Case Number:	Criminal Appeal 196 of 2016
Date Delivered:	28 Sep 2018
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Paul Kihara Kariuki, Patrick Omwenga Kiage, Agnes Kalekye Murgor
Citation:	Jennifer Wanjiru Ng’ang’a v Republic [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	HC. CR. A. No. 77 of 2011
Case Outcome:	Accused convicted
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KIAGE & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 196 OF 2016

BETWEEN

JENNIFER WANJIRU NG'ANG'A aka MAMA FLORA aka

MAMA MWANGI aka MAMA KABIRI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at

Nairobi (Lesiit, J.) dated 28th July, 2016

in

HC. CR. A. No. 77 of 2011)

****

JUDGMENT OF THE COURT

September 11, 2011 is a date that the residents of Gitambaya Village in Ruiru District of Kiambu County would sooner forget but may not soon forget. That is a day of darkness, tears and infamy. This is because some eight villagers, all of whom had visited and imbibed various amounts of *changaa*, an alcoholic brew at a local pub popularly, if ominously, named "Mtongwe Bar" and more ambitiously referred to as "Kings Pub" as well, succumbed to death after complaining of excruciating stomach, chest and whole-body pain. Some suffered blurred vision, vomiting and diarrhea before giving up their ghost. Some other happy revelers were lucky enough to escape death, but barely, and they lived to tell their tale of agony of the adulterated and toxic brew they had consumed that had claimed the eight.

Following police investigations, the appellant **Jennifer Wanjiru Nganga,** who was also popularly known as '**Mama Flora'** and '**Mama Mwangi'** as well as '**Mama Kabiri'** was arrested and charged with eight counts of the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code.** This in respect of the deaths of Jane Wambui Kamau alias Wa Kamau; Festus David Nzuki; David Karanja Nduati; Samuel Waweru Wanjiku; James Mwita Wanjiku alias Fracis Mwita; Julius Kariuki Mwangi; Joseph Ndichu Kamau and Stephen Nzuki.

The appellant denied the charges and there then followed a trial first before Mucheru J. before whom some eleven (11) testified.

That judge was transferred and Lessit, J. then took over the trial after complying with the requirements of **Sections 201(1)** and **200** of the **Criminal Procedure Code**. The learned Judge took the testimony of five (5) prosecution witnesses more and, after finding that the appellant had a case to answer, her sworn defence as well.

The prosecution case as presented before the learned Judge was that the appellant was the owner of the aforesaid pub which was located in her dwelling house. On the material day, all the deceased took *chan'gaa* and other alcoholic drinks including one by name "kegs" in that pub. After the deceased and those who survived started exhibiting the symptoms of stomachache, vomiting, chest pain and blurred vision, a group of them proceeded to the Ruiru Criminal Investigations Office where they recorded statements regarding what they had consumed at the pub and the consequences that now attended their drinking.

A report had been made on the same 11th of September 2011 at Ruiru Police Station regarding the deadly alcohol following which the appellant, who was mentioned in the report and by those who went to record statements, had been arrested and taken into custody. Six post mortem examinations that were conducted on the bodies of the deceased at the Kenyatta University Mortuary and one each at the Thika District Hospital and Bishop Okoye Hospital all indicated that they had no visible injuries. The pathologists thus formed the opinion, pending toxicology results, that the cause of death was possible poisoning. Samples of the liver, kidney, blood and stomach contents were taken from the bodies and sent to the Government Analyst and the reports prepared for all the deceased save for David Karanja Nduati (David) and Samuel Waweru, Wanjiku (Samuel) showed various levels of methanol (methylalcohol) and in the case of two of them, ethanol as well. The opinion formed in each of those cases was that;

"This level of laced methanol, a highly toxic industrial alcohol, is lethal and may have solely caused the death of the deceased persons as no other chemically lethal-toxic substance(s) was detected in the submitted post-mortem specimens (exhibits)."

In the case of David and Samuel, no methanol was detected in the samples presented for analysis and from the exhibit Memo Forms respecting the two, blood samples were not presented. The Government Analyst in this respect made a note that;

"The deceased person's blood or urine or both blood and urine should have been duly submitted as indicated in the accompanying case exhibit memo form for the verification of the suspected causation of death as reflected in the précis of offence."

