REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 86 OF 2019

CHARLES PATRICK OOKO ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the conviction and sentence in Bondo PM'S Court Criminal Case No. 1034 of 2018 delivered on 10th December, 2019 by Hon E.N. Wasike, SRM)

JUDGMENT

Introduction

1. The Appellant **CHARLES PATRICK OOKO ONYANGO** was charged before the Principal Magistrate's Court in Bondo with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code the particulars of the offence being that on the 25.8.2017 at Dienya East Location, Gem Sub-county within Siaya County, he unlawfully killed Ruth Awino Ndoji.

2. The appellant pleaded not guilty to the charge and the matter proceeded to full trial whereby the trial magistrate, Hon. E.N. Wasike after hearing the seven prosecution witnesses and sworn testimony of the appellant found that the prosecution had proved their case beyond reasonable doubt against the appellant and proceeded to find the accused guilty of manslaughter and sentenced the appellant to serve 25 years imprisonment.

3. Dissatisfied by the said conviction and sentence the appellant filed his petition of appeal as amended on 17th January, 2020 based on the following grounds:

a) That the learned trial magistrate erred in law in holding that the material contradictions and inconsistencies in the prosecution evidence could not be resolved in the accused's favour.

b) That the learned trial magistrate erred in law and fact in sentencing the Appellant to the maximum sentence when the evidence on record was doubtful.

c) That the learned trial magistrate committed an astonishing error of reasoning by misapprehending the facts and applied wrong principles and thus misdirected himself on the law of burden of proof and conviction was entered against the Appellant notwithstanding that the prosecution did not discharge its legal burden of proof beyond reasonable doubt as is required by the law.

d) That the trial magistrate erred in law and facts by dismissing the appellant's defence evidence which was cogent enough to award an acquittal.

e) That the learned trial magistrate erred in law when having read the committal bundles reduced the charge to manslaughter whereas he was supposed to discharge the Appellant if the evidence was insufficient or commit the Appellant to stand trial in the High Court.

Appellant's Submissions

4. Mr. Maganga counsel for the appellant submitted that the superfluity of prosecution witnesses at the trial stage did not in any way assist the prosecution in meeting the legal burden of proof through the nature of the evidence they gave. He further submitted that the inconsistences and contradictious from the testimony of **PW4,** who was the only witness who spoke on the incidence was of such a nature that it left doubt in the prosecution case which should have been resolved in favour of the Appellant.

5. Relying on section 9 (3) of the Penal Code, Mr. Maganga further submitted that whereas motive was not essential to prove a crime, it became an element to consider where the case rested purely on circumstantial evidence which failed to show that the appellant caused the deceased's death.

6. It was further submitted that **PW4's** Uncle and brother Alphonce were never called to testify, even though they were listed in the charge sheet as witnesses, which lends credence to the inference that their testimony would have been adverse to the prosecution's case. Further, that only witnesses of the deceased testified against the appellant which evidence was not cogent or credible. It was submitted that PW1, 2,3,5 gave hearsay evidence, and that PW4 gave contradictory and inconsistent evidence as she did not witness the assault on her mother and that she never noticed any weapon being used to assault her mother which weapon was never produced in evidence. Counsel also complained that the trial court accepted as exhibits which were never identified by prosecution witnesses as linking them to the injuries sustained by the deceased.

7. Mr. Maganga submitted that suspicion alone, however high, has never sustained any conviction for a criminal offence. It was his case that in a case depending exclusively upon circumstantial evidence the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis that that of the accused's guilt. Reliance was placed on the case of **Wilson Wanjala Mkendeshwo v R, Court of Appeal Criminal Appeal No. 97 OF 2002**

8. It was submitted by counsel that he had abandoned ground 5 of his petition of appeal.

9. The Respondent never filed any submissions despite being given time to do so.

Analysis & Determination

10. This being a first appeal, this court is called upon to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See **Okeno v Republic (1972) E.A. 32.**

11. Revisiting the evidence before the trial court, PW1 Charles Odole Ndonje testified that that on 26/8/2017 at about 4pm he was at home when his younger sister one Dorin Adhiambo called and informed him that his other sister, the deceased, had passed on. It was his testimony that together with his brother they proceeded to the homestead of the deceased and on reaching there they found the daughter to the deceased who told them that her father, the appellant had taken the deceased to the mortuary and upon inquiring from her as to the circumstances leading to the deceased's death she told them that she witnessed her parents fighting for some time after which she went to her grandmother where she spent the night and on coming back the following day she realized that her mother was missing and after some frantic search, she was found dead. PW1 testified that the following day he went to the appellant's home and that PW1 called the area chief and informed him and also reported to Wagai DO's office then they went and reported the matter to the police station and later they visited the deceased at the mortuary at Sagam and realized that the body had severe and visible injuries. He concluded by stating that the accused was eventually arrested.

12. In cross-examination by the appellant, PW1 stated that the appellant and the deceased lived far from them. He further stated that when they found the appellant at his home he was seclusive as he did not want them to get close to him. He stated that Fidelis, the appellant's first born, narrated how the incident happened.

13. PW2 and PW3 both did not witness the incident. It was their testimony that they identified the deceased's body prior the post-mortem which they also attended. In cross-examination they both admitted to not knowing who killed the deceased.

14. PW4 Fidelis Akinyi Ooko, a form 4 student and daughter to both the appellant and the deceased stated that on the 25/8/2017 at about 6.30 p.m. she was at her grandmother's homestead when she heard her mother, the deceased, and her brother, Alphonce, crying and shouting out for help respectively. It was her testimony that she then went to the fence separating their home and their grandmother's to find out what was happening and that's when she saw her mother and brother outside and her father was demanding for super and by then the deceased was lying down while groaning in pain. It was her evidence that the appellant then ordered Alphonce to go and bring a towel.

15. PW4 testified that she saw the accused assaulting the deceased. It was her testimony that she went back to her grandmother's house where she spent the night and on the following day went back home to prepare breakfast where she found all her family members except her mother and after a while her father left for a funeral. It was her testimony that around lunch hours, their farm worker one Maloba, went and called her out after which he led her to a point where she found her mother dead with some wounds on the thighs, legs and hands and blood stains. She screamed and called her father the appellant but he was not picking the phone. She then said that she went and reported the matter to her grandparents and the deceased's body was later taken to the mortuary. According to PW4, her parents used to fight frequently.

16. In cross-examination PW4 reiterated that she was in her grandmother's home when she heard her mother screaming and that she was standing at the fence during the commotion.

17. **PW5 Maloba Arosi** testified that on the 26/8/2017 at about 1 p.m. a friend of his went and informed him that he had seen PW4's mother lying dead. It was his testimony that he proceeded to the scene and found the deceased naked with some blood stains on her face. He further testified that he then proceeded to the deceased's compound and informed PW4 of what he had seen after which he called the appellant and informed him of what had transpired and the latter responded that he was on his way. In cross-examination he stated that he found the deceased lying but did not see any wounds.

18. **PW6 Chief Inspector Jared Nyaosi** of Akala police station who was among the investigating officers in the case stated that on the 27/8/2017 at about 3pm he was at the station when two reportees namely Charles and Bonface went and reported that their sister, the deceased had been beaten to death by her husband and that her body had been taken to the mortuary. It was his testimony that together with

another officer they proceeded to Sagam Community Hospital where they viewed the body of the deceased which had multiple injuries after which they proceeded to the home of the deceased but did not find the appellant though they found their children whom they escorted to the police station where they recorded their statements in which they revealed that their father had assaulted their mother. PW6 further stated that they started tracing the appellant and managed to arrest him on the 28/8/2017 and escorted him to the station. PW6 then produced 6 sets of photographs (P. exhibit 2a, b, c, d, e, f), a Certificate of Photographic Prints (P. exhibit 2a) and Mortuary Records (P. exhibit 3) as part of his evidence.

19. In cross-examination by the accused, PW6 stated that they arrested the appellant about 1km from his home and that he relied on witness statements in the course of his investigations.

20. PW7 Dr. Biko Opidi, a Medical Doctor gave evidence in relation to a Postmortem Form (P. exhibit 1) in respect of the deceased. It was his testimony that upon conducting a postmortem of the deceased, he made the following observations;

a) Rigor mortis noted.

b) Left supra orbital laceration above the left eye.

c) Reddening of the left eye.

d) Severe bruises on the right jaw, left shoulders, knee and markings of a stick on the right eye.

21. On the Internal appearance, Dr. Opidi testified that he noted bleeding on the soft tissue of the head and thus concluded that the cause of death was head injury with base of skull fracture caused by blunt injury to the head. He then produced the Postmortem form (P. exhibit 1) as an exhibit. In cross-examination Dr. Opidi stated that a severe head injury may lead to death.

22. Placed on his defence, the appellant gave sworn testimony and stated that he had been married to the deceased for the past 20 years but that 7 years ago they both got into a drinking habit which strained their relationship. It was his testimony that he could not remember what transpired on the fateful day but that the evidence adduced by the prosecution did not incriminate him as no one saw him commit the offence. He further stated that he had 7 children who depended on him and that after the incident he had stayed in custody for a year.

Determination

23. The offence of manslaughter is provided for in section 202 of the Penal Code as follows:

> **"Manslaughter**
>
> **(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.**
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> **(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm."**

24. The death of the deceased and the cause of that death are neither in doubt nor are they disputed. From the findings of the post-mortem by PW7, Dr. Opidi who performed the post-mortem testified that the cause of death was head injury with base of skull fracture caused by blunt injury to the head.

25. The question that remains is whether the appellant was the one who unlawfully killed the deceased's death. The appellant submitted that the prosecution failed to prove beyond reasonable doubt that he caused the deceased's death. According to the appellant's counsel, the prosecution case against the appellant primarily rests on circumstantial evidence. It is not uncommon for legal practitioners to attack and deride circumstantial evidence in criminal cases, almost suggesting that it has little probative value or at the best, rate such evidence as weaker, in comparison to direct evidence.

26. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR**, the Court of Appeal had this to say on this point:

> ***"However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -***
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> ***"It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."***

27. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: -

"Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; 9iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else."

28. In the instant case, PW4 gave evidence that she heard her mother the deceased crying for help as PW4 was at her grandmother's place which neighboured their home. Upon looking over the fence, she saw her mother on the ground groaning in pain. She testified that she saw the appellant attacking the deceased and that later the appellant sent his brother, Alphonce for a towel. She testified that that was the last she saw her mother alive as the following day she was informed of her mother's dead body being found and she went and confirmed.

29. The appellant denied killing the deceased. He testified that he could not remember what happened on the fateful day. It was his admission that his and the deceased's relationship had been going through difficulties for the past 7 years due to their drinking habits.

30. In the instant case, it is clear that the prosecution adduced evidence which established that the deceased was last seen alive in the company of the appellant herein. As discussed herein above, that was in the evidence of PW4, who heard a cry for help from both the deceased and her brother Alphonce, then she saw the deceased groaning in pain on the ground and she also saw the appellant attack her mother and she went to sleep at her grandmother's house. . the following day she found her mother dead outside their compound with wounds and blood stains.

31. Albeit no weapon used in the killing of the deceased was recovered and produced as an exhibit to link the appellant to the death of the deceased, absence of a weapon used to kill alone cannot be fatal to the prosecution's case as the accused had the opportunity to dispose of the weapon used in the killing of the deceased since he was not found or arrested while assaulting the deceased. The evidence of PW4 who saw the deceased that night and the appellant assaulting her in my humble view placed the appellant at the scene and therefore it was upon the appellant to explain how the deceased that scene and was to be found killed outside his home compound the following morning. The fact that the appellant claimed not to remember what transpired that day or night is not absence of guilt on the part of the appellant.

32. In the circumstances I am convinced beyond reasonable doubt that all the circumstantial evidence points to the appellant and that it satisfies the principles of circumstantial evidence as set out in numerous authorities including the case of **R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in which the court of appeal East Africa had this to say;

"In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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."

33. Evidence of the surrounding circumstances to a crime is said to be the best evidence. Locally courts have taken cognizance of this fact in various decisions. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of R v. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20 thus:

"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics."

34. Having considered entire evidence in this case I am satisfied that the circumstances of this case points irresistibly towards the accused person to the exclusion of any other person as principal offender in the deceased death. He was the last person with the deceased before he died. It is my humble view that the appellant was fully involved in the deceased's death as a principal offender.

35. The appellant further alleged that the prosecution evidence especially that of PW4, the prosecution's star witness, was contradictory and full of inconsistencies. I have perused the record and this is not the case. I see no contradictions or inconsistencies in that evidence that is material as to go to the benefit of the appellant. The Court of Appeal of Kenya addressed itself on the issues of contradictions in the case of **Richard Munene v Republic [2018] eKLR** stated as follows;

"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

36. Accordingly, I find no contradictions that would prejudice the appellant.This ground fails.

37. The appellant also raised the issue that the prosecution failed to call crucial witnesses specifically the aforementioned Alphonce, brother to PW4, to prove their case. In **Bukenya v R (UGC 1952)**, the court stated:

"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

38. I am however alive to the fact that there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides: -

"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"

39. In **Donald Majiwa Achilwa and 2 other v R (2009) eKLR** the Court stated:

"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

40. In the case of **Keter v Republic [2007] 1 EA 135** the court held inter alia thus:

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

41. Similarly, in the instant case the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial court was in my opinion not at liberty to determine which witnesses are sufficient to prove the prosecution case. The court was not told whether the said brother to PW4 was capable of testifying in the matter or not and as he was a child to the appellant, nothing prevented the appellant from calling him as a witness. Accordingly, this ground of appeal fails.

42. Finally, the appellant alleged that the trial magistrate erred by giving him the maximum sentence when the evidence presented was doubtful. The sentence prescribed for manslaughter is life imprisonment, the appellant herein was sentenced to 25 years in prison.

43. Trial Courts have a greater deal of discretion when it comes to punishment and meting out the appropriate sentence and other determinations. The law basically provides various range of sentences from which a Judge or Magistrates can opt to effect and apply in specific cases. The same law provides for a minimum mandatory sentences where the appellant case is stated to have been proved by the prosecution.

44. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of **Ogalo s/o Owuora 1954 24 EACA 70**. It is well set out that:

"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice"

45. Similarly, the Court of Appeal of East Africa stated in **Wanjema v Republic [1971] EA 494** stated that:

"An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case"

46. In the circumstances, I find no reason for this court to interfere with the trial court's sentence however, in accordance with Section 333(2) of the Criminal Procedure Code, it is worth noting that the court should deduct the period spent in remand from the sentence considered appropriate, after all factors have been taken into account.

47. As the appellant was on bond, I hereby order that the 25 years imprisonment be inclusive of the time spend in remand upon arrest of the appellant on 28/8/2017, before he was released on bond.

48. In the end, I find the appeal against conviction devoid of merit. I dismiss it. The appeal against sentence succeeds only to the extent that the 25 years imprisonment to be calculated from the date of arrest of the appellant before being released on bond on 28/8/2017.

49. Orders accordingly and this file is closed.

Dated, Signed and Delivered at Siaya This 30th day of November, 2020

R.E. ABURILI

JUDGE