



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NO. 8 OF 2020**

**MOO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment, conviction and sentence delivered on 4/5/2020 in Siaya PM Criminal Case No 34 of 2020 by Hon Lester Simiyu, Principal Magistrate)*

**JUDGMENT**

**Introduction**

1. The Appellant MOO was charged before the Principal Magistrate's Court at Siaya 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 night of 1<sup>st</sup> to morning of 2<sup>nd</sup> day of January 2020 at [particulars withheld] village in Nyang'oma sub-location in Siaya county he unlawfully killed LA A alias LAM.
2. The appellant pleaded not guilty to the charge and the matter proceeded for hearing whereby the trial magistrate, Hon. L. Simiyu after hearing the eight prosecution witnesses and unsworn 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 the charge and sentenced the appellant to serve 30 years' imprisonment.
3. Aggrieved by the said conviction and sentence, the appellant filed his petition of appeal based on the following grounds:
  - a) **That the deceased being a matrimonial wife died in his hand.**
  - b) **That the evidence of PW1 being their child was a key witness to the whole scenario of events.**
  - c) **That from the evidence of PW1, the post mortem was coupled with consistency.[sic]**
  - d) **That the Appellant prayed for a lesser sentence other than the one imposed of 30 years.**
  - e) **That the Appellant was a layman in law and prayed for Section 389 of the CPC to be cited.**

**Appellant's Submissions**

4. The appellant submitted that the prosecution vide the evidence of PW1 had proved its case beyond reasonable doubt, that he had been positively identified and placed at the scene of crime and that malice aforethought on his part had been proved. The appellant thus submitted that he deserved a lesser sentence.
5. The prosecution did not file any submissions.

**Analysis & Determination**

6. 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.**
7. Revisiting the evidence before the trial court, PW1 a minor and daughter of the deceased and appellant was certified suitable to give

evidence. It was her testimony that on New Year's night she and her parents, the deceased and the appellant had visited Nyangoma market and that she went back home with her mother, the deceased who asked her to sleep as she left saying she would return. She testified that the appellant returned before the deceased returned home and on finding the deceased's missing, locked the door from outside and left to go search for the deceased. It was her testimony that suddenly the deceased came and asked for the key and when she said she did not know, the deceased informed her that she was going to PW1's grandmother's home which was nearby.

8. PW1 testified that the appellant returned after the deceased had gone, entered the house, took a torch and left then returned and slept in a coach. She testified that she also slept on a coach as their house was a huge single room. She further testified that the deceased came and knocked and asked for the door to be opened and the appellant opened and asked her where she was from and that the deceased retorted that she was from grandmother's house which answer did not satisfy the appellant who flashed the torch he had and picked a rungu near the bed and started beating the deceased all over the body to the point that the rungu broke. She further stated that the torch was on the bed and its light illuminated the room.

9. PW1 identified the Rungu in court and stated that it belonged to the appellant and was usually kept besides the bed. She further testified that the deceased bled from the face. It was her testimony that the appellant took the deceased out in the verandah where he took a wheelbarrow and knocked her pushing it towards her severally. She further stated that there was a solar bulb hanging outside the door which was on so she was able to see what happened. She further stated that the deceased tried to flee as she was calling a neighbor and she fell.

10. PW1 testified that the appellant took a panga which she identified in court from the house and used it to beat the deceased severally on her body after which he cut off the deceased's hair with a pair of scissors. It was her testimony that there was moonlight outside and so she could see.

11. She further testified that the appellant gave the deceased water to bath and took off the deceased's clothes and dropped them in a pit latrine after which he placed water near the deceased but the deceased could not stand so he gave her a bath. It was her testimony that the deceased was injured on the forehead, mouth, back had cuts from being struck by the panga and that the appellant placed the deceased in bed.