The appellant was acquitted on the charges relating to David and Samuel on that account.

Testimony was led that the police and the local chief got word from an informer that the appellant was seen transferring liquor from her house two days after the fateful and fatal drinking by the deceased and some of the witnesses to an unknown location. When they visited the appellant"s house, they found that the appellant had locked herself in the house and opened for them after some 5 minutes of knocking. On searching the house they did not get any *changaa* though there was a strong smell of it. They thus left empty handed but the Senior Chief **Peter Thuo Ngugi** (PW3) received a call at about 8.30pm from yet another informer that the appellant"s house had holes in which she hid alcohol. Returning to the house they indeed found holes dug under the wardrobe in one of the bedrooms and covered with timber. It reeked strongly of alcohol but was empty as was another hole in the

kitchen which had empty 20 litre jerricans. They thus took no exhibits.

When placed on her defense, the appellant denied the charges laid against her. She denied knowledge of any of the deceased and of the witnesses who testified and insisted she has never manufactured nor sold *chang'aa*. In cross examination she stated that she lived in Kiambu but admitted having previously lived Ruiru and having been arrested there is connection with the charges facing her. She denied running any bar or pub but admitted after an initial denial, that she is known as Mama Flora.

On the basis of the evidence tendered and after considering and rejecting the appellant"s defence, the learned Judge found her guilty of the charges of murder in respect of all the deceased, save David and Samuel as we have indicated, and sentenced her to suffer death as provided by law.

That conviction and sentence aggrieved the appellant and she accordingly filed this appeal in which she complains that the learned Judge erred in law and fact by;

"1. …holding that the ingredients of the offence of murder could be inferred from the circumstantial evidence of owning a bar.

2. …holding that the offence of murder was proved beyond reasonable doubt.

3. …concluding that Actus reus and mens rea could be inferred from the circumstances of owning a bar."

Arguing the appeal before us, Mrs. Mary Mungai the appellant"s learned counsel characterized this *"a case in which the appellant was charged and convicted of murder on the basis only of bar ownership."* She criticized the learned Judge for failing to seek for, and be satisfied that both the *actus reus* and *mens rea* for the offence of murder had been established. As the appellant had not been proved to have committed any act leading to the death of the deceased, she should not have been convicted, she submitted. Counsel next charged that the circumstantial evidence led by the prosecution did not go beyond establishing that the appellant owned the bar in question. The appellant was, however, not present at the said bar on the material day and there was also no evidence that the brew sold thereat was analysed. Counsel then posed the question of what nexus there was between methanol in the bodies, (blood to be exact) of the deceased and their having been at Mtongwe bar. She also saw as a fatal omission the prosecution"s failure to call the two young men who were serving liquor at the bar on the material day. This was critical „as there can be no vicarious criminal liability", a submission for which we enquired whether she had any authority, and she demurred, but still urged us to quash the appellant"s conviction.

For the Republic, **Mr. Muriuki** the learned Senior Principal Prosecution Counsel defended the conviction and sentence. He submitted that the circumstantial evidence was sufficient to found a safe conviction and that the pathologist **Dr. Oduor Johnson** (PW17) in his report and testimony in court established the connection between the post-mortem results and the toxicology findings. All the deceased were at the appellant"s Mtongwe Bar on 11th September 2011 and that was the source of the lethal methanol in the blood. Regarding malice aforethought, the learned Senior Principal Prosecution Counsel argued that it was established by the appellant"s unlawful act of selling unlicenced, untested, illicit liquor for which she must be held responsible and her conviction was sound and warranted. He urged us to leave it undisturbed.

Mrs. Muigai's brief reply to those submissions was a reiteration that no nexus had been established between the liquor consumption and the subsequent multiple deaths, and that the appellant was not at the premises.

We have set out the case placed before the learned Judge in some detail having carefully, and exhaustively evaluated and considered all the evidence on record as we are enjoined to do in a first appeal, which proceeds by way of a re-trial, with a view to forming our own independent view of the evidence. See ***Rule 29(1)*** of the Court of Appeal Rule, ***OKENO vs. REPUBLIC [1972] EA 32***; ***PANDYA vs. REPUBLIC [1957] 570.***

From the record, there can be no serious denying that the deceased all did consume *chang'aa* as testified by **Antony Kiarie** (PW15) at King"s Bar also known as Mtongwe Bar on the 11th day of September 2011. There is also little dispute that the owner of those premises was Mama Flora, the appellant herein. In fact, that much is conceded in the submissions made on behalf of the appellant the main thrust whereof was that she was being "improperly convicted of murder by bar ownership." The evidence as we see it goes beyond mere bar ownership. The appellant owned and operated the bar and despite her denial of it, she was in full and effective control of it. That is how she was in the premises on the two occasions on 13th September 2011 following tip offs from informers. That witness was categorical that there were holes dug and covered with timber in the wardrobe of one of the bedrooms as well as in the kitchen. Even though no alcohol was found on that occasion, the place reeked of *chang'aa*. There were also empty 20-litre jerry cans present in the kitchen. We think there was ample circumstantial evidence to prove beyond reasonable doubt that the appellant's house had been converted into an illicit brewery for potent *chang'aa*. It makes little difference in our way of thinking, that there was no *chang'aa* found when the chief and the police officers visited the house two days after the fateful day. By this time the drinkers had fallen ill or died and there was more than ample opportunity for the appellant to either convey it elsewhere as the first informer advised PW3 or simply empty it into the ground but it did leave its stubborn and distinctive smell.

The evidence of those who were with the deceaseds was quite consistent that they drank *chang'aa* at the appellant's house. There was no serious suggestion that all or any the victims consumed alcohol elsewhere. Mtongwe Bar or Kings Pub is the common denominator as to where the deceased's imbibed the lethal alcohol.

The analyst's report clearly found that the blood samples taken from the deceased contained high amounts of methanol or industrial alcohol sufficient to literally knock the life out of one as it did to the deceased's. There is absolutely no doubt as to the cause of death. The alcohol taken at the appellants' house, having been manufactured or transferred and sold illegally away from the institutions of quality control in fact contained fatal potency and it was the direct cause of the deceaseds' death. And the law punishes perpetrators of death.

For a homicide to constitute the offence of murder under **section 203** as read with **204** of the **Penal Code**, the offender must be shown to have caused the death by an unlawful act or omission and "*of malice aforethought*." There is no dispute that the act of selling at her premises liquor that was unlicensed and laced with high, indeed fatal, amounts of methanol was the unlawful act that caused the death.

What needs our independent determination is whether, in the circumstances of this case, the appellants caused those deaths by

malice aforethought. We decry the failure by counsel for the appellant as well as for the Republic of place before us case law on this point. We cannot say that learned counsel rendered the assistance that it is their duty to render to the Court by coming prepared with authorities with which to back their submissions. This Court, as should all superior courts, expects and demands that counsel appear with bundles and lists of authorities as a basic minimum of their getting up preparation. The adjudicative duty remains ours, however, and we must discharge it.

The Penal Code does not define "malice aforethought", the indubitable *mens rea* for the offence of murder. What the Code does at **section 206** is list circumstances under which malice is deemed to be established;

"S.206 Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

Evidence having been led that the appellant was in the business of brewing and selling *chang'aa* and other liquors at her house-turned pub, and that the deceased and the other persons who drank at the pub on 11th September 2011 were regulars thereat, it is easy to discount (a) (c) and (d) because there is no evidence, and neither was it alleged, that the appellant intended to kill or grievously harm the deceased or to commit a felony by the mere act of selling the *chang'aa* laced or spiced though it was.

The fact, however, that the appellant was selling an illicit brew stored in '*secretive holes'* in contravention of the **Alcoholic Drinks Control Act**, **Cap 121**, and the same being laced with lethal methanol convinced the learned Judge that there was in the conduct of the appellant a recklessness or indifference that amounted to malice aforethought. The learned Judge reasoned thus, at paragraph 65 of the judgment;

"65. The accused was engaged in an illegal trade. She took a risk selling a product prepared against the law and also public order. She cannot feign innocence of the lethal content in it as having taken a deliberate risk she should be accountable for it and be held responsible for the consequences of the sale. What the accused in this case can best be described as a reckless act and the fact the brew was laced with lethal levels of methanol establishes clearly the indifference on accused part as to the effect the illicit brew, manufactured, transported and sold in secret could have on her customers. The accused as owner of the brew bears the full responsibility for anything that occurs from the consumption of it. There is direct connection between the consumption of the brew and deaths of the deceased persons. The brew had high, in fact lethal levels of methanol and that is what caused the deaths of the deceased in this case. She is culpable for having sold lethal brew which caused the deaths of most of those who consumed it. I am satisfied from these facts and circumstances that the accused was actuated by malice when she sold the brew to the customers. Malice aforethought was proved."

The question we have to decide in this appeal in whether the circumstances of this case disclosed a proven case of malice aforethought. To do so, it is necessary to restate the true meaning of '*malice aforethought'* beyond the quaint and even archaic phraseology. First, it of course has nothing to do with „malice" in the ordinary sense of ill-will or malevolence and, secondly, it really need not have been planned or premeditated in the sense of happening „heretofore." It is enough to state as does David Ormerad, the learned author of ***SMITH AND HOGAN'S CRIMINAL LAW*** (13th Edn) Oxford University 2011 P497 that malice aforethought, an arbitrary symbol, is a concept of common law that consists in;

(1) an intention to kill any person or,

(2) an intention to cause grievous bodily harm to any person.

It is instructive that these two elements are at the heart of the provision of **Section 206** of the Penal Code aforesaid. Since, however, we have discounted intention, did the appellant have the knowledge that the act of selling the adulterated or methanol-laced *chang'aa* would probably cause the death of or grievous harm to the deceased or any other person as contemplated by **Section 206(b**)" It is clear that the knowledge first needs to be established before any indifference, or recklessness as to the consequence of the act or omission can become relevant. As to the knowledge itself, the position in law is that it means "*true belief*." See Ormerod (supra) at 128-29; ***USA vs. DYNAR [1997] 2SC R 462,*** a decision of the Canadian Supreme Court; and ***REGINA vs. SAIK [2007] 1 AC 18,*** a decision of the House of the Lords.

We think, with respect, that the learned Judge did not sufficiently or at all explore the „*knowledge*" aspect of **Section 206** but instead launched directly into the question of recklessness or indifference. Without intention to kill or cause grievous harm, and without proof of knowledge or true belief that the selling of that *chang'aa* would lead to the death or grievous harm to the deceased and those who drank it, the onus to prove, beyond doubt rested on the prosecution, and we are not satisfied that the *mens rea* for murder was established. We do think, from our perusal of the record and analysis of the evidence tendered that the killing of the deceased, though unlawful, was not proved to have been accompanied by the requisite malice aforethought.

Any unlawful homicide that is not murder for lacking the requisite *mens rea* is manslaughter which, under **Section 205** of the **Penal Code** is a felony and the offender is liable to imprisonment for life. Manslaughter is a lesser cognate offence and a person charged with murder may instead be convicted of the same by virtue of **Section 179** of the **Criminal Procedure Code,** even though he was not charged with manslaughter. We are satisfied that the evidence did prove that the appellant was guilty of manslaughter through any one or a combination of the unlawful and dangerous act of selling illicit brew laced with dangerous amounts of methanol; gross negligence or subjective recklessness as to the danger that the brew exposed its drinkers to. We therefore quash the convictions on the charges of murder and substitute therefor convictions for manslaughter.

As to sentence, the appellant had been sentenced to suffer death from murder and we set aside that sentence. We note that manslaughter carries a maximum sentence of life imprisonment.

Given the number of casualties out of the appellant"s deadly brew and trade, we order that she shall serve a term of ***fifteen (15)*** years in prison for each of the 6 counts on which she was convicted. The sentences shall run concurrently.

This judgment is delivered under ***Rule 32 (2)*** of the Court of Appeal Rules, 2010, Kihara Kariuki, PCA, having ceased to hold office after the hearing of the appeal.

Dated and delivered at Nairobi this 28th day of September, 2018.

P.O. KIAGE

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR