IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 86 OF 2019

CONSOLIDATED WITH

CRIMINAL APPEALS NO. 87 OF 2019

BETWEEN

PETER NZAMBU NGOLO.....1ST APPELLANT

SAMUEL MUTUA NGOLO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 9th May 2019

in Criminal Case No. 60 of 2017 at the Thika Magistrates Court

before Hon G. Omodho, SRM)

JUDGMENT

1. The appellants **PETER NGOLO NZAMBU** and **SAMWEL MUTUA NGOLO** together with their co-accused, LWN, were charged with offence of manslaughter contrary to **section 202** as read with **section 205** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that the appellants on 25th January 2017 at Kiandutu slums in Thika within Kiambu County unlawfully caused the death of **Harrison Wambua Musembi** ("the deceased").

2. The appellants were also charged with assault causing actual bodily harm contrary to **section 251** of the ***Penal Code***. The particulars were that on 2nd January 2017 at Kiandutu slums in Thika within Kiambu county, they unlawful assaulted **Mugo Kiarie** thereby occasioning him actual bodily harm. Both appellants were convicted on both counts and sentenced to serve 30 years' imprisonment for manslaughter and a fine of Kshs. 50,000.00 each or in default to serve 12 years' imprisonment.

3. In their respective appeals, the appellants contend that there was insufficient evidence to support their respective convictions. They complained that in considering the evidence of identification, the trial magistrate did not rule out the possibility of mistaken identity. The appellants submitted that there was inadequate evidence to support the prosecution's case which was based on circumstantial evidence. The appellants also complained that their defences were not considered.

4. The respondent supported the conviction and sentence and urged that the prosecution proved the offence beyond reasonable doubt. It contended that the appellants were not strangers to the complainant and that all the evidence pointed to the appellants as assailants.

5. As this is a first appeal, I am obliged to consider all the evidence afresh and in so doing reach an independent conclusion as to whether I should uphold the conviction and sentence bearing in mind that I never heard or saw the witnesses testify. In order to proceed with this task, it is necessary to set out the fact emerging from the trial.

6. Joseph Mugo Kiarie (PW 1) testified on 2nd January 2017 he was with the deceased at 8.00pm walking home. He recalled that the accused emerged from their café along as they were walking. LWN came and passed between them causing him to ask why he had passed between then yet the road was wide. LWN and the appellants all unleashed pangas. As the deceased ran away, the accused followed him. He was left

with LWN who assaulted him. He ran for safety and when he reached his house he found the deceased had been cut on the neck and fingers and was bleeding profusely. They got into a motor vehicle, reported the incidence to the police post first then took him to hospital. The deceased was discharged, stayed a week but was readmitted in hospital where he died.

7. Dr. Kiprotich Ngetich (PW 4) a medical doctor from Thika Level 5 produced P3 medical form which was filled by Dr. Maingi who examined PW 1 on 3rd January 2017. He noted PW 1 had a cut wound on right ear and hand and concluded it was by a sharp object. He assessed injury as harm.

8. Musee Musembi (PW 2) testified that on 2nd January 2017 he was informed that the deceased had been attacked by thugs. He went to the hospital, Mulumba hospital and found he had a cut on the left side of the neck and palm of left hand. He could not speak. He told the court that the deceased passed on after 15 days and that he attended post mortem where he identified the deceased's body. Juliana Mukai Musembi (PW 3) testified that she visited the deceased in hospital. She recalled that he was in hospital for a couple of days but was discharged but was undergoing treatment. She stated that before he died, he told her that he had been assaulted by people, a person called Zambu but he could not remember the names of the other two people.

9. The Investigating officer, Corporal Lawrence Olwal, PW 5, testified the case of assault was reported on 29th January 2017 by PW 1 who said that he and the deceased were assaulted by LWN and the appellants. The appellants were arrested when the deceased passed away in hospital. PW 5 produced postmortem report prepared by Dr Josephine Muthama who conducted the autopsy on 25th January 2017.

10. When the appellants were put on their defence, they elected to make unsworn statements in which they denied committing the offences. 1st appellant denied the offence in his unsworn statement, he told the court that on 2nd January 2017 at 7am he was with the 2nd appellant and their co-accused when the police came and searched the hotel and arrested them on suspicion of assault. He denied committing the offence. the 2nd appellant denied committing the offence in his sworn statement. He also said he did not know anything about the offence.

11. The issue is whether the appellants committed the offences for which they are charged. The evidence is based on the testimony of one witness, PW 1, in circumstances that were admittedly difficult for positive identification. The Court of Appeal has held, in several cases, that the court must examine all facts and weigh the evidence in order to determine whether the identification is free from error. In ***Wamunga v Republic*** **[1989] KLR 424**, the Court of Appeal observed that:

> It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

12. It is also accepted that evidence of recognition is stronger than that of identification because recognition of someone known to the witness is more reliable than identification of a stranger (see ***Anjononi & Others v Republic*** **[1980] KLR 59**). But in ***Wanjohi & 2 Others v Republic*** **[1989] KLR 415**, the Court of Appeal held that, *"recognition is stronger than identification but an honest recognition may yet be mistaken."*

13. In this case, PW 1 stated that although he did not know the names of the appellants, he had known them for about a year as they owned a café in the area. In their defence, the appellants did not deny that they ran the hotel from where they were arrested on 7.00am on the material morning. Moreover, PW 1 had close altercation with the appellants before they ran off chasing the deceased. PW 5, in his testimony, stated that PW 1 named the appellants when he reported the incident. All these facts, I find and hold, show that the appellants were positively identified as the assailants.

14. As regards the case concerning the deceased, as PW 1 was assaulted by LWN, he saw the appellants following the deceased with pangas. In a short while, he found the deceased in his house severely injured. The fact that the deceased was injured was confirmed by PW 2 and PW 3 who visited him in the hospital. The case against the appellants in this respect is founded on circumstantial evidence. In ***Sawe v Republic*** **Criminal Appeal No 2 of 2002 [2003] eKLR**, the Court of Appeal restated the principles which ought to be applied when dealing with circumstantial evidence in the following terms:

> In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.

15. There is no doubt that the appellants confronted PW 1 and then ran after the deceased armed with pangas. In a short while, the deceased was found seriously injured with cut wounds. It is only them who could explain what had happened to the deceased. In their respective defences they did not say what happened to the deceased but chose to dwell on the manner of arrest. The inescapable conclusion therefore is that they assaulted the deceased.

16. Since the appellants were the last people seen chasing the deceased with pangas, it is only they who could explain what could have happened to him. The trial magistrate relied on the provisions of **section 111** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which provides as follows:

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence. [Emphasis mine]

When the accused fails to offer a reasonable explanation, the court is entitled to presume what could have happened under **section 119** of the ***Evidence Act*** which states;

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

17. In their defence, the appellants said nothing of what happened on that night when they were seen chasing the deceased with weapons. They were well known. They emerged from their café, unleashed their weapons and followed the deceased who was found dead a short while later. The inescapable conclusion is that it is the appellants who assaulted the deceased.

18. The final issue is whether that assault resulted in death. The postmortem form was produced by the investigating officer without objection from the parties. According to the post mortem form, the deceased died from cerebral edema due to hypoxia due to severe anemia. In other words the deceased suffered severe bleeding which led to lack of oxygen in the brain resulting in death. The cause of the severe bleeding was the direct result of the assault. I therefore find and hold that the cause of death was a direct result of the assault. I therefore find that the cause of death was directly caused by the assault. Since it is the appellants who caused the unlawful act of assault that led to the deceased's death, I affirm the conviction.

19. I am however not convinced the prosecution did not prove that the appellants assaulted PW 1. He clearly testified that while LWN was assaulting him, it is the appellants who chased the deceased. I therefore quash the conviction and sentence on the second count of assault against PW 1.

20. The maximum sentence of manslaughter is life imprisonment. I have considered the sentence in light of the circumstances. In as much as the case against the appellants was circumstantial, the appellants chased the deceased and assaulted him. Although they were first offenders, the taking of life is a serious matter. For purposes of consistency and fairness, I have looked at cases of a similar nature and I find that the sentence of 30 years' imprisonment is inordinately harsh and excessive. I impose a sentence of 10 years' imprisonment to run from the date of arraignment since the appellants have been in custody since that date.

21. I allow the appeal to the extent that I quash the conviction and sentence on Count 1. I affirm the conviction for the offence of manslaughter but quash the sentence of 30 years' imprisonment but substitute the same with a sentence of **ten (10) years** imprisonment from **5th January 2017**.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 29th day of JANUARY 2020.

J. N. ONYIEGO

JUDGE

Appellants in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecution for the respondent.