Case Number:	crim app 4 of 98
Date Delivered:	06 Mar 1998
Case Class:	Criminal
Court:	Court of Appeal at Nakuru
Case Action:	Judgment
Judge:	Johnson Evan Gicheru, Samuel Elikana Ondari Bosire, Zakayo Richard Chesoni
Citation:	LERESON LEBURTA vs REPUBLIC[1998]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(Coram: Chesoni C.J., Gicheru & Bosire, JJ.A.)
CRIMINAL APPEAL NO. 4 OF 1998
BETWEEN

LERESON LEBURTA.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Rimita, J.) dated 3rd October, 1997 in H.C.CR.C. NO. 4 OF 1995)
****

JUDGMENT OF THE COURT:

Before the High Court of Kenya at Nakuru, the appellant was charged with two counts of the murder of NATILA LEMONGI and her four year old son JACKSON LEMONGI contrary to section 204 of the Penal Code which was allegedly committed on 10th March, 1994. The evidence available before the learned trial judge, however, indicated that the alleged murder of the two deceased persons may have been committed on 8th or 9th March, 1994. The former date appeared in the appellant's charge and cautionary statement in relation to the killing of NATILA LEMONGI which was recorded from him by I.P. JAMES NYAGA NDWIGA (P.W.9) at Maralal Police Station on 12th March, 1994 at 4.00 p.m. In his concluding remarks at the hearing of the appellant's appeal at Nakuru on 26th February, 1998, counsel for the appellant, Mr. Konosi, submitted that save for the variance in the dates of the offence with which the appellant was charged as is indicated above, the appellant's charge and cautionary statement in relation to the killing of NATILA LEMONGI reflected what had happened. In that statement, the appellant had said:

> ***"I remember on 10-3-94 at about 7.00 a.m. I went to mama Lemachole where there was chang'aa. There I met the deceased who was carrying her child. I bought chang'aa for 200/-. I and the deceased drunk some chang'aa there and carried some to the Lagah where we took it. We were only two plus the child of the deceased. After we finished the chang'aa we started fighting because of drunkenness. I got hold of the deceased and strangled her. After strangling her, I threw her body to the river. Then I went to the police and informed them where the body of the deceased and that of her child were. When we were fighting the child fell in the river and died.***
>
> ***After informing the police, they arrested me and (I) took them to where the bodies were and they took both bodies to their camp. The deceased was not my girlfriend, she was a prostitute at South Horr."***

Indeed, except for the fact that the appellant was the last person to be seen leaving the home of MUKEYO LEMACHOLE (P.W.4) with the deceased NATILA LEMONGI and her deceased four year old son JACKSON LEMONGI alive on the evening of 8th March, 1994 , the only other evidence as to how

the two deceased persons met their death is in the circumstances narrated in the appellant's charge and cautionary statement.

Post-mortem examination of the deceased NATILA LEMONGI on 12th March, 1994 by Doctor JULIUS OGATO (P.W.10) revealed that externally she had bruises on the head and neck; scratch marks on the head, neck and upper limbs; and cut wounds on the face - on both eyes but the eye balls were intact. Internally, she had small haemorrhages in the trachea and bronchus. She had also a fracture of the frontal bone of the skull with the resultant bilateral epidural haematomas. Her cause of death was Anoxia . Post-mortem examination of her deceased four year old son JACKSON LEMONGI on the same day and by the same doctor revealed that externally he too had scratch marks and bruises on the face and neck. Internally, he had some haemorrhages within the lung tissues and some bleeding in the trachea and bronchus. His cause of death was Anoxia.

In his judgment the learned trial judge observed that P.W.10 corroborated the appellant's charge and cautionary statement in that the death of NATILA LEMONGI was as a result of strangulation. He also believed that the death of her four year old son JACKSON LEMONGI was due to strangulation by the appellant as his cause of death like that of his mother was Anoxia. The learned trial judge then proceeded to say that although there was evidence that the appellant had taken chang'aa, there was nothing to show that he was too drunk to be incapable of forming the necessary intent. Indeed, according to him, although the appellant mentioned in his charge and cautionary statement that he fought with the deceased NATILA LEMONGI , there was no evidence that the latter hit back. The learned trial judge then said:

> ***"Accused received no injuries. I believe he strangled her to death for reasons only known to himself. He had to get rid of the deceased child after killing the mother. He also strangled the deceased child to death. He then dumped the bodies in a river to cover the crime."***

The learned judge then proceeded to find the appellant guilty of the murder of NATILA LEMONGI and her four year old son JACKSON LEMONGI, convicted him on both counts and sentenced him to suffer death on each of the two counts in the manner authorized by law. Against that conviction and sentence the appellant has appealed to this Court putting forward five supplementary grounds of appeal in addition to his original four home made grounds of appeal.

Except for the variance in the date of the offence as is referred to earlier in this judgment, which is curable under the relevant provisions of section 382 of the Criminal Procedure Code , and in sentencing the appellant to suffer death twice in the two counts of murder, which again could have been resolved by suspending one of the death sentences, the gravamen of the appellant's complaint to this Court was that in all the circumstances of the case before the learned trial judge, the offence disclosed against him was that of manslaughter and not murder.

One of the essential ingredients of the offence of murder as set out in section 203 of the Penal Code is malice aforethought. The burden of proving this ingredient in Criminal proceedings on a charge of murder against an accused person is on the prosecution. Where the evidence falls short of establishing the offence of murder, a conviction of manslaughter may be substituted therefor provided this lesser offence is proved. The evidence negativing malice aforethought need not be strictly proved. It is sufficient if there is evidence which raises a reasonable probability of absence of malice aforethought.

Once this is the effect of such evidence, then the onus lying upon the prosecution is not discharged and the offence of murder is not proved - See Lokoya v. Uganda, [1968] E.A. 332 at page 334 letters D to G and Festo Shirabu s /o Musungu v. Reginam, (1955) EACA 454.

In the present appeal, the appellant in his charge and cautionary statement said that after having drunk chang'aa with the deceased NATILA LEMONGI they started fighting because of drunkenness. In the process, he got hold of her and strangled her to death. He then threw her body into a river.

The extent of that fight is not apparent in the record of the proceedings before the learned trial judge and whether or not in the course of the fight the deceased NATILA LEMO NGI hit back and injured the appellant was the bounden duty of the prosecution to prove. There was absolutely no evidence before the learned trial judge in this regard with the result that the murder of the deceased NATILA LEMONGI by the appellant was not proved nor was that of her four year old deceased son JACKSON LEMONGI as it also appears to have been committed in the course of the appellant's fight with NATILA LEMONGI or immediately thereafter. In the circumstances, the appellant could only have been found guilty of manslaughter on both counts and convicted accordingly. Consequently, his conviction on the two counts of murder is insupportable. The same is therefore quashed and the sentence of death on each count is set aside and in place therefor we substitute a conviction of manslaughter contrary to section 205 of the Penal Code on both counts and sentence the appellant to 8 years imprisonment on each of the two counts. Both sentences are to run concurrently from the date of the appellant's conviction and sentence in the superior court, that is to say,

3rd October, 1997. To this extent, the appellant's appeal is allowed.

Dated and delivered at Nairobi this 6th day of March, 1998.

Z.R. CHESONI

.....

CHIEF JUSTICE

J.E. GICHERU

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

www.kenyalawreports.or.ke 7 I certify that this is a true copy of the original.

DEPUTY REGISTRAR

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions. Read our Privacy Policy | Disclaimer