REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 255 of 2006

SAFARI GALGALO KOMORO …….…….. APPELLANT

AND

REPUBLIC ……..……..…….…… RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya Malindi (Ouko, J) dated 13th April, 2005 in H.C. Cr. Case No. 22 of 2003)

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JUDGMENT OF THE COURT:

Ouko J, with the aid of assessors, tried and convicted Safari Galgalo Komoro, the appellant hereinafter, on an information which charged the appellant with 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 21st day of September, 2003 at Milikini Village in Adu Location within Malindi District of the Coast Province, the appellant murdered Kobra Bashora Shena, hereinafter "the Deceased".

The alleged offence took place in the home of Katana Mae (P.W 9) where there was a birth-day party for the child of Mae. Before going to that home, the appellant passed through the home of the deceased and together with Eguda Obira (P.W 1), a son to the deceased, the two proceeded to the home of Mae. There was really uncontroverted evidence both from the prosecution witnesses and the appellant himself that there was consumption of liquor (palm wine) in the home of Mae to celebrate the birth of Mae's child. In cross-examination, Eguda admitted that there was drinking of liquor during the birth-day celebration. Usho Guyo Usho (P.W 2) also agreed there was drinking at the home of Mae. Other witnesses such as Bakuna Hirbae (PW 4) and Mitsanga Charo Mlewa (P.W 5) also talked of a party at the home of Mae and the consumption of liquor during the party. The consumption of alcohol during such parties is nothing unusual. When he testified on oath the appellant had this to say, and we quote him:-

"…… **On 21.9.2003 I recall very well that I woke up and was to attend the burial of my uncle, Hirbae who had passed away on 20th September 2003. On my way I passed through the home of Kobra Bashora to greet him. When I got there, I met Kobra Bashora. Kobra was my uncle. I left with his son Heguda, who was escorting me. We passed by Katana Mae's home where there was a birth-day party for a newly born baby. There was alcohol. We were given two bottles of palm wine. I brought 2 other bottles and later Heguda brought one bottle. A fight broke out between Sosso Warses and Hirbae Gakuna. They were fighting over an allegation of theft. Myself and**

Hegda (sic) did not involve ourselves. I left on seeing this fight to go to the funeral of my uncle. I left Heguda behind. I also left with my bottle of palm wine half-way. ……"

Of course the appellant tried his silly-best to distance himself from the death of "the deceased" but that attempt was bound to fail. All the witnesses who were at the scene swore they saw him cut the deceased with a panga on the neck and Dr. Philip Masaula (PW 10) who performed the post mortem examination on the body of the deceased on 23rd September, 2003, said he found the body with a very deep cut wound on the left side of the neck measuring 15 cm. The major arteries and veins on the cut part of the body were severed and in the doctor's opinion the cause of death was due to severe bleeding as a result of asphyxia. That is a bit confusing, but the doctor had no doubt that a sharp object was used to cause the very deep cut wound on the neck. As we have said, all the witnesses present at the scene said they saw the appellant cut the deceased with a panga on the neck. The learned trial Judge and the assessors believed the version put forward by the prosecution witnesses and rejected the one put forward by the appellant.

In those circumstances, it is perfectly understandable that Mrs. Adogo, the learned counsel for the appellant, did not attempt to convince us that the appellant had nothing to do with the death of the deceased.

Instead, Mrs. Adogo sought to convince us that the appellant ought not to have been convicted on the charge of murder, but on the lesser charge of manslaughter. Mrs. Adogo's contention before us was that there was evidence from both the prosecution and the defence that the appellant had consumed a considerable amount of palm-wine and despite the availability of that evidence, the learned trial Judge did not at all, in his summing-up to the assessors, mention the issue about the consumption of liquor by the appellant. Nor did the learned Judge touch on the issue in his own judgment. Mrs. Adogo submitted that it was the duty of the learned trial Judge to direct the assessors and himself on the issue of drunkenness and for that proposition, Mrs. Adogo relied on certain well-known authorities on the point.

