IN THE COURT OF APPEAL

AT ELDORET

CORAM: TUNOI, O'KUBASU & DEVERELL, JJ.A.

CRIMINAL APPEAL NO. 246 OF 2005

BETWEEN

WILLIAM NGIMERO KEBO …….. APPELLANT

AND

REPUBLIC ……..……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Eldoret (Hon. Lady Justice R. Nambuye) dated 7th February, 2000

in

H.CCRC NO. 18 OF 1998)

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JUDGMENT OF THE COURT

WILLIAM NGIMERO KEBO, the appellant before us, was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. He was convicted by the High Court (R. Nambuye J) on 7th February 2000 of murder and sentenced to death in the manner prescribed by law.

The facts relied upon by the trial Judge were well summarised in her judgment as follows:-

> ***"The facts are that the accused and deceased resided in Kapkatet area at the time of the incident. The accused was known as a casual labourer in the area while the deceased was a brick maker. At the time of the incident they were making bricks for PW4. PW4 recalled that the deceased and one Patrick Simiyu came and asked for money on 13th September 1997. He had been paying them in bits and he gave them Shs. 500/- and they went away.***
>
> ***On the same day at around 4.p.m. the deceased and the accused went to the home of PW2 the area assistant chief. The deceased was very drunk and he was staggering. PW2***

observed the condition the deceased was in and he told them to go away and come back the next day and they left.

They went passed the home of PW3 who saw them heading to the area Sub-Chief who is his neighbour. Both PW2 and 3 stated that the accused complained that the deceased owed him Shs. 12,000 from brick making. PW3 referred them to the assistant chief PW2 who told the accused to come the next day. They went away passed the school nearby. On the way PW1 (a teacher in Kapkatet) and his girl friend met the two and they passed. He knew the two as local residents. The deceased was making bricks near the school while the accused was a casual labourer in the locality. PW1 knew them by appearance. After passing the deceased staggered on and the accused appeared to be assisting him but at a distance of 50 meters away the deceased fell down and then the person identified as the accused bent down in a gesture of helping the person lying down.

PW1 was still observing and then he saw the accused step on the chest of the person lying down. PW1 suspected that there was something wrong and then he decided to go and find out what was going on. On seeing PW1 approach, the accused allegedly took off. PW1 tried to chase him but he (the accused) disappeared into a maize plantation.

PW2 (sic. should be PW1) attempted to report that night to the Assistant Chief PW2 but was prevented by fierce dogs until the next morning.....

The body was taken to the mortuary by the police the next morning and was identified by PW3 to the Doctor PW8.

The doctor observed a large cut across the neck cutting the thyroid cartilage trachea, both carotid arteries and the esophagus, the cervical spine and the skin posterially. The cause of death was due to the injury causing the severing of the major organs of the neck, the carotid and trachea following assault.....

Following the deceased's death information was given to the provincial administration that the deceased was seen last with the accused which information was supported by PW1 and the authorities started searching for the accused who had disappeared from the area. PW2 the Assistant Chief accompanied by a member of the public who reported to PW5 that the person who had murdered somebody at Kapkatet farm had been seen at Chesire farm.

PW5 was led to a certain house believed to be the house of the accused's brother and arrested him and took him to Moi's Bridge Police station.....

He was interrogated by the OCS PW9 who recorded a statement under inquiry from him. The statement was recorded voluntarily in accordance with the rules. It was not objected to and the same was produced as exhibit 5. .....

The accused gave unsworn evidence to the effect that he knows nothing about the incident, he was arrested for nothing and he was not informed of the offence committed after arrest until later on when he was tortured and then he thumb printed a paper whose contents he does not know. He was then charged with the offence of murder which he knows nothing about.

The assessors returned a verdict of guilty for murder."

The learned trial Judge in reaching her conclusion commented on the statement under inquiry stressing that:-

"The said statement is detailed, it was not retracted and it has been supported in some respects by the evidence of PW1, 2 and 3 and could only have been given by a participant

and so I find the same to be true."

The learned trial Judge further warned herself of the dangers of acting on the evidence of the single eye witness to the killing and concluded that ***"however I find that the evidence of PW1 is water tight and can be acted upon considering the fact that PW1 and 3 saw the deceased in the company of the accused and that the deceased was very drunk and he was staggering."***

The learned trial Judge went on to find that there was sufficient evidence to link the appellant to the commission of the offence and added:-

> ***"Having found so, I now come to decide which offence has been disclosed. Nobody saw the accused plan the death but from revelations from the statement and evidence of PW3 and 2 there was a disagreement over the money paid for making bricks. The deceased was the in charge and he is the one who used to be paid money and then he goes to pay the others. He complained to PW2 who told him to come the next day and they left together. PW1 did not witness the exchange of words as the deceased appeared to be too drunk but he saw the deceased fall down, accused bend over him and on going to find out what was happening he found the throat of the deceased cut and the accused ran away. By the accused running away on seeing PW1 it means that he knew what he was doing and he knew that he had done wrong. The very fact of cutting the throat of the deceased it means that he intended to kill the deceased and he did kill him. As for the issue of motive which is an essential ingredient in murder cases all we have is a complaint over non payment of money. This also featured in the statement under inquiry. Even if this is not the motive then the possibility of having an undisclosed motive or hidden motive cannot be ruled out. Herein the nature of the weapon used, the nature of the injuries inflicted all go to show that the accused intended to murder the deceased and indeed he murdered him. The assessors rightly returned a verdict of guilty."***

The learned trial Judge did not make any reference in her judgment to the evidence suggesting that the accused was himself to some extent under the influence of drink and yet PW3 testified that he saw the two men one of whom was very drunk and the other *"drunk but not very drunk"*. PW1 testified that he saw the two men.

In answer to cross-examination by Mr. Amata learned Counsel for the appellant PW1 said of the two men *"one appeared very drunk. One was not drunk or had very little drunkenness because he ran away."*

The accused said in his unsworn evidence:-

> ***"As we were headed for Nicholas son of Gideon my anger climbed high, I then beat him, he fell down and I removed a knife from his coat pocket and I stabbed him.***
>
> ***I was angered by both the Assistant Chief and Mzee Sitienei's failure refusal to assist me."***

After considering all the evidence we are of the view that there was a possibility arising from the appellant being under the influence of alcohol (although to a lesser extent than the deceased) coupled with the anger the appellant felt over the unpaid money owed to him and the lack of assistance from the Assistant Chief that, in the heat of the moment, he did not have the required intention to kill. This possibility is one which should have been drawn to the attention of the assessors by the Judge. The defence of provocation should have been explained to the assessors.

In ***Mabonga v. Republic*** *[1974] EA 176* this Court's predecessor (Sir William Duffus, P., Wambuzi C.J. and Mustafa J.A.) stated:-

> ***"The Judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the cow was in the particular circumstances of this case provocation sufficient to have reduced the offence from murder***

to manslaughter. His failure to direct himself or the assessors to this issue was a serious misdirection. In the circumstances, we think it will be unsafe to allow the conviction for murder to stand, as on the evidence, provocation cannot be ruled out. We accordingly quash the conviction for murder and set aside the sentence of death. We substitute therefore a conviction for manslaughter and a sentence of ten years' imprisonment."

We consider we should apply the same reasoning in this case and we therefore allow the appeal and quash the conviction of the appellant for murder and set aside the sentence of death.

We substitute therefore a conviction for manslaughter and a sentence of ten year's imprisonment to run from 7th February, 2000 when the appellant was convicted and sentenced.

Dated and delivered at Eldoret this 22nd day of September, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

…….

JUDGE OF APPEAL

W. S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR