IN THE COURT OF APPEAL

AT NAKURU

(CORAM: CHUNGA, C.J., BOSIRE & O'KUBASU, JJ.A)

CRIMINAL APPEAL NO. 27 OF 2001

BETWEEN

PATRICK KIHARA NJOROGE.....APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence in the High Court of Kenya at Nakuru (Mr. Justice Rimita) dated 26th January, 2001

in

H.C.CR. CASE NO. 20 OF 1999)

****

JUDGMENT OF THE COURT

The appellant, **Patrick Kihara Njoroge** (the appellant), had been charged with murder contrary to section 203 as read with section 204 of the Penal Code Cap. 67 Laws of Kenya but after his trial was found guilty of the lesser offence of manslaughter and accordingly convicted. He was subsequently sentenced to five years imprisonment.

During the trial of the appellant in the High Court, the prosecution called eight witnesses. The summary of the prosecution case was that on 5th May 1998 at about 10.00 p.m. the deceased George Chege was with others in a bar at Wanyororo market when the appellant with four other men arrived in a lorry. The appellant and his group entered the bar where George Chege (the deceased) was and an argument erupted regarding an organisation known as "Puma". As the deceased went out he was attacked by the appellant who stabbed him with a knife. The deceased died on his way to hospital. Dr. Edward Vilembwa (P.W. 7) who conducted postmortem examination on the body of the deceased found that the cause of death was due to severe haemorrhage due to ruptured spleen resulting from a stab wound.

When put to his defence the appellant said that he had been drinking with the deceased and other people who attacked and injured him. He then hit back in self defence.

Since there was no clear analysis of evidence by the superior court we think that it may be necessary to consider, but only briefly, what various witnesses stated in their evidence before that court. Henry Kuria

Gachoya (PW2) stated that he was with the deceased Chege when they went for drinks on the evening of 5th May, 1998. Gachoya (PW2) told the court how the appellant came in a hurry together with four other people who had pangas. In his evidence in chief this witness stated inter alia:

> "We saw things we re not good. We wanted to force ourselves out. As Chege was going out he found the accused holding an arrow. He wanted to stab Chege. I got hold of the arrow and it got broken. The group of 5 went to the lorry. We decided to go into a hotel. Chege d ecided to go home. Kihara had waited for Chege outside. We heard Chege say Kihara had stabbed me seriously.
>
> All those in the hotel went out. We found Kihara holding the knife and Chege holding the place where he had been stabbed (looks at Exh.3) and says it is the knife accused was holding.
>
> I jumped and held Kihara's hand. He managed to cut me between the thumb and front finger. Many people came. Kihara ran away. Chege's brother in law came. Chege had been stabbed. We went to look for a vehicle to take him to hospital. We brought him to Nakuru Provincial General Hospital"

From the above it is to be observed that there was a disturbance in which the appellant and the deceased were involved and in the end according to this witness (PW2), the appellant stabbed the deceased with a knife.

There was then the evidence of Malik Salim Shalembe (PW3) who said that on the material day (5th May, 1998) he was in his house at Wanyororo, when he heard noise. It was a disturbance of people who wanted to fight. When he went out he found the appellant and the deceased having an argument. The appellant was saying that he could kill someone as there was no law in Kenya. The appellant was complaining that the deceased had refused to recognize PUMA party. This witness (PW3) went back to his house only to hear the deceased cry saying in Kikuyu:-

"Come come Kihara has stabbed me badly " This witness then went out again and found the deceased bleeding badly. The deceased had been stabbed in the stomach. PW3 and other people took the deceased to Nakuru Provincial General Hospital where the doctor pronounced the deceased dead.

Hannah Wanjiku Gichohi (PW4) was one of those who went to the scene when they heard the noise. She said that there was moonlight and that she saw the appellant running away while the deceased was being held by Esther Njoki Gichohi (PW5). In fact these two ladies (PW4 and PW5) were sisters of the deceased.

Mary Mukuhi Gichungi (PW6) was yet another resident of Wanyororo whose business was selling of soup in a butchery. She too recalled the evening of 5th May, 1998, at about 10.00 p.m. when she saw the appellant in a group of people who had pangas. The thrust of her evidence was as follows:-

> *"There were about 5 people at the scene. I t hen heard Chege say Kihara you have stabbed me with a knife. We looked for the vehicle. Kihara later threw the knife and ran away followed by Kimani. Later we managed to get a vehicle. He was brought to hospital".*

As already stated elsewhere in this judgment it was Dr. Edward Vilembwa (PW7) who conducted postmortem examination on the body of the deceased, George Chege. In the doctor's opinion the cause of death was haemorrhage due to a stab wound. The same doctor examined Patrick Kihara Njoroge (the appellant herein) on 8th May, 1998. The doctor found the appellant to be aged about 30 years and mentally stable hence fit to stand trial.

Inspector Mary Gakuo (PW8) recorded a charge and cautionary statement from the appellant which statement was produced after a trial within a trial. In that statement the appellant appears to have admitted killing the deceased. In that statement the appellant is stated to have said:- "I killed him because he attacked me"

In his defence the appellant stated that he went to Wanyororo where he started drinking as from 2.0 p.m. They drunk up to 10.00 p.m. when trouble started. He was hit on the mouth and started bleeding. He struggled with those who attacked him and managed to get to his lorry and then drove home. In concluding his defence the appellant stated:-

> "I admitted that I was drinking at Nyanguthii's bar.I also admitted that there was a fight in which I was being beaten. They told me that one of the people who fought me was badly injured. I was then ch arged".

Having considered the evidence before him the trial Judge (Rimita J) came to the following conclusion in his judgment:-

> *"I find that there was a struggle between the accused and the deceased. The two fought after a misunderstanding as they were drunk.*
>
> *The deceased brother -in-law PW3 said that he was attracted by noise of people who wanted to fight. He found the deceased's and the accused's in an argument. The accused was saying that he could kill someone as there was no government in Kenya. The deceased was also saying things in response. It is after this argument that the deceased's was stabbed while outside.*
>
> *The disagreement was over some organization called PUMA. The deceased did not recognise it. It was an association of hooligans w ho waited for drunkards at night and mugged them. The accused had no business forcing others to recognise an illegal association. But it is clear from the evidence before me that the deceased took part in argument with the accused. The accused had been drinking for sometime. He must have been drunk. I would find him guilty of the lesser offence of manslaughter and not murder as charged. Consequently, I convict the accused of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code and acquit him of the offence of murder".*

We have carefully re-evaluated the evidence adduced before the trial court and making our own independent assessment of the same we come to the conclusion that this was a case in which the appellant and the deceased were involved in a drunkards brawl and, as often happens in many such incidents, the deceased lost his life at the hand of the appellant. There was overwhelming evidence to the effect that the appellant stabbed the deceased with a knife. The appellant on his part said that he was defending himself as he struggled with those who were attacking him. There was no question of mistaken identity since the witnesses knew both the appellant and the deceased. There were security lights at the scene and there was moonlight. The appellant never denied having been at the scene of crime. In the end the issue before the learned Judge was whether the facts before him constituted the offence of murder or manslaughter. He was of the view that the facts disclosed the lesser offence of manslaughter rather than murder. His reason for that finding was that the appellant had been drinking for sometime and so he must have been drunk.

On our part we wish to draw the learned Judge's attention to section 13 of the Penal Code which provides:

> 13.(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the a ct or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -
>
> (a) the state of intoxation was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charge d was by reason of intoxication insane, temporarily or otherwise, at the time

of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intenti on, specific or otherwise, in the absence of which he would not be guilty of the offence.

(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."

Having regard to the foregoing, we are not able to say that the appellant was so drunk that he was incapable of forming any guilty intention. However, since the charge of murder was reduced to manslaughter, we think that it would not be appropriate to interfere with the learned Judge's findings.

Before we conclude this judgment, we wish to call to the learned Judge's attention, the contents of a judgment. Section 169(1) of the Criminal Procedure Code (Cap.75 Laws of Kenya) provides:-

"169(1)Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it". (underlining provided)

The learned Judge's judgment clearly does not comply with the aforesaid provision. We wish to reiterate that trial courts should observe this provision scrupulously, otherwise, in an appropriate case an otherwise sound decision might be set aside. We do not however, think that on the facts and circumstances of this case the error by the learned trial Judge is fatal to the appellant's conviction. The omission is curable under the provisions of section 382 Criminal Procedure Code.

In conclusion we wish to say that having considered the evidence placed before the superior court and the findings thereon by the learned Judge we find that the appellant was convicted on clear evidence and in view of his own admission that he killed the deceased, we find no merit in the appeal against conviction. As for the appeal against sentence the appellant complained in his memorandum of appeal that the learned trial Judge did not take into account the period he spent in remand custody. A cursory perusal of the record of the trial court reveals that the learned trial Judge indeed considered that aspect in arriving at a sentence of 5 years imprisonment. We think that considering the facts and circumstances of this case the appellant was leniently treated. A stiffer sentence was called for. The appellant's appeal against sentence too, lacks any merit. In the result we order that the appellant's appeal be and is hereby dismissed in its entirety.

Dated and delivered at Nakuru this 15th day of March, 2002.

B. CHUNGA

.....

CHIEF JUSTICE

S. E. O. BOSIRE

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR