



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 82 OF 2018

BETWEEN

WILLIAM CHESEREGWONY CHEPKIYENGAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. H. Nyaberi, PM

dated 8th October 2015 at Iten Magistrate's Court in Criminal Case No. 318 of 2014)

JUDGMENT

1. The appellant, **WILLIAM CHESEREGWONY CHEPKIYENG** was charged with the offence of manslaughter contrary to **section 202 (1)** as read with **section 205** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 7th March, 2014 at Kaptul Village in Koibarak Location within Elgeyo Marakwet County, he caused the death of **CHEPKIYENG CHESIR** by an unlawful act. He was sentenced to 14 years' imprisonment.
2. The appellant appeals against conviction and sentence based on the grounds of appeal filed in this court. He contends that there were no eyewitnesses to establish the truth of the allegations and the prosecution relied on hearsay evidence and that the deceased's dying declaration was not corroborated and could not be relied upon. The appellant also complained that the proceedings were conducted in a language he did not understand and that the sentence imposed on him was harsh and excessive despite a favourable probation report. The respondent's counsel submitted that the prosecution proved all the elements of the offence of manslaughter.
3. As this is a first appeal, it is the duty of this court to evaluate the evidence afresh and reach its independent conclusion while taking into account that it never heard or saw the witnesses testify.
4. The prosecution case was based on circumstantial evidence. The deceased, who was the appellant's father and who was about 90 years old, was found dead in the grass thatched house where they were living alone. When the postmortem was done by Dr. Wilfred Kimosop (PW 3) at Kapsowar Mission Hospital, he found that the deceased had a bruise on the right chest measuring 2cm x 6cm, a cut on the forehead with rigged edges. Internal examination revealed fractures of the right 2nd to 5th and 8th to 10th ribs which led to the lungs to collapse. There was bleeding in the abdomen. PW 3 concluded that the cause of death was respiratory failure due to collapse of lung and blunt trauma of the chest. He stated in cross-examination that a fall from the bed was unlikely to cause the ribs to break.
5. The deceased's brother Sylvester Cheseke Chesir (PW 1) testified that he had been to the deceased's home on 7th March, 2014 and that the accused and deceased were in the house sleeping. He woke up the appellant, they conversed and he went back to sleep. Later at about 9.00 pm he went back and found the house locked but he heard the appellant telling the deceased, "*stop making noise I will beat you.*" He later learnt that the deceased had died on the next day.
6. John Chepkuyeng Chesir (PW 2) went to the appellant's home on 8th March 2014 after hearing that the deceased was injured. He found him on the bed in blood stained clothes with a cut wound on the head and a swollen head and neck. The deceased told him he had been assaulted by the appellant. PW 2 organised for a vehicle to take him to hospital but as he was being taken he died.
7. The Investigating Officer (PW 4) recalled after being asked to investigate the matter by his superiors, he proceeded to the appellant's home where he found the appellant sleeping. He arrested him and charged him after taking statements.

8. In his defence, the appellant stated that he left home on the morning of 8th March 2014 at about 6.00am to go and sell a goat skin. When he returned home at about 8.00am, he found the deceased on the floor. He picked him up and placed him on the bed. He proceeded with his chores and then took him to hospital but he died on the way.

9. The prosecution case was based on circumstantial evidence as no one saw the appellant assault the deceased. The principle guiding the court in such cases was summarized 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.

10. The fact and cause of death of the deceased was proved by PW 3. I agree with him that the death of the deceased was not natural and the injuries were inflicted by a person. I therefore reject the appellant's defence that the deceased fell from his bed and died as a result.

11. As to who cause the unlawful act that led to the deceased's death, the evidence was that the deceased and the accused were staying alone together. This was confirmed by PW 1 and PW 2 and admitted by the appellant in his defence. In the circumstances, only the appellant could explain what could have happened to the deceased as they were living alone. In ***Mkendeshwa v Republic [2002] 1 KLR 461***, the Court of Appeal elucidated the law in **section 111** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** as follows:

In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.

12. The appellant suggested that someone could have come to the house between 6.00am and 8.00am while he was away. However, his conduct was inconsistent with his innocence. He did not take the deceased immediately to hospital and in fact, it is PW 3 who organized for a vehicle to take the deceased to hospital. I also find there is other evidence that foreclosed the possibility that a third party killed the deceased and points exclusively to the appellant. PW 1 heard the appellant statement threatening to assault the deceased and the deceased's statement to PW 3 that he had been assaulted by the appellant.

13. The deceased's statement to PW 2 is admissible as it falls within the definition of a dying declaration under the provisions of **section 33(a)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. It must however be received with the necessary caution and circumspection although it is not a requirement of law that it must be corroborated to support the conviction (see ***Choge v Republic [1985] KLR 1*** and ***Pius Jasunga s/o Akumu v R [1954] 21 EACA 331***). The deceased told PW 2, who was his brother and a person he trusted what had happened to him. The fact that he was assaulted was confirmed by the injuries he sustained which were consistent with assault.

14. The totality of the evidence is that it is only the appellant who would have assaulted the deceased. His defence was a sham and like the trial magistrate I find that prosecution proved its case.

15. Finally, the appellant complained that the trial was conducted in a language he did not understand. This complaint lacks merit as the proceedings show that the trial was conducted in Swahili and Marakwet. He participated in the proceedings and was able to cross-examine the witnesses and make his defence and he did not raise any complaint at the trial.

16. As regards the sentence, I do not detect any error in the matter the trial magistrate imposed the sentence as he was guided by precedent. I find the sentence of 14 years' imprisonment reasonable and I affirm it.

17. I dismiss the appeal.

DATED and DELIVERED at ELDORET this 24th day of April 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mokua, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.