In **WAFULA S/O WAMINIRA VS REG [1957] EA 498**, the then Court of Appeal for Eastern Africa held:

"**(i) the omission of the judge to direct himself and the assessors on the issue of provocation was a serious misdirection, and the conviction of murder could not stand.**

(ii) the conflict of evidence as to the appellant's state of intoxication raised an issue whether the prosecution had established beyond doubt that the appellant was capable of forming the required intent, and the judge's omission to direct the assessors was further reason for setting aside the conviction."

What is to be gleaned from this authority is that where there is evidence, whether from the side of the prosecution or the defence, of intoxication, provocation or self-defence, then it is the duty of a trial judge to direct the assessors and himself on that evidence and that failure to do so would normally result in a conviction for murder being set aside and substituted with one for manslaughter. That was the same position taken by the Court in the more recent case of **OBUON vs. REPUBLIC [2003] EA 209** where the Court held that: -

"**The learned trial Judge had a duty to deal with the Appellant's alternative defence of intoxication as it clearly emerged from the evidence and ought to have directed the assessors and himself to deliberate whether the Appellant had formed an intention to kill the deceased."**

While admitting that in the present appeal the learned trial Judge did not direct himself or the assessors on the issue of intoxication which was present in the evidence, Mr. Monda, the learned State Counsel, submitted before us that the evidence on record was such that even if the learned Judge had directed himself and the assessors upon that evidence, they would have inevitably come to the conclusion that the appellant was not so drunk as not to know the consequences of his action. We think, with respect to Mr. Monda, that is missing the point. Neither the learned trial Judge nor the assessors made any findings at

all on the appellant's state of intoxication and there being no findings at all on that aspect of the matter, it would not be right for this Court to make such findings for the very first time in this appeal. As was said in **WAFULA'S CASE**, the Court would merely be speculating on what it thinks the assessors would have found, had the judge directed them on the matter. **OKENO vs. REPUBLIC [1972] EA 32** does not authorise the doing of such a thing. Under **OKENO v. REP**, supra, the Court on a first appeal, is entitled:-

" **….. to reconsider the evidence, evaluate it itself and draw its own conclusions IN DECIDING WHETHER THE JUDGMENT OF THE TRIAL COURT SHOULD BE UPHELD."**

If there has been no conclusions on an important point on which a judgment is based, then there is no way in which this Court can, for the very first time, determine such a point, one way or the other, even if the appeal is a first one to the Court. On issues such as intoxication arising from the consumption of local brews or provocation involving the cultures of various communities in Kenya, the opinions of assessors, even though not binding on a judge are or ought to be of considerable assistance to a trial judge for the assessors are or ought to be peers of the accused person and understand such matters better than the judge. If a judge whose origins are in Western Kenya, for instance, is sitting with assessors from Coast Province and the issue is one of intoxication from palm-wine, one would expect that such assessors would have a better understanding of such an issue which may not exist in Western Kenya. That is the basis on which the assessors were selected and used. We repeat that the opinion of assessors is not binding on a judge but it must also be remembered that where the judge is differing from the opinion given by the assessors, the judge is required to give a reason for doing so. Until the institution of assessors is abolished as it is proposed to be, the legal position remains the same.

In this appeal, Mr. Monda having admitted that the learned trial Judge totally failed to direct himself and the assessors on the issue of intoxication, we can find no reason to differ from the authorities previously established on this point. The consequence of that must be that the conviction for murder cannot be allowed to stand. We accordingly allow the appeal to the extent that we set aside the conviction for murder under **section 203** as read with **section 204** of the Penal Code and in place thereof substitute a conviction for manslaughter under **section 202** as read with **section 205** of the Penal Code.

On sentence, the appellant brutally inflicted a very deep cut on the neck of the deceased and before doing so, he had run to some other place to fetch the panga. He attacked other people on his way back to the scene where he slew the deceased. We think he deserves a severe sentence and we accordingly sentence him to **fifteen (15)** years imprisonment to run from **13th April, 2005** when he was convicted and sentenced by the superior court. Those shall be the orders of the Court on this appeal.

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

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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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