12. She testified that the deceased kept turning and saying "*my heart is writhing and am dying*" prompting the appellant to ask PW1 to give the deceased medicine which she did. It was her testimony that suddenly she heard the appellant screaming "*I have hurt her the whole body*" and that at dawn he asked PW1 to clean up and that the deceased asked her to make tea which she did but that the deceased did not take. It was her testimony that a white blanket which the deceased covered herself with had a lot of blood. She further testified that the deceased progressively deteriorated to a point that she became unresponsive prompting the appellant sending PW1 to call her Uncle only to come back and find the appellant locking the door after which she subsequently learnt that the deceased had passed on.

13. In cross-examination, PW1 reiterated that the appellant usually had two rungus which he used in his assault of the deceased. She further stated that the appellant also used a panga which he normally used to slash and which he kept under the bed, to assault the deceased.

14. PW2 a sibling to PW1 testified that the appellant was a dangerous man who regularly assaulted the deceased and had previously assaulted PW2. He testified that he received news of his mother's passing on the 4<sup>th</sup> of January while at Magengo with his aunty. He testified that he had fled home to his auntie's place due to the violence occasioned on his mother as well as himself by the appellant. In cross-examination, PW2 reiterated his testimony on the appellant's violent nature.

15. PW3 EO testified that on 2<sup>nd</sup> January 2020 he was in his house between 3-4 pm when PW1 went and asked him to go to their home as the appellant had called on him to go assist take the deceased to hospital. He testified that he interrogated the child (PW1) but she did not volunteer information other than say that the appellant and deceased had fought again which prompted PW3 to hurry to PW1's home.

16. It was his testimony that as he neared the fence, he saw the appellant closing the door and when he inquired from the appellant as to what had happened, the appellant revealed that his wife had wronged him and he slapped her with a panga but it cut her. He testified that he asked the appellant whether he could see the wife but the appellant refused and also turned a bit violent. He further testified that the appellant then asked to be escorted to Kogelo Police station and later to Sarah Obama police station but since the OCS was not at the station the appellant refused to talk to the junior police officers after which PW3 called one officer known to him as Alex to help go check on the deceased.

17. He further testified that they went back to the home of the appellant wherein they found the deceased had already passed on and he took custody of the appellant as they returned to Sarah Obama Police Station where the appellant was placed in custody.

18. In cross-examination, PW3 reiterated his statement and further stated that the appellant denied him the chance to check on the deceased when he initially arrived at the home and only allowed him to do so when in the company of A with whom they had returned from the police station, at a time when he discovered that the deceased had already passed on. He further stated that he did not hear any noise the previous night as the radio was on.

19. PW4 JO, a brother to the appellant, testified that he was informed by his wife about the death and proceeded to the appellant's house which he found locked and upon opening, he found the deceased lying in bed and was dead cold. He further stated that the OCS (PW5) arrived shortly and took the body away. It was his testimony that he went to the mortuary with his in-laws to identify the body for post mortem where he noticed blunt force injuries on the deceased's head.

20. PW5, Chief Inspector James Kago, the OCS Kogelo police station testified that on 2.1.2020 at about 7:30pm the appellant went to the Police Station and asked to speak to the OCS stating that he had attempted to call his phone but it was off. He testified that the appellant informed him that his wife was too sick and he needed police help to take her to hospital stating that on night of 1<sup>st</sup> to 2<sup>nd</sup> January 2020 his wife had returned while drunk and they quarreled and fought and she was injured on her head and lower abdomen and had since grown cold on touch.

21. It was his testimony that he booked the report and together with other officers and CID officers from Siaya proceeded to the appellant's house where they found the deceased in bed with rigor mortis already set in. He testified that he noted that she had injury on her head, face and injury on the stomach. He further testified that he searched the house and found a panga under the bed which looked washed as well as a rungu and blue jeans with blood stains all over, stashed under a chair. It was his testimony that he searched around when a child told him that her mum was shaved and her hair thrown in the garden which hair he retrieved.

22. In cross-examination PW5 stated that the previous night, he had encountered the appellant and deceased at Nyang'oma centre as he was in civilian, and that they were celebrating to retire to their homes when he saw the appellant standing near a butchery calling out to the deceased and warning her of dire consequences. He stated that he spoke to both of them telling them to go home.

23. PW6 Corporal Simiyu of DCI Siaya testified that on the 2<sup>nd</sup> January of 2020 at 9:00p.m he was requested by Inspector Kago to proceed to [particulars withheld] village in Nyangoma to attend a scene of murder which he did in the company of PC Bett, the investigating officer. He testified that they were shown a house where they found a body of a female dressed in a pink blouse and track suit pant with multiple injuries and a bandaged head and that upon removal revealed a deep cut on upper left side of the eye as well as on the abdomen. He further testified that he took nine photos as follows which photos he produced as exhibits:

- a) *View of house*
- b) *Closer view of house showing body on a bed.*
- c) *Closer length of deceased.*
- d) *Closer upper view of body.*
- e) *Closer view of bandaged head.*
- f) *Facial view of deceased showing deep cut on forehead.*
- g) *View of abdomen area.*
- h) *Closer view of wound on left side of abdomen.*
- i) *Closer view of blood stained panga recovered under the bed.*

24. In cross-examination Corporal Simiyu stated that he saw a deep cut on the head and that there was no possibility that deceased died out of a fall as the injuries were all over and multiple and could not be attributed to a fall. He further denied that the injuries on the deceased's body were as a result of her taking medicine without eating.

25. PW7 PC Moses Bett testified that on the 2.1.2020 at 8:00pm he was called by DCIO and informed of a murder at Kogelo that had been reported by the OCS Kogelo after which he left with Corporal Likonyi to Kogelo police station where they found Chief Inspector James Kago who confirmed the murder was at Achiewo village and also found the appellant in custody.

26. It was his testimony that they interrogated the appellant who revealed that on the night of 1<sup>st</sup> to morning of 2<sup>nd</sup> January 2020 he argued with his wife on allegations of her infidelity leading up to a fight during which she sustained injuries and died on 2<sup>nd</sup> January 2020 at 3pm. He testified that he and OCS Kago and backup team headed to the crime scene where they found the deceased's body lying on her back with her head bandaged and her face with injuries and some clotting.

27. He testified that they recovered a panga, a broken rungu, blood stained jeans and took the body to Siaya Hospital Mortuary. He further stated that they recorded the statement of a child witness known as B who informed them that the appellant attacked and injured the deceased. He stated that they subsequently charged the appellant with manslaughter. PC Bett reiterated his testimony in cross-examination as well as questioning by the court.

28. PW8 Dr. Biko Okilo sought and was granted permission to produce the post-mortem report done by Dr. Juma, his colleague for over 4 years, who was engaged in theatre performing surgery. It was his testimony that at the time of examining the deceased's body Dr. Juma noted the following;

- a) *That there was multiple bruising on abdomen, chest, forehead and left and right of head.*
- b) *Cut wound above right eye measuring 3cm long and into the skull.*
- c) *No skull fracture*
- d) *Blunt skull injury on left side of head and haematoma*
- e) *Respiratory system- normal.*
- f) *Cardiovascular- Heart was intact and vessels normal.*

- g) *Digestive system -Normal*
- h) *Genito-Normal*
- i) *Urinal system normal*
- j) *Head- Left perineal epicranial haematoma*
- k) *Subdural haematoma on brain.*
- l) *Pressure incurred in the brain also to haematoma.*
- m) *Spinal cord was normal.*

29. It was his testimony that Dr. Juma's findings led him to conclude that the cause of death was Trauma brain injury due to trauma by a blunt object. In cross-examination, Dr. Okilo reiterated that the deceased died because she was hit by blunt object. He stated that there was no crush of the skull but due to blunt force, blood could accumulate under the skull. He further stated that if the deceased fell from a height above 20 meters she could sustain the haematoma and that the bruising and cut could result from a fall but the haematoma in this case was out of blunt force. He further stated that it was possible that a cut wound was inflicted by a panga on the left side of head as the deceased was hit with blunt force but that a rungu could occasion such injury.

30. Placed on his defence, the appellant gave unsworn evidence as follows, that he had arrived home at 5:00am on 1<sup>st</sup> January and went to bed till 8 am when he woke up and slashed around the home till 10:00 when he had breakfast and left to visit a friend. That he returned home at 1400 hours and after having lunch he took his child to Nyangoma market to watch entertainment as he sat drinking with his wife. That later he asked the deceased to return home and as he sat waiting for his phone to be charged, he suddenly saw the deceased whom he called but she fled towards home and he followed but upon reaching home she was nowhere. That he returned to the market to search for her to no avail. That the appellant returned home and slept and the deceased later arrived and since she could not explain her whereabouts a quarrel ensued and he slapped her.

31. The appellant testified that the deceased fled to the kitchen and came with a rolling pin which she used to strike the appellant twice and fled the house but tripped on a wheel barrow that was in the veranda and fell and when the appellant went to check on her, he found her bleeding. That he wiped away the blood and went to ease himself but upon return he found the deceased hiding under the bed where he removed her and placed her in bed and she complained of headache and asked the appellant to cut off her hair piece which he did and that later she asked for a pain killer which was offered to her. He testified that the next morning the deceased did not take breakfast but asked for medicine and the appellant sent PW1 to buy paracetamol and ointment which were offered to the deceased.

32. He further testified that he cooked lunch and left to visit a friend who had been involved in a road accident and upon return the deceased asked to bask in the sun and a mat was laid out for her and after basking she returned to bed. That lunch was served but she did not eat and that the appellant noted that the deceased had deteriorated and thought that she had poisoned herself and offered her milk and later he sent for PW3 to assist him take the deceased to hospital but later changed his mind and sought help from Nyangoma police and when he could not find the OCS they went to Mama Sarah Obama Police Station where they found officer Alex who offered to go to their home to check on the deceased and upon return found the deceased had passed on after which Alex ordered him to go back to the police station where the OCS interrogated him and subsequently locked him up and later he was charged.

33. The trial magistrate found that the prosecution had proved its case beyond reasonable doubt against the appellant that he unlawfully killed the deceased who was his wife and proceeded to convict him. In mitigation the appellant reiterated his innocence and further sought leniency on the grounds that his two children were young and defenseless and as he was orphaned, there was nobody to look after them as his in-laws were poor and he was the one providing for them.

#### **Determination**

34. 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.***

***(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.”***

35. The death of the deceased and the cause of that death are neither in doubt nor are they disputed. The appellant in his petition of appeal as well as submissions in this appeal admitted as much. The crux of the appeal in my considered opinion and as emerges from the appellant's submission is the length of sentence which the appellant deems to be too harsh. The appellant was sentenced to 30 years' imprisonment.

36. The maximum sentence prescribed for manslaughter is life imprisonment. 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 Magistrate can opt to effect and apply in specific cases. The same law provides for minimum mandatory sentences.

37. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is was restated in the case of **Daniel Maina Wambugu v Republic [2018] eKLR**. It was stated:

***“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.”***

38. In the circumstances of this case where the appellant butchered his wife to death in the presence and full view of his child PW1 and was sentenced to serve only 30 years imprisonment which was lawful and lenient as there was absolutely no justification for such unlawful killing, 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, I order that the appellant’s sentence shall be calculated from the date of his arrest ON 2<sup>ND</sup> JANUARY 2020 as he was not on bond during trial.

39. Accordingly, the appeal against conviction is dismissed. Appeal against sentence dismissed except to the extent stated by this court.

40. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 16<sup>th</sup> Day of December, 2020**

**R.E. ABURILI**

**JUDGE**