



IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GICHERU, TUNOI & BOSIRE, J.J.A.)

CRIMINAL APPEAL NO. 88 OF 1993

BETWEEN

SILAS KAIMAGOL CHEPKWONY APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from Convictions and Sentence of the High Court of Kenya at Nairobi
(Khamoni, J) dated 30th July, 1993

in

H.C.CR.C. NO. 40 OF 1992)

JUDGMENT OF THE COURT

SILAS KAIMAGOL CHEPKWONY, hereinafter called the appellant, was on 30th July, 1993, convicted by Khamoni, J on three counts of murder contrary to Section 203 as read with Section 204 of the Penal Code and consequent upon those convictions, the appellant was sentenced to suffer death. He had been tried by the learned Judge, with the aid of assessors, on an information the particulars of which stated that on the 15th day of January, 1992, at Kenyatta National Hospital within the Nairobi Area he murdered three Administration Police Officers, namely, Emmanuel Kochulemu, Josephat Orwonyi and Lawrence Kamotho. We shall hereinafter refer to them as the deceased.

The appellant, also an Administration Police Officer based at Uhuru Camp in Nairobi, together with the three deceased officers were on the evening of the material day among a group of officers assigned to guard various places in Nairobi. The appellant with Constable Gichovi had been particularly designated to guard the residence of the then Deputy Public Prosecutor situate at Upper Hill. For this purpose each officer was issued with a gun and a magazine with rounds of ammunition. The appellant was issued with a G3 rifle and 20 rounds of ammunition. When leaving for duty from their base at Uhuru Camp, the appellant did not join his colleagues on the vehicle which took them to Kenyatta National Hospital where they used to gather before dispersing to their respective places of work. However, the appellant was there on time. How he reached there no one for sure knows. No sooner had all the officers gathered at the Hospital than the appellant, without any warning, started shooting indiscriminately at the officers. In the process the deceased officers were fatally shot. After a moment of resultant panic and confusion the appellant was arrested on the spot and disarmed. Several days afterwards he was arraigned in Court on the crimes the subject matter of the appeal before us.

The evidence led before the learned trial Judge does not show the accused as having quarrelled or having had any dispute with anyone. The witnesses testified that the appellant was a man of a quiet disposition who talked little and generally never caused any problem to his fellow officers or his superiors. On the fateful day in particular he did not have any quarrel or dispute with the deceased persons or indeed anyone. In fact, he looked normal in behaviour and gait.

On his arrest, the appellant was searched and some plant material and capsules were recovered from him. These articles were taken for analyses by the Government Chemist who on examination found them to be cannabis sativa (bhang) and ampicillin drugs, respectively. The appellant's blood sample indicated a blood alcohol content of a minimum intake of four and a half (42) litre bottles of beer or ten (10) whiskies.

Dr. Mburu (PW 1), a psychiatrist specialist at the University of Nairobi, examined the appellant on 27th January, 1992. The appellant told him that he had been drinking alcohol on the material day from 10 a.m. to 3 p.m. when he reported for duty and had no recollection of what had happened until the following day when he found himself in the cells. He was not on any medication. However, he had a cousin who had a mental illness. Dr. Mburu testified:-

"Psychological intoxication can result even from small amount of alcohol. Temporary insanity can be caused and in that state the victim may not know the consequences of what he is doing. After that effect, the suspect may appear normal."

In his testimony before the trial court, the appellant stated that he only found himself at the Police Station. He did not know why he was there. He only heard that he had killed people.

The main question for decision at the trial was whether the appellant at the time he shot dead the deceased persons was insane, so as not to be responsible for his act. The learned Judge found against the defence submission on this point and we agree with his findings that the requisite degree of proof of insanity in the legal sense was not present.

However, the other crucial point which called for serious determination was whether the appellant had formed any intention to kill or to do grievous harm to the deceased officers or to any person in that regard. Under Section 13 (4) of the Penal Code it is laid down that:-

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

The counsel for the appellant, Mr. Mogikoyo, submitted that the appellant was so intoxicated that he was incapable of forming, and did not form, any intention to cause the death of the deceased officers. The learned Judge dealt with the issue in his judgment in the following terms:

"There is no other evidence that the accused was intoxicated. He met his seniors and his equals for hours particularly between 3:45 p.m. and 6:30 p.m. They never noticed that the accused was intoxicated. If he were intoxicated to the extent the learned defence counsel put in the submissions at the end of the defence case, the witnesses who met and dealt with the accused or talked to him between 3:45 p.m. and 6:30 p.m. could not have failed to notice that the accused was intoxicated. They could not have failed to observe that the accused was behaving in an abnormal manner and to suspect that he was insane. The duty officer at Uhuru Camp could not have noticed the accused's drunkenness from things like staggering and or stammering accompanied by alcohol smell. The accused himself could not have failed like he has failed, to say it in his defence in this court either through his charge and cautionary statement or both through such a statement and through his defence direct that he had been taking alcohol and had become drunk and lost his mental control."

On our own part and after a very careful consideration of all the evidence in the case including the submissions of Mr. Mogikoyo we have with great respect come to the conclusion that the finding actually

made by the learned Judge on the existence of malice aforethought is indeed contrary to the weight of the evidence in the case and cannot be upheld.

It is manifestly clear that no quarrel of any sort between the appellant and any other person preceded the killing. No provocation, either by insult or act, had been offered to him by anyone. The wild shooting at random is an act that appears to us to be completely inexplicable on any other hypothesis but compatible and entirely comprehensive if the defence of intoxication is believed.

The presence significant amount of blood alcohol in the appellant's body shows that the appellant had consumed a considerable quantity of alcohol prior to the killing. While under Section 13 of the Penal Code intoxication is to be taken into account in determining whether the appellant had formed the necessary intent to commit murder, it is not the only factor which falls for consideration.

The complete absence of any quarrel or other motive for the killing, the rather aimless way in which the firing of several rounds of ammunition was done, the lack of any provocation and the general conduct of the appellant before and after the shootings all lead us to conclude beyond any per adventure that the appellant acted as he did entirely without malice aforethought.

We believe that his action was most probably due to his having consumed an excessive amount of alcohol and this is the only reasonable conclusion that can properly be drawn from the evidence as a whole. It must follow therefore that in the absence of malice aforethought the appellant should not have been found guilty of murder. We accordingly allow the appeal, set aside the convictions and the sentences for murder and substitute convictions for manslaughter.

In view of the circumstances in which we have found the killings were committed, namely, that the three Administration Officers unnecessarily lost their lives as a result of a wanton and aimless gun shooting by the appellant while highly intoxicated, we think we should express our horror and disgust by awarding justly deserved sentences. We sentence the appellant to twelve (12) years' imprisonment on each count of murder. The sentences shall be served concurrently..

Dated and delivered at Nairobi this 8th day of December, 2000.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR