down at Mbaraki after he had dropped the deceased at school, and gave her the car keys. By then, however, PW2 and her husband had contacted the deceased's school and were told the deceased had not arrived there. When PW2 told the appellant this, he ran away as soon as she went indoors to make a telephone call to her husband. It later transpired that the appellant travelled to Nairobi the same day from where he was later arrested.

In the meantime motor vehicle KAN 018D, was found abandoned at Jomo Kenyatta Beach, partially concealed inside a thicket. It was locked. The doors were forced open. Inside the car, between the back and front seats the deceased was lying there unconscious. He could have been dead. He was rushed to Mombasa Hospital where a doctor pronounced him dead upon examination. A post mortem examination was carried out about three hours later by *Dr. Mandalia, K.N.*, a pathologist, who found that the deceased had died from asphyxiation due to strangulation. He did not see any spermatozoa at the anal opening. He observed superficial cuts on the face caused by a sharp object.

Upon the police getting information about the recovery of the body of the deceased and the vehicle in which the appellant had carried him, they started looking for the appellant. The appellant was arrested on or about 16th March, 1999, at Eastleigh, Nairobi. He was pointed out by one *Hamisi Omar Dzishanga*, (PW7) who like the appellant, was employed by PW1, but as a gardener. He accompanied the police there. He was brought down to Mombasa, and on 18th March, 1999, he is alleged to have given a statement under inquiry after a caution, and a charge and caution statement on 24th March, 1999. In the former, the appellant alleged that as he was driving the deceased to his school the boy called him an asshole, a term his father had allegedly been calling him, (the appellant). This angered the appellant who lost his composure, and thereafter drove the car to an isolated place at Mama Ngina gardens where he parked the car. He slapped the deceased several times, hit his head against the dash board as a result of which the deceased became unconscious. He then started the car and drove it to Florida Night Club where he parked it off the road. He picked a stone and hit the deceased on the neck. He then drove to Jomo Kenyatta Public Beach, parked the car, locked it and then went back to PW1's residence by matatu. He lied to PW2 that the car had developed mechanical problems and had been abandoned at Mbaraki.

Later the same day the appellant boarded a Tawfiq bus and went to Nairobi from where he was arrested on 16th March, 1999.

In the charge and caution statement the appellant is alleged to have stated as follows: -

"Ni kweli niliua lakini ni kwa sababu ya maudhi waliyokuwa wananitendea siku nyingi. Nilifanya bila ya kupanga bali ilitokea tu."

That is: -

"It's true I murdered him but its because of some frustrations at my place of work. I had not planned to murder him but it just happened."

Both statements were admitted in evidence after trials within a trial, the appellant having alleged that they had not been voluntarily obtained.

Before the appellant's trial commenced Dr. Charles Mwangombe (PW15) a consultant Psychiatrist, examined the appellant on 7th November, 1999 as to his fitness to stand trial. His opinion was that the appellant was fit to stand trial.

On the basis of the foregoing background facts, the prosecution case was that the appellant with malice aforethought caused the death of the deceased.

In his defence the appellant admitted he was given the aforesaid car by PW1 with instructions to take the deceased to school. At that time he was drunk. He took a short cut. On the way he became confused and found himself driving to Mikindani. He had had domestic disagreement with a relative, one *Anthony*, and he thought that was partly the cause of his confusion. He abandoned the car and went to Nairobi from where he was arrested. He said he did not know the deceased had been killed until he was told about it by the police after his arrest.

Under cross-examination, the appellant stated that he had taken a high quantity of alcohol, and it was his first time to taste alcohol. His employer detected he was drunk but nonetheless let him take the deceased to school.

Joyce Khaminwa, J. heard the appellant's case. In convicting the appellant she found as fact that the appellant was the last person seen with the deceased before his death; the deceased was shortly later found inside PW1's car unconscious; that the deceased was later confirmed to have died from strangulation; the appellant escaped to Nairobi the same day, and that the totality of the circumstances together with the extra judicial statements he made, pointed to the appellant to the exclusion of all other people as the person who killed the deceased. She then found him guilty, and convicted him.

