REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 128 of 2003

SAID KUPATA MWAKOMBE …….……. APPELLANT

AND

REPUBLIC ……RESPONDENT

***(An appeal from a conviction and sentence of the High Court of Kenya Mombasa (Khaminwa, Comm. of Assize) dated 9th June, 2003* in H.C.CR.C. NO. 2 OF 2000)**

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JUDGMENT OF THE COURT

The appellant *Said Kupata Mwakombe* was on 10th December, 1999 committed to the High Court for trial for the offence of murder by the Principal Magistrate Malindi under *section 234* of the Criminal Procedure Code (CPC). That section formed part of *Part VIII* of the CPC providing for committal proceedings. The whole of Part VIII of the CPC was repealed by Act No. 5 of 2003 thus abolishing the committal proceedings procedure. Upon the committal of the appellant the Attorney General filed an Information charging the appellant with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars of the charge stated that on 16th March, 1995 at Kisumu Ndogo village Malindi the appellant murdered *MAPENZI MUKOKA* (deceased). The appellant was tried by the superior court (Khaminwa – Commissioner of Assize – as she then was) with the aid of assessors, convicted as charged and sentenced to suffer death on 16th June, 2003.

The appellant appeals from the conviction and sentence on three grounds, namely: -

"*1. THAT the record is quite incomplete and incomprehensible such that the appellant cannot argue his appeal effectively hence the High Court trial should be declared a mistrial.*

2. THAT the learned trial Judge erred in law and in fact by failing to find that malice aforethought was not proved.

3. THAT the trial Judge erred in law and in fact by failing to consider the accused's defence of provocation."

This is an outline of the prosecution case.

The deceased **MAPENZI MUKOKA** was the wife of the appellant, the appellant having married her

about 2 years before the appellant stabbed her to death. The deceased was previously married by one ***Katana Maitha***. There were four children of that marriage including ***Sidi Katana*** (PW4). The deceased returned to her parent's home after a disagreement with her former husband and after three months the deceased married the appellant. The appellant paid dowry to ***Mukoka Mumba*** (PW8) the deceased's father in form of money. The deceased's father paid part of the dowry money to Katana Maitha as refund of the dowry. The appellant had two other wives. The marriage of the deceased and the appellant was blessed with two children **Saumu** and ***Santa***. The deceased was 3 months pregnant at the time of her death.

According to the evidence of ***Mukoka Mumba*** (deceased's father) the appellant and the deceased used to have disagreements on minor issues and on three occasions the deceased's father had reconciled them. The deceased had returned to her parent's home two days before her death. She told her father that she had left her husband's home and that she would discuss the matter with her father later. On the material day, the appellant went to the home of the deceased's father at about 10.30 p.m. He did not find Mukoka Mumba and his son ***Kazungu Charo*** at home but he found ***Dama***, wife of Kazungu Charo (PW1) with her three children, namely ***Agnes Rehema*** (PW2), ***Nafasi Kazungu*** (PW3), ***Fikiri Kazungu*** (PW7) and the deceased's daughter ***Sidi Katana*** (PW4) having a meal at the verandah of the house. The deceased was inside the house. The appellant was given a seat after which he asked the whereabouts of the deceased's father and son (Kazungu). After he was told that they were not at home, he asked deceased to escort him so that they could talk. The deceased was carrying her baby ***Saumu*** on her back. She told the appellant that she would have to first lay the child to bed and started walking towards her father's house. The appellant started chasing her and the deceased started running away. The deceased however stumbled and fell down on her stomach near her father's house whereupon the appellant drew a knife and stabbed her several times. The appellant also stabbed the child Saumu who sustained a deep cut wound at gluteal region. The appellant ran away leaving the knife behind. The deceased sustained multiple cut wounds at the right scapula area, left lumbar area and left forearm leading to massive bleeding and died shortly thereafter. The cause of death was established to be due to cardio-pulmonary arrest due to external harmorrhage from multiple cut wounds inflicted by a sharp object.

The appellant was arrested three days later. On 22nd March, 1999 the appellant made a statement under inquiry to ***I.P Hilton Kombo*** (PW12) and on the following day, 23rd March, 1999, he recorded a charge and cautionary statement before ***IP Cosmas Kichamba*** (PW13). The appellant said in the statement under inquiry that after the deceased had escaped to her parents' home, he went there on 15th March 1999 to convince her to return and continued –

"**On 16/3/1999, I went back to the home and I was told that she had arrived that morning. I convinced her to return with me to my house but she told me she would not go until her brother (Kazungu) was present. I went back to my house and stayed until 12.00 p.m. when I decided to go and check again but she was not around. I went to drink mnazi liquor until 7.00 p.m. when I returned to my home.**

At 10.00 p.m. of the same day, I decided to go and check on her and on arrival at her home, I found her. I asked her to accompany me home. She refused. I saw a knife kept near the door and I took it. When she saw me taking the knife she ran away. I chased her and caught up with her. She fell down and I stabbed her twice and I fled away. I went and hide (sic) myself at Sabaki and the following day I went to Marereni. I stayed at Marereni for two days and the police came and arrested me."

The appellant recorded the charge and caution statement himself describing how his efforts to get the deceased from her parents' home where she escaped to had been frustrated by the deceased's parents and stated:

"**On the second day 16th March 1999 I decided that I am to be given my wife and if they refuse to take other measures (sic). By bad luck I went and saw no gentleman and I got a knife under the chair. I took it and began to threaten her and she ran away and fell down. I stabbed her, and ran away."**

The prosecution case was mainly based on the evidence of five eye-witnesses, ***Dama w/o Kazungu***, ***Agnes Rehema***, ***Nafasi Kazungu***, ***Fikiri Kazungu*** and ***Sidi Katana*** and on the two extra judicial statements made by the appellant. The two statements were admitted as evidence at the trial without any objection by the appellant or his counsel.

The appellant gave long sworn evidence at the trial describing the relationship with his deceased wife and his fruitless efforts to have the deceased return home, the events of the fateful night and continued:

"**At about 10.00 p.m. I went to her home. I found Dama and Kazungu, another Kazungu and Katana. They were sitting outside where there was a fire. They gave me a chair to sit down. I asked whether father had arrived. I asked for my wife. I heard sound of a child coming from the house. It was from my child. I asked Dama who was with my child. She did not say anything. She kept quiet. I had a torch. I put it on. I saw there was a chair and underneath the chair a knife. I went and took that knife. I said let us go home. She got out and started running. She was carrying a child on her back. I was drunk and I started to run after her. After a short time she fell down. I was angry with (Hawa). I cut her with a knife. I cut her many times even the child was cut while on her mother's back. This one of the child I had fathered. I did not have any (Hazira) with the children but I was drunk. I got confused and I left and run away. I did not went (sic) to this home with a knife ….."**

The trial Judge made a finding that the evidence of the appellant in his defence was an admission of the commission of the offence but that the appellant had put forward a defence of provocation and intoxication. It was clearly a misdirection to say that the appellant had admitted the offence in his evidence. The appellant merely admitted that he stabbed the deceased to death but not the commission of the offence of murder. The learned Judge evaluated the evidence and came to the conclusion that the version of facts as given by the appellant was not different from the evidence of the prosecution witnesses. The only difference as found by the learned Judge was that whereas the prosecution witnesses claimed that the appellant was carrying the knife, the appellant claimed that he picked the knife from under a chair in the house. The learned Judge resolved that conflict in favour of the prosecution. Although the learned Judge believed the appellant's evidence that he had drunk two large bottles of liquor which he had shared with others, the Judge nevertheless made a finding that the defendant was not so intoxicated as not to know what he was doing saying: -

"**Indeed it appears that he had already made intention to kill his wife deceased (sic). Seeing that the suspicions he had had against her arose out of separate instances spread over time."**

In support of the first ground of appeal Mr. Kamoti, learned counsel for the appellant referred to the deficiencies in the record of appeal. In particular he submitted that the record does not show when the plea was taken, how and when the assessors were selected, whether the summing up to assessors was conducted and whether the assessors gave their opinion. He also referred to gaps in the typed proceedings. He contended that in view of the defects in the record, the evidence cannot be evaluated for the purpose of the appeal; that there was a mistrial and the trial should be declared a nullity and the appellant acquitted.

It is true that the record of appeal is not altogether perfect. The proceedings prior to the beginning of the trial proper have not been availed and there are not only some gaps in the typed proceedings but also a mix-up of some pages. This problem was brought to the attention of the Court by the appellant's counsel on 16th January, 2006 and the Court ordered the Deputy Registrar to ensure that all proceedings in the High Court are made part of the record. The Registrar of the High Court reported to this Court by a letter dated 5th May, 2006 partly that: -

"**The pages are untraced. It appears in the High Court record that some original hand written proceedings are torn thus hindering proceedings flow and more so the handwritten proceedings are not paginated making the flow and comparison difficult."**

We have considered this ground of appeal. In our view the fact that the record of appeal contains the

defects complained of does not in any way hamper or prejudice the appellant in the prosecution of the appeal. Firstly, the appellant has not raised any specific ground of appeal concerning the selection of the assessors. He does not say, for example, that any of the three assessors selected is exempted by ***section 266*** of the CPC or that he had raised any objection in court either to the panel or to the individual assessors. Had he raised any of such grounds of appeal and it is found later that the relevant proceedings are missing then it could have been easy for the Court to make a finding that the missing proceedings have hampered the appellant in the prosecution of the appeal and thereby causing injustice to the appellant.

Secondly, the record of appeal contains all the material evidence given at the trial including the evidence of all the prosecution witnesses and the evidence of the appellant and his witnesses.

Lastly, this is a case where the appellant has confessed in two voluntary extra-judicial statements which were admitted at the trial without any objection and further in his sworn evidence in defence that he stabbed the deceased to death with a knife. The appellant further admitted that the prosecution witnesses told the truth except that he disputed that he was carrying a knife when he went to the house of the deceased's father. Thus the most material evidence in the appellant's case can only be the evidence relating to his defence of provocation and intoxication. All that evidence is on the record. We have perused the original record of the superior court. It shows, contrary to the submissions of Mr. Kamoti, that on 23/4/2003 the summing up to assessors was scheduled for 13th May, 2003, that indeed the summing-up in typed form was done and the unanimous opinion of the two assessors that appellant was guilty as charged was recorded. The appellant has not raised any question about the adequacy, misdirection on non-direction regarding the summing-up. Enough has been said to show that the first ground of appeal has no merit.

The appellant's counsel did not address us on the second and third grounds of appeal. At first he stated that he had abandoned them but after Mr. Ogoti, learned counsel for the Republic, addressed us on their merits, Mr. Kamoti merely asked the Court to consider them.

We have in the interests of justice considered the two grounds of appeal. The two grounds relate to the defence offered by the appellant at the trial and raise the question whether the learned Judge was justified in rejecting the defence of intoxication and provocation. We have found it necessary to investigate whether the trial Judge was aided by the assessors as the law requires in reaching her decision. By virtue of ***section 262*** of the CPC it is mandatory that the trial in the High Court should be held with the aid of assessors. As this Court said in **Kinuthia v Republic [1988] KLR 699** at page 702 para 25 - 40: -

"**The purpose of Assessors is to make sure that as far as possible in the most serious cases which are tried by the High Court the decisions of fact have broad base conforming with the notions of that part of society which the accused person belongs. The Assessors are of special value in determining what action amount to provocation They are also of great importance in assessing contradictory stories of what occurred in a particular case and they may be able to guide a court as to the manners and customs, and so to the truth of what the witnesses said. It is therefore right and proper that the trial should be with the aid of assessors in the full sense. They should be allowed to ask the witnesses questions. They should have exhibits and reports shown and explained to them and they should give their opinions in general and on special points as the circumstances of the case require."**

In that case, the Court quoted a passage from **R v Paulo Lwevola s/o Mupere [1943] 10 EACA 63 thus**: -

"**It is observed that the assessors merely said, "*I find accused guilty of murder.*" It is often desirable for the Court of Appeal to know not only the assessors' opinion but also their reasons for their opinions".**

In **Francis Juma s/o Musungu v R [1958] EA 192** the court observed at page 193 D that the value and opinion of an assessor is in many cases to be judged by the reasons he gives for it.

As regards the criteria for selecting assessors, ***Sir John Ainley, CJ*** said in **R v Wilken [1965] 286 at page 288**: -

"**The Judge's selection of assessors should, in my view, be governed by the help which he anticipates he will gain from the individual in that list. Though admittedly there must be an element of chance in the matter an attempt should be made to get from those summoned three assessors who will give maximum assistance in the particular case to be tried."**

Lastly, by ***section 269*** of CPC, it is the magistrate holding a subordinate court of First Class "*having jurisdiction in the province or district in which sessions are to be held"* who summons persons to be selected as assessors by the presiding Judge of the session. It is implicit from that section that the three assessors to be selected for a particular trial should come from the same district or province as the accused persons. We take judicial notice of the fact that in Kenya a district is occupied predominately by one distinct community.

In this case two assessors participated until the conclusion of the trial. The first assessor ***Benjamin Otieno***, who, as the record shows, comes from Nyanza Province merely said in his opinion: -

"**I agree with the prosecution that accused is guilty as charged."**

The second assessor ***Ernest Michira Obuti*** apparently also from Nyanza Province gave his opinion thus: -

"**I agree with the prosecution that accused committed the offence as charged.**

The record does not show what happened to the third assessor ***Malachi Oliech*** who was also from Nyanza Province.

The two assessors did not specifically deal with the defences raised by the appellant particularly the defence of intoxication and did not give reasons for their respective opinion. The appellant apparently comes from the Giriama community and lives in Malindi District in Coast Province. It is apparent that this community has stuck to its customs and traditions. The appellant gave evidence of the attempts to solve the matrimonial problems and the frustrations he encountered. It is only an assessor from this community who can know the temperament of the community and who can assist to know whether the frustrations the appellant encountered in his efforts to get the deceased to return to his home were in the circumstances of this case such as to deprive the appellant of the power of self-control and to induce him to stab the deceased.

The ultimate justification of the trial with the aid of assessors is to do justice especially to an accused person. In this case it cannot be truly said that the appellant was tried with the aid of assessors and that the assessors gave valid opinions to the trial Judge on the important question where the appellant was guilty of the offence of murder or manslaughter. Indeed, the assessors in this case were of no value in the trial. The decision of the trial Judge that appellant was guilty of murder remained solely the decision of the trial Judge unaided by assessors. The legal effect of the failure to select assessors from the appellant's community is in our view, the same as the omission by a Judge to direct himself and assessors on defences raised by an accused person as in the case of **Wafula s/o Waiminira v R [1957] EA 498**. In this case if the trial was conducted with assessors from the appellant's community, it might well be that they could have accepted both the defence of provocation and intoxication or either of them and advised the trial Judge that the offence committed was manslaughter and not murder and the trial Judge might have accepted their opinion. The appellant should be given the benefit of that uncertainty (- see **Msaro Galime v Republic [1964] EA 488**.)

In assessing the appropriate sentence we have considered that the appellant did not go to the home of the deceased's father with the intention to kill the deceased. His intention from the evidence was to seek a reconciliation and have the deceased return to his home. However, he stabbed the deceased viciously in a fit of fury when she refused to return to his home. In the circumstances of this case, the appellant acted with extreme brutality. He deserves a severe punishment.

For the reasons stated, we allow the appeal to the extent that the conviction for the offence of murder is set aside and substituted with the offence of manslaughter contrary to ***section 202 (i)*** as read with ***section 205*** of the Penal Code. The appellant is sentenced to 20 years imprisonment for the offence of manslaughter. The sentence is to start from 16th June, 2003 - the date of conviction.

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

…….

JUDGE OF APPEAL

W.S. DEVERELL

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR