IN THE COURT OF APPEAL OF KENYA
AT NYERI
CRIMINAL APPEAL 202 OF 2005

DAVID MUNGA MAINA …….....…… APPELLANT

AND

REPUBLIC …….....…… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Okwengu, J) dated 30th September, 2004

in

H.C. Cr. Case No. 97 of 2003)

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JUDGMENT OF THE COURT

The appellant, **David Munga Maina**, was charged before the superior court with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that on the 14th day of October, 2002, at Thumaita Village in Kirinyaga District within Central Province, he murdered Sarah Muthoni Ngari. He pleaded not guilty. A total of twelve witnesses testified in that case which was High Court Criminal Case Number 97 of 2003 and after the full hearing the superior court (Okwengu, J) found him guilty as charged, convicted him and sentenced him to death as provided by law. That sentence was awarded on 30th September, 2004. All the assessors had also given their opinion that the appellant was guilty of murder. In convicting the appellant, the learned Judge stated *inter alia* as follows:

"**I have considered whether the accused had the necessary mensrea to cause the death of the deceased. The Accused testified in his defence that on the material day he was drinking from 2.00 p.m. to 5.00 p.m. when he left the Bar to go home. It is obvious that his drinking was by choice and not by the malicious or negligent act of another person.**

There is further no evidence that the Accused was so drunk as to be incapable of knowing what he was doing or as to be temporarily insane. The fact that the Accused buried the body of the deceased in an attempt to conceal her death clearly shows that the Accused knew exactly what he was doing.

I have considered the defence of the Accused that the deceased came back home drank and when asked how she could take care of children in such a state responded that it was not the duty of women to educate children. I find that this was not such a wrongful act or insult to the Accused as could qualify as provocation as is defined in section 208(1) of the Penal Code to justify the reaction

from the Accused in assaulting the deceased in the manner that he did.

Although there is no direct evidence that the Accused had formed a specific intention to kill the deceased, malice aforethought can be inferred from the circumstances i.e. the fact that this was a clear case of domestic violence where the Accused knew that his actions would probably cause the death of or cause grievous harm to the deceased. Section 206(b) of the Penal Code is applicable. I find therefore that the Accused caused the death of the deceased with malice aforethought."

The appellant was not satisfied with the same conviction and sentence and hence this appeal before us in which the appellant filed on his own three main grounds of appeal namely:

"**1. That the learned trial Judge erred in law in relying on the evidence of leading to the grave of the deceased which was not proved that I led the police.**

2. That the learned trial Judge erred in law to convict me on insufficient evidence and inconsistent of the prosecution case.

3. That the learned trial Judge erred in law in rejecting my defence without explanation thus shifting the burden of proof on my side."

Ms. Mwai, the learned counsel for the appellant, adopted the same grounds and addressed us on the same, emphasizing that parts of the evidence adduced by the prosecution, upon which the appellant was convicted, was not admissible and other parts such as the cause of death were not consistent and therefore unreliable. She further submitted that the superior court should have considered the effect of provocation by the deceased upon the appellant as well as the effect of drunkenness by both the deceased and the appellant. Mr. Kaigai, the Senior State Counsel, however maintained that the conviction for the offence of murder was proper as there was ample evidence to support it.

The appellant was married to two wives. The deceased, Sarah Muthoni Ngari, was his second wife. On 14th October, 2002, George Munyao Karuki (PW 1) (George) was on his way to a football march at Rumaita football ground. He heard screams from the appellant's home and he went to the appellant's home, perhaps out of curiosity. He found the appellant beating the deceased with a jembe handle. As he was beating her, George heard the appellant asking the deceased why the deceased was drinking alcohol. According to George, when the jembe handle got broken, the appellant took a coffee tree branch and continued beating the deceased with it, beating her on her back and on her buttocks. Later at 7.00 p.m., on the same day 14th October, 2002, John Waweru Gichira (PW 3) (John) who had been working for the deceased part of that day and had gone to Kiambere shops to buy cigarettes was on his way back to his home when he heard the deceased screaming and pleading with the appellant not to beat her. He heard the appellant's response to that plea and that response by the appellant was that he (the appellant) had to beat her that day. After about three days, John says police went to the appellant's home and removed a body from the appellant's coffee farm after digging the same farm. Francis Mwai Kariuki (PW 4) (Francis) was taking cattle home through a route near the appellant's home and he saw the appellant beating the deceased using his hands and beating her all over the body. He did not intervene as the appellant often used to beat his wives and none would intervene. That was at about 6.00 p.m. After about a week, he saw the police exhuming a body at the appellant's farm and that body was that of the deceased. Elijah Malaka Irungu (PW 5) (Elijah) heard Lucy Nyambura (PW 10) saying that her parents were fighting within his (Elijah's) compound. When he approached his gate, he met the appellant dragging his wife outside his (witness's) compound to the road. The two were standing, but the appellant was forcefully pulling his wife holding her hands. Elijah pleaded with the appellant to stop beating the deceased, but the appellant never responded but continued beating his wife as they moved on. Next day, Elijah went to Nairobi, and returned the following Friday. He saw the appellant in his compound but never saw the deceased. Muremi Nahashon Mutugi (PW 6) (Muremi) recalled that on 14th October, 2002 at 7.00 p.m., he was coming from Kamurugo Shopping Centre. He heard screams from the appellant's home. He went to see who was screaming. He found the deceased was being beaten by the appellant. She was being kicked and hit with fists all over her body. The deceased was just standing. Later after that day, he saw James Mutugi Kune (PW 7), the Assistant Chief put a stick at some part of the

appellant's farm near the house of the appellant, where the body was later exhumed. After the above witnesses had seen or heard of the appellant assaulting the deceased on 14th October, 2002, the deceased was not seen alive and on 19th October, 2002 at 9.00 a.m., the appellant went to his mother-in-law, Lucy Wangui Munyu (PW 11) (Wangui) and reported that the deceased had disappeared from home. However, on the next day, 20th October, 2002, Cpl. Robert Wanyama Kibone (PW 8) (Cpl Robert) of Kagio Police Station, acting on information from the area Chief and other people arrested the appellant and took him to Baricho Police Station where the appellant was received by Cpl. Philip Ngutho (PW 12) (Cpl Philip). Cpl. Philip placed the appellant into the cells. The next day, 21st October, 2002, Cpl. Philip was passing near the cells when the appellant called him. As a result of what the appellant told this witness, the body of the deceased was exhumed from the appellant's farm. The body was taken to Kerugoya District Mortuary where a post mortem examination was done. The doctor who carried out the examination did not give evidence in court but Dr. Abraham Gatangi (PW 9) (Dr. Gatangi) who gave evidence on the physical and mental condition of the appellant also produced the post mortem report prepared by Dr. Njue who carried out the post mortem examination on the deceased. There were bruises on the body, aspirated food on the trachea; a large bruise over the left parietal area of the skull, and there was inhalation into the chest cavity of material from trachea. Dr. Njue in the post mortem report stated that he formed the opinion that the cause of death was head injury using a blunt force, and that there was also complicating asphyxia due to aspiration of food material. There was also a comment at the bottom of the same post mortem report as follows:

"**Comment: A blunt object was used over the head. Terminally she vomited and asphyxiated. She may have had a convulsion."**

The above are the facts that led to the appellant being charged with the offence. Put on his defence, the appellant stated that on the material day he took the children to school and then went to see a cow he wanted to buy. After that he went with another person (Mwangi) to a bar in Kagio Town where they drank till 5.00 p.m. from around 2.00 p.m. At 5.00 p.m., he left the bar and went home feeling drank. On reaching home, he found the deceased was not there. Later, the deceased came and was very drank. He asked her how she could care for the children in that state and she responded in a manner not acceptable to the appellant. She told him it was not the duty of women to educate children. He became annoyed and slapped her twice. She ran away and did not return home that night and the following day, she did not return and the appellant did not know her whereabouts till 21st October, 2002 when the appellant was arrested and was told three days later by the OCS Baricho Police Station that his wife's body had been found buried. He thus did not know anything about the deceased's death.

It is on the basis of the above entire evidence that the appellant was convicted of murder and sentenced to death. We have cared to put the same facts down in details as this is a first appeal and in law, we are duty bound to appraise the evidence afresh, and come to our own conclusion, but always bearing in mind that the trial court had the advantage of seeing and hearing the witnesses and their demeanour and giving allowance for that - see the case of **Okeno vs. Republic (1972) 32**.

We are not in doubt and we do agree with the learned Judge, that much as there appeared to have been some apparent confusion as to the cause of death, and much as the presence of Dr. Njue who performed the postmortem examination could have been an added advantage in solving the apparent confusion, on proper reading of the report and the explanation by Dr. Gatangi, it is clear that the cause of death was a blow on the head by a blunt force which resulted into the deceased having convulsion and the food found in the trachea was as a result of convulsion. There were several witnesses whose evidence we have summarized hereinabove to the fact that the same beating was administered upon the deceased by the appellant. The appellant himself admits that he slapped the deceased twice but there is direct undisputed evidence that he beat the deceased with his fists as well as with a jembe handle and a coffee tree branch. This beating seems to have taken place for a fairly long time. George witnessed it at about 4.00 p.m. whereas the other witnesses witnessed it at 6.00 p.m. and at about 7.00 p.m. That, in our mind, explains why witnesses did not see each other at the scene and why some witnesses did not see such items as the jembe handle or the coffee tree branch being used in the assault. It is however, after that beating, which went into the night, that the deceased was not seen alive again, as no evidence was adduced of her having

been seen alive after the beating. The next time that the deceased was seen was when her body was exhumed from the appellant's farm. Even if one were to ignore the evidence of Timothy Gachoki Wairia who on 16th October, 2002 saw two people pushing a wheel barrow and another pulling it with a dog behind, and even if one was to ignore the part of the evidence of Cpl. Philip which was to the effect that it was the appellant who showed them where the body was on 21st October, 2002, still in our view, one thing stands out clear, and that is that the appellant beat the deceased upto evening of 14th October, 2002, and thereafter, the deceased was never seen till 21st October, 2002 when the deceased was found dead and buried on the appellant's farm. The irresistible inference that any reasonable tribunal would arrive at is that the appellant knew how the deceased had met her death and how she came to be buried at his farm. We would not be the exception.

The next aspect, we need to consider is whether the appellant in causing the death of the deceased did so with malice aforethought. In short, whether the offence of murder was proved beyond any reasonable doubt. The learned Judge, in her summary to the assessors stated as follows *inter alia*:-

"If you are satisfied that the evidence points irresistibly to the deceased having died as a result of the Accused's unlawful act or omission and that the accused had the intention to cause the death of or to do grievous harm to the deceased, then you must return a verdict of guilty to the offence of murder. If you do find that the deceased died as a result of the accused's unlawful act or omission but that the accused did not have the intention to cause the death or to do grievous harm to the deceased or that there was provocation, you must return a verdict of manslaughter. If however you find that the deceased's death was not as a result of the accused's unlawful act or that the accused was so intoxicated as to be temporarily insane such that he did not know what he was doing then you must return a verdict of not guilty."

It is clear the learned Judge, in that summary to the assessors, did not inform the assessors that intoxication or drunkenness could also reduce the charge of murder to that of manslaughter if the assessors found that the appellant, in beating the deceased, was heavily under the influence of drinks to the extent that he was not capable of forming intent to murder. In her judgment, the learned Judge considered the appellant's evidence in defence that on the material day, just prior to the incident, he had been drinking from 2.00 p.m. to 5.00 p.m. but she dismissed that as being by choice and not by the malicious or negligent act of another person, and she went on to say that there was no evidence that the appellant was so drunk as to be incapable of knowing what he was doing or as to be temporarily insane. She concluded by saying:

"The fact that the accused buried the body of the deceased in an attempt to conceal her death clearly shows that the accused knew exactly what he was doing."

Our problem with the learned Judge's statements and findings above are, first, that in saying that there was no evidence that the appellant was so drunk as to be incapable of knowing what he was doing, the learned Judge seemed to suggest that the appellant should have adduced such evidence. With respect, that was a misdirection. In the case of **Nyakite s/o Oyugi vs. R.** (**1959) EA 322 at page 325** it was stated by the predecessors to this Court as follows:

"In the present case we think, with respect, that the learned trial Judge erred in directing himself that the burden of raising a defence of intoxication so as to negative an intent to kill or cause grievous harm was on the accused."

Earlier, in that case, the learned Judges of the then Court of Appeal for East Africa had been considering drunkenness such as would negative an intent to kill or cause grievous harm. They quoted the case of **Manyara v. R. (5) (1955), 22 EACA 502** where the same Court had stated:

"It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection

if the trial court lays the onus of establishing this upon the accused."

The Court in that case, and in the case of **Kongoro alias Athumani s/o Mrisho vs. Reginam (1956) 23 EACA 532,** was making a difference in a case where an accused person pleads insanity by reason of intoxication and a case where intoxication or drunkenness is raised as in this case merely to negative the intent to kill. In the case of **Boniface Muteti Kioko and Willy Nzioka Nyumu vs. Republic** (**1982 – 1988) I KAR page 157**, one of the holdings is:

"It was the duty of the Judge to deal with alternative defences, such as intoxication, that emerged from the evidence, which might reduce the charge to manslaughter."

In this case, the learned Judge was clearly alive to the defence of intoxication, and dealt with it. However, it is the way she dealt with it that was, in our view, and with every respect, not proper. She treated it as a plea of insanity by reason of intoxication which it was not. It was a defence that would have, if properly considered, negatived the intent to kill and reduce the charge to that of manslaughter.

The second problem is that the learned Judge found that the appellant buried the deceased and that in itself, to the learned Judge, showed that the appellant knew what he was doing. The evidence on record does not show anywhere that it was the appellant who buried the deceased and in any case, it does not show when the deceased was buried and how many days after death even if one were to accept that the appellant buried the deceased. This time element is important as intoxication or drunkenness is a temporary episode and thus the appellant, if he buried the deceased at all, could have done so after drunkenness had subsided.

Lastly, we also note that the learned Judge did consider that the response of the deceased to the appellant's question on who would care for the children was a minor matter that could have not amounted to provocation. The learned Judge did not consider such a remark with the background of the rural folk still intent on maintaining men's supremacy over their wives. Perhaps, if she had done so, she may have come to a different conclusion particularly if she had noted that both were apparently under the influence of alcohol.

On our own view of the matter, we feel that the benefit of doubt as to whether the appellant was so drunk as to negative the intent to kill goes to the appellant and together with the mild provocation by the response by the deceased, and that both were drunk, the offence of murder was not established as required by law. That of manslaughter was established.

The totality of all the above is that we allow this appeal against the offence of murder and set aside the conviction and the sentence of death. We do substitute in its place, a conviction for the offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. The appellant is sentenced to serve imprisonment for a period of **ten (10) years** with effect from **30th September, 2004**. Judgment accordingly.

Dated and delivered at Nyeri this 4th day of August, 2006.

E.O. O'KUBASU

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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