The appellant, it would appear to us, has all along been relying on the defence of drunkenness. That defence, however, does not constitute a defence if it can be shown that the person charged, by reason of intoxication at the time of committing the act or making the omission complained of, did not know that such act or omission was wrong or that he did not know what he was doing (See *section 12 (2)* of the Penal Code). There are, however, pre-conditions. Firstly, that the state of intoxication must be shown, either to have been caused by the malicious or negligent act of another person without his consent, or secondly, that by reason of such intoxication he became insane, temporarily or otherwise, at the time of the act or omission complained of.

The appellant appears to us to be relying on the latter aspect. Apart from giving the defence of intoxication the appellant did not say anything more. So *section 12 (2)* of the Penal Code does not avail him of anything. That being the conclusion we have come to, it follows that the only other provision relevant is *section 12 (4)* of the Penal Code, which provides that: -

"(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."

In determining that issue a court has to consider the facts and circumstances of the case. It is a question of fact whether or not an accused person had formed the necessary intention, specific or otherwise, of committing the act or making the omission complained of.

We earlier set out the facts of this case as could be gleaned from witnesses' respective testimony. From the narration we infer the following. The appellant was aware he was employed by PW1 and travelled to the latter's residence, took car keys, and drove PW1's car with the deceased inside it intending to take him to his school. He had reasonable control of that vehicle as he was able to drive it, at least up to where it was eventually recovered from without causing any accident. It would appear he had proper control of it and exercised proper discretion as he drove it along. He returned the car keys to PW2 and was disturbed when the latter asked searching questions about the appellant's delay in returning and the fact that he was not telling the truth about dropping the deceased at his school.

The appellant was conscious that he had been insulted, if we were to accept his defence that he used to be called an asshole by PW1, before that day and by the deceased as he drove towards his school. The appellant later the same day escaped to Nairobi.

Clearly, the circumstances show the appellant, inspite of any intoxication, was capable of forming the specific intention of killing a person. He took steps to conceal the act which clearly shows that he knew what he was doing. While we agree with Mr. Aboubakar for the appellant that the burden lay throughout

on the prosecution to prove the charge beyond any reasonable doubt, it is our view that the appellant, also, had the duty of offering a reasonable explanation as to the circumstances leading to the deceased losing his life. It is a duty placed upon him by statute to wit *section 111 (1)* of the Evidence Act, *Cap 80* Laws of Kenya. How the deceased met his death was a fact peculiarly within the knowledge of the appellant, and he was obliged to offer a reasonable explanation.

The explanation the appellant offered that the deceased called him an asshole is unreasonable, and even if it were to be accepted, it is not such as would provoke a reasonable person to kill another. We do not, however, accept the appellant's explanation as neither PW1 nor PW2 was cross-examined on the issue. If anything the questions asked suggested that the relationship between the appellant and his employer was good.

The conduct of the appellant as revealed by the evidence clearly shows he was in full control of his mental faculties. Consequently, we find no basis for interfering with the judgment of the Court.

An issue we have noticed in reading the Judgment of the superior court, is that the trial Judge supplanted parts of her summing up notes and made them part of her judgment without any amendments. For instance at page 226 of the record the judgment reads as follows: -

"It is up to you to consider the effect of the two contradictory statements on the prosecution evidence."

This was part of the directions to the assessors. There are other parts which show that what the learned Judge did was to panel-beat her summing up notes into a judgment, but she did not appropriately amend them.

We do not however think the appellant was thereby prejudiced. The contradictory statements she was talking about are the inquiry and charge and caution statements. Even if the two statements are ignored, the conviction of the appellant is sound, and we have no basis for interfering with it.

In the result we dismiss the appellant's appeal in its entirely.

Dated and delivered at Mombasa this 20th July, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR