IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, PALL & OWUOR, JJ.A.)

CRIMINAL APPEAL NO. 7 OF 1994

BETWEEN

KIMILU KISUNI NZOMBA..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a conviction of the High Court of Kenya at Machakos (Mr. Justice J. L. A. Osiemo) dated 10th December, 1993

in

H.C.CR.C. NO. 4 OF 1993)

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JUDGMENT OF THE COURT

After setting out the prosecution case and that of the appellant in this appeal, the learned trial judge in his judgment dated and delivered at Machakos on 10th December, 1993 had this to say:

"I have considered the evidence of both the prosecution and the defence carefully. The accused states that he was so drunk that he did not know what he was doing. But his acts were so consistent and the sequence was that of a person who knew what he was doing.

The offence of murder is committed when a person of malice aforethought plans to kill and he kills and it does not matter whether the person killed is the person he intended to kill or not.

In the present case, although the accused intended to shoot Ndilo but instead he shot and killed the two deceased persons does not exonerate him of the blame.

The prosecution has proved its case beyond any reasonable doubt that the accused formed his mind to kill the deceased persons and that the killing was unlawful.

I therefore record the finding of guilty and convict the accused accordingly with the offences of murder of

BONIFACE KIOKO and **MUTIE WAMBUA** contrary to section 203 as read with section 204 of the Penal Code.

The only sentence provided by law for the offence of murder is death. I therefore sentence you **KIMILU KISUNI** to death."

From the foregoing, it is quite clear that the analysis by the learned Judge of the evidence placed before him at the trial of the appellant for the murder of *BONIFACE KIOKO* and *MUTIE WAMBUA* was very scanty indeed.

The appellant had been charged with two counts of the murder of *BONIFACE KIOKO* and *MUTIE WAMBUA* contrary to *section 204 of the Penal Code.* According to the prosecution, on 2nd March, 1989 the appellant together with one *DAVID NDILO WAMBUA (P.W.8)* and Ndiani Malii went to a funeral within their village where they stayed until about 6:00 p.m. when they left for their respective homes. Along the way the appellant and *P.W.8* quarrelled and abused each other and thereafter they parted and each went on his own way. But according to the appellant, on the morning of 2nd funeral. He obliged and they both went to the home of one Malii Kituku and thereafter they together went to the home of Ndiani Malii where there was liquor. They left this home at about 1:00 p.m. and went to the home of one Nzioka Mutungi where they again took liquor up to about 6:00 p.m. They were never able to go to the funeral but decided to go to their respective homes and as they did so *P.W.8* and Ndiani Malii started quarrelling with him and when he was about 30 paces away from his home, *P.W.8* held his coat and tried to remove it from him. The appellant fell down and while on the ground *P.W.8* and Ndiani Malii started beating him. *P.W.8* squeezed his testicles while Ndiani Malii held his hands. With alot of pain, the appellant screamed and Ndiani Malii released his hands and prevented *P.W.8* from inflicting any further punishment on him. From the evidence of *P.W.8*, it would appear that at some stage on the way to their respective homes, the appellant had complained to him that he had sometime back beaten him (appellant) when the latter was drunk. Nevertheless, according to the appellant, with pain from his squeezed testicles he jumped over the fence to his home, picked his bow and arrows and challenged *P.W.8* to wait for him, if he was a man. When he returned to the scene of the assault, now armed with a bow and arrows, he was hit with a stone on his right leg just below the knee. According to *DR. DAVID MUTUNGI (P.W.2)* who medically examined the appellant on 9th March, 1989, the appellant had a small superficial wound on this leg which was about 6 days old which is consistent with the appellant's story. The appellant then chased *P.W.8* to his home where he entered into his house. He asked him to come out of his house but *P.W.8* refused. The appellant set that house on fire and *P.W.8* came out of it and ran towards his brother *MUTIE WAMBUA'S* house. The appellant followed him there and asked the occupants of that house to get *P.W.8* out. The response was negative. The appellant then set fire to the said house and released an arrow into the burning house which shot at the deceased *MUTIE WAMBUA* whose body was burnt out beyond recognition. Thinking that the people in Mutie's house had moved to the neighbouring house of *NAVIN MUTUNGI MASAI (P.W.10)*, the appellant set the same on fire and shot the deceased *BONIFACE KIOKO* on the chest with an arrow. According to *P.W.10* who was the father of the deceased *BONIFACE KIOKO*, the appellant had on the same night gone to his kiosk introducing himself as *P.W.8* and wanting to buy a match box. When he opened the window to the kiosk the appellant shot him with an arrow on the chest. According to the appellant, he did all this under the influence of alcohol and after being assaulted by *P.W.8* who had squeezed his testicles and when on the following morning at about 6:15 a.m. he sobered up and realised what he had done he decided to report the matter to the police and was arrested.

When summing up to the assessors, the learned trial judge said that the appellant and *P.W.8* had spent the fateful day together and they could have taken traditional liquor and could have quarrelled. He, however, made no reference to the assault allegedly committed on the appellant by *P.W.8* and its

effects, which according to the appellant, was the genesis of the series of events that took place on the night of 2nd/3rd March, 1989. Indeed, in his judgment, whereas the learned judge faithfully set out the details of this assault and the subsequent events as narrated by the appellant, he nonetheless did not address himself on whether or not if the appellant was so assaulted as he alleged, that assault could have amounted to provocation. Provocation had been a live issue in the final address to the learned judge by the then counsel for the appellant and respondent.

In his appeal to this court, the appellant's strongest point was that the issue of provocation was not addressed by the learned trial judge though it was apparent in the proceedings before him, nor was it put to the assessors. According to his counsel, Mr. Keriako Tobiko, this lapse on the part of the learned trial judge led to a miscarriage of justice.

The response of counsel for the respondent, Miss. E. Kamau, was that the assault on the appellant was such that it should not have led him to behave the way he did leading to the death of the two deceased persons. He had therefore the necessary intent to kill them.

In *Rex v. Lulakomba*$^{s}/_{o}$ *Mikwalo and another,* (1936) 3 E.A.C.A. 43, the Court of Appeal for Eastern Africa held:

"That where a defence, not manifestly false, is made, the trial judge must put it to the assessors and to himself, and failure to do so constitutes a miscarriage of justice."

Indeed, where, as in the case before the learned trial judge, there was evidence of provocation, it was the duty of the trial judge to direct himself and the assessors on the issue of provocation. Failure to do so was a serious misdirection for it is not open to this Court to speculate on what the conclusion of the trial judge would have been had the issue of provocation been addressed to the assessors and the learned judge had considered it - see the case of *Wafula* $^{s}/_{o}$ *Waminira v. R.,* [1957] E.A. 498. In the circumstances, the appellant's conviction of the murder of *BONIFACE KIOKO* and *MUTIE WAMBUA* contrary to *section 204 of the Penal Code* cannot stand. Accordingly, we allow the appellant's appeal, quash his conviction of the murder of *BONIFACE KIOKO* and *MUTIE WAMBUA,* set aside his death sentence and as we think that he was guilty of the offence of manslaughter contrary to *section 205 of the Penal Code* in respect of the death of the two deceased persons, we substitute therefor a conviction of the offence of manslaughter on both counts and sentence him to 10 years imprisonment on each count. Both sentences are to run concurrently with effect from the date of the judgment of the superior court, that is to say, 10th December, 1993.

Dated and delivered at Nairobi this 20th day of November, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR