



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KWACH, SHAH & O'KUBASU, J.J.A.)**

**CRIMINAL APPEAL NO. 122 OF 1991**

**BETWEEN**

**JOSHUA MATATA NDONYE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a Conviction and Sentence of the High Court of  
Kenya at Machakos (Justice Torgbor) dated 26th April,  
1991**

**in**

**H.C.CR.C. NO. 2 OF 1989)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

**JOSHUA MATATA NDONYE**, the appellant, (hereinafter called "the accused") was charged with murder contrary to **section 203** as read with **section 204** of the Penal Code on an information containing six (6) counts. In count 2 it was alleged that on 27th May, 1987 at about 8:30 p.m. at Kwakaseke Village, Mukaa Location in Machakos District within Eastern province the accused murdered Ndongye Matata. It was the murder of Ndongye Matata (the deceased) that the accused was found guilty of, convicted and sentenced to death. In all the accused had committed 6 murders. Five of the victims were his own children while the sixth was his mother.

On the fateful night, the accused returned home and found his wife Beatrice Mboli (P.W.1.) (Beatrice) asleep. Her 5 children Nzomo, Ndongye, Faith, Ndolo and Malinda had also gone to bed. The accused woke up Beatrice and asked her to give him some food. He specifically asked for chicken and Beatrice started preparing this for him. While the chicken was being prepared the accused asked Beatrice to give him some other food which had been cooked for dinner that evening. He demanded to be served like a "**BWANA**" which **COLLINS ENGLISH DICTIONARY** (Third Edition) defines as "**a master, often used as a respectful form of address corresponding to sir.**" The accused was not satisfied with the quality of service Beatrice was giving him and he suddenly turned violent, grabbed her, hit her on her back with his fist and kicked her. Beatrice cried out and this was heard by the accused's mother, Nduku Ndongye, who came and separated them. Beatrice escaped and spent the night at her house. Early the following morning, she walked into what could only be described as murders most foul. All her 5 children and her mother in law were lying on the floor in a pool of blood,

dead. Each one of them had been brutally murdered. The accused was nowhere to be seen. Beatrice went to a neighbour, Muinde Kitete (P.W.2.), and asked her for help. The old lady was indisposed and asked another neighbour, Wallace Muthoka, to accompany Beatrice to the home of the Assistant Chief to report the incident. Ultimately, information reached Kilome Police Station and P.C. Newton Munyao (P.W.4.) was dispatched to the scene. He found the bodies covered with half-burnt grass. There was a boiled chicken lying near the fire place. His impression was that an attempt had been made to burn the bodies. Outside the kitchen he found a big leg covered in blood. He described the injuries he observed on some of the victims. Faith Matata had a deep cut on the back of her head, Malinda had a broken neck. Ndolo Matata had a deep cut on the head while Nzomo had a deep cut on the left eye. Ndonye had a deep cut on the head and her brain was cracked and dripping out. He arranged for the bodies to be taken to Machakos Mortuary. A blood-stained piece of wood was also found at the scene. The accused was arrested on 30th May, 1987 following a tip off from the OCS Sultan Hamud Police Station and taken into custody.

***The accused did not deny the murders. In his unsworn statement he told the trial Judge-***

***"I came to know on 29th May, 1987 that I had murdered my son, the deceased. This was at Kalimbwana village in Kajiado District. Someone called Daniel told me I had murdered my whole family. I did not know when I went to Kalimbwana but I found myself there. I was surprised but I admitted murdering my family because I did not know what made me go to Kalimbwana or to escape there. With regard to the charge I admit that I killed Nzomo Matata. On 27th May, 1987 I helped to do some parents' work at the school attended by my children. After that I went to drink some traditional liquor with Mativo Ndusi.***

***There were 4 of us. We first drank two jerry cans of muratina containing 5 litres each ..... After the two cans Mativo brought two more cans and we finished them also. Then he brought more. Mativo Ndusi was the brewer. We drank till about 7:00 p.m. when we went to Mativo's house and drank some more. I had assisted Mativo by digging his shamba for him and he was repaying me with the drink. I do not recall going home". (Emphasis added).***

The accused put forward the defence of intoxication. It is provided by section 13(2) of the Penal Code (Cap 63) that-

***"(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and -***

***(a).....***

***(b)the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission."***

The accused said that he had consumed a considerable amount of alcohol. At no time did he say that as a result of that consumption he got drunk. He probably left that to be inferred from what he had said in his unsworn statement in his defence. Beatrice's evidence was that the accused appeared to have been drinking but he was not drunk when he returned home, woke her up and demanded to be served like a bwana. Beatrice said that if he had been drunk he would have been unable to overpower her. The learned Judge was right to accept the evidence of Beatrice on this point as there was no reason to reject it.

In the case of **KONGORO s/o MRISHO V. R** (1956), 23 EACA 532, the Court of Appeal for Eastern Africa referred to the case of E.A.C.A. Criminal Appeal No. 450 of 1955, Cheminingwa vs Republic (unreported) in which it was 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."***

On the defence of insanity the learned Judge directed himself perfectly correctly. After reviewing the evidence presented by the prosecution and the accused in his own defence, the learned Judge concluded-

***"As nothing has been said by the accused or the defence to show or even suggest that the accused was insane through drink at the time of the commission of the offence this court is unable to find or conclude that the accused was so insane when he killed Nzomo.***

***The court must therefore reject the defence of insanity though it is specifically urged and considered and the court in this case declines to apply the provisions of the Penal Code and of the Criminal Procedure Code relating to insanity.***

***Again further, and on the evidence the court is unable to find or conclude that by reason of intoxication the accused was at the time of the commission of the offence incapable of forming the intention to kill the deceased or that he did not know the nature of his act or that his act was wrongful. On the contrary, from the manner in which the accused killed the deceased by smashing his head and considering in particular the weapon used by the accused and the fact that he was not very drunk, this court finds that the accused was capable of and did form the intention to kill the deceased."***

We agree entirely with the learned Judge. If the accused had been drunk, he himself would have said so, but he did not. And if he had overlooked the matter, his wife, Beatrice, who escaped from him shortly before he embarked on what was clearly a systematic carnage of his mother and children, would have said so. She told the court the accused was not so drunk. We are satisfied that the accused's conviction for murder was proper. Accordingly, the appeal must fail and it is dismissed.

Dated and delivered at Nairobi this 16th day of March, 2001.

**R.O. KWACH**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**