



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 125 OF 2017 [Manslaughter]**

**STEPHEN MULAMBA WERE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment, conviction and sentence passed in original*

*Principal Magistrate's Court at Siaya in Criminal Case No. 741 of*

*2015 on 6<sup>th</sup> December, 2017 by Hon. J.O.Ong'ondo, Principal Magistrate)*

**JUDGMENT**

1. The appellant **Stephen Mulamba Were** was convicted of the offence of Manslaughter contrary to section 202 as read with section 205 of the Penal Code. Particulars of the charge are that on the 2<sup>nd</sup> day of October 2015 at Got Regea sub location in Gem District within Siaya County, he unlawfully killed CA, a girl aged 11 years old.

2. The appellant denied the offence and the prosecution called six witnesses to establish its case against the appellant. In his judgment delivered on 6<sup>th</sup> December 2017, Hon Ong'ondo Principal Magistrate at Siaya convicted the appellant and after mitigations, sentenced him to serve life imprisonment.

3. The appellant being aggrieved by the judgment, conviction and sentence of the trial court filed this appeal on 19<sup>th</sup> December 2017 setting out the following grounds of appeal:

*i. That I did not plead guilty to the charge and still maintain the same;*

*ii. That the lower court magistrate erred in law and fact in not finding that the availed medical reports were unreliable as one contradicted the other in vital matter;*

*iii. That the trial magistrate erred in law and facts in not finding that there was no legal provision in favour of the respondent similar to those in favour of the appellant for a fair hearing during criminal trial and misdirected himself in proceeding to make impugned order;*

*iv. That since I cannot recall all that were adduced during trial, I therefore urge the honourable court to certify me with the true copies of the trial court proceedings to enable me erect more grounds of my appeal and further be present during its hearing.*

4. The appellant urged the court to allow his appeal, quash the conviction and set aside the life imprisonment imposed on him.

5. 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**.

6. Revisiting the evidence before the trial court, the prosecution's case was that PW1, MA had gone to her maternal home with her deceased daughter namely, CA on 19<sup>th</sup> September, 2015 and that at or about 7. 30a.m, PW1 sent the minor to get milk from the home of Nyaugenya. PW1 then left her home and proceeded to a funeral at Ugenya. She was however called by her brother who informed her that the child had been sexually assaulted and was in a very bad condition. That when PW1 returned, she found the minor had been taken to Manyala Hospital in Butere. She followed her there and tried to found out from the victim what had really transpired.

7. It was also alleged that from her hospital bed the child confided in her mother and told her that she was on her way to collect milk when the appellant tricked her that there was a shortcut to Nyaugenya's home. That the appellant then led the child into a different direction and into a thicket and defiled her. That the deceased child described the appellant as **'the herdsman at Olum's home.'** That PW1 knew the herdsman as Mulamba who had been around for at least one month herding for Mr. Ulum. That the minor narrated to PW1 that during the ordeal, she tried to scream but the appellant pressed her throat effectively subduing her.

8. **PW2** the father to the deceased child received a call from PW2 that his daughter the deceased had been defiled. He proceeded to Yala Hospital where the child had been admitted and talked to her. That the child aged 12 years told him that her grandmother had send her to bring Milk when the appellant herein took her into a thicket by carrying her on his shoulders and gagged her then he defiled her. That she was in a very bad state. The witness did not know who Were Mulamba was. He stated that on 2/10/2015 the child passed away. He led the police in arresting the appellant from the home where he was working but that the accused/appellant herein refused to open the door. That they used a child to knock the door and he opened and they arrested the appellant later the witness went and identified his daughter's body on 30/9/2015 for postmortem. He stated that according to the doctor, had his daughter survived, she would never have had children because of the serious injuries that she had sustained following the defilement.

9. **PW3, PO** the uncle of PW1 and brother to the complainant's mother stated that the minor told him that she was attacked by **'the man who works at Owino Olum's home.'** That he saw the child walking with difficulty. He took the child to Manyala Hospital and later to Yala Hospital. Unfortunately, the minor did not recover. She died on 2/10/2015.

10. **PW4 Dr. Belinda Akinyi** from Siaya County Referral Hospital testified and produced the post mortem report concluding that the minor died as a result of massive loss of blood due to multiple organ injuries. The doctor noted that there was foul smelling discharge from the child's vagina through which infection entered the body. In the report, the pathologist stated that the spinal cord was inflamed and that the small intestines were affected.

11. **PW5, Evelyn Odhune** the Clinical Officer examined the minor 2 days before she died on 30/9/2015. She noted injuries on the neck.

12. Placed on his defence, the appellant gave unsworn testimony. He denied the offence indicating that he was still new in the area, barely 3 weeks old. He alluded to his arrest which came one week after the offence was allegedly committed.

## SUBMISSIONS

13. In his written submissions which he adopted as canvassing his appeal, the appellant contended that section 200 of the Criminal Procedure Code was violated in that the matter moved through the hands of 3 different magistrates but that the trial record does not show that section 200 of the Criminal Procedure Code was complied with. He relied on **Rebecca Mwikali Nabutola v Republic** (no citation given) where the court allegedly stated that provisions of Section 200(3) of the Criminal Procedure Code are mandatory and that the records must as of necessity contain a fact that the succeeding magistrate informed the appellant the right to recall or re-hear any witness. Further reliance was placed on **PHN-V-R (no citation given)** where the court allegedly cited numerous authorities and held that failure to comply with the provisions of Section 200(3) of the Criminal Procedure Code would in appropriate circumstances render a trial fatally defective.

14. The appellant claimed that there is no record that he was informed of his right to recall witnesses, nor is there a record that he elected not to recall witnesses. It was his submission that the omission by the trial court was fatal to the proceedings.

15. On alleged shoddy investigations, it was submitted that the medical reports which were exhibited were contradictory of one another. That whereas the charge sheet indicates that the death occurred on 02.10.2015, the witnesses, PW1 and PW2 testified that they identified and carried out post mortem respectively on 30.09.2015.(See pg. 13 line 14 and pg. 19 line 21.) The appellant claimed that the piece of evidence raises a question as to when the incident actually occurred.

16. It was further submitted that the initial charge of defilement was not established since no report was made and recorded with the police and that there was no evidence linking the alleged defilement with the death. That no post mortem report was produced to show the probable cause of death.

17. Further submission was that the minor was able to walk and talk and that she was taken to hospital yet she was discharged before being taken to the police station for reporting. (see pg. 9 line 3-5). It was submitted that it was not explained why the minor did not record a statement with the police and if she did then why it was not produced in court as part of the prosecution evidence.

18. The appellant submitted that lack of a statement recorded by the minor with the police even after being taken to the police station at Yala, renders the entire prosecution case hearsay.

19. On alleged defective charge sheet, it was submitted that the charge of manslaughter was defective since the ingredients of the offence were not met and or established. He cited section 202 (1) Penal Code which defines the offence of manslaughter as:

***"Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed as manslaughter."***

20. It was submitted that the key ingredient in the offence is death and whose probable cause in the instant case was never established and proved by way of production of a post mortem report.

21. The Respondent state through the Senior Principal Prosecution Counsel Mr. David Okachi opposed the appeal contending that the crime was heinous and called for a deterrent sentence. That the appellant was known by the victim and that the offence took place in broad

daylight. Mr. Okachi urged the court to uphold the conviction and sentence imposed on the appellant.

## **DETERMINATION**

22. I have considered the appeal herein, the evidence adduced in the lower court and the submissions for and against the appeal. In my humble view, the main issues for determination emerge from the appellant's submissions and grounds of appeal.

23. On whether section 200 (3) of the Criminal Procedure Code was not complied with and the effect thereof, it is true that the case was first heard by Hon. Hazel Wandere, Principal Magistrate who was then transferred midway and the trial was taken over by Hon. James Ong'ondo Principal Magistrate on 6/6/2017. On the said later date, the trial court record clearly shows that the appellant was in court and directions were given in terms of section 200 of the Criminal Procedure which provides:

***“(3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the appellant may demand that any witness be resummoned and be reheard and the succeeding magistrate shall inform the appellant of the right”.***

24. On the said date the succeeding trial magistrate observed that the appellant had a warrant of arrest on his head and the appellant produced treatment notes to the effect that he was sick so the warrant was lifted and the court stated:

***“Section 200 of the CPC complied with.***

***Accused- 1. The matter to proceed from where it had reached.***

***2. Proceedings to be typed.***

***A hearing date was then set for 10/7/2017”***

25. On the hearing date of 10/7/2017, the prosecution sought for adjournment to amend the charge sheet to read date of death as 2/10/2015 and not 30/9/2015 although it had two witnesses present in court and the court granted leave to amend the charge sheet which was presented to court and read to the appellant afresh in Kiswahili language and he pleaded not guilty before the hearing proceeded subsequently on 1/8/2017.

26. Accordingly, I find and hold that the appellant's contention that section 200 (3) of the Criminal Procedure Code was not complied with or that he was not informed of his right to recall witnesses or to start the hearing *denovo* is not true and the same is dismissed.

27. On allegations of shoddy investigations, the appellant claimed that although the amended charge sheet stated that the death occurred on 2/10/2015 the evidence of PW1 and PW2 was that they identified the body of the deceased for postmortem on 30/9/2015 which was contradictory.

28. I have perused the evidence on record and indeed the charge sheet as amended reveals that the deceased died on 2/10/2015 and so does the evidence of all prosecution witnesses who mentioned the death of the deceased. However, PW1 and PW2 stated in their evidence that postmortem was done on 30/9/2015. Further, I have perused the postmortem form produced as exhibit 4 which is signed by Dr. Odinga. It does show on page 2 that the postmortem was done on 3/10/2015. In my view, albeit there was a contradiction in the dates, the contradiction is not material. It is curable as it does not go to the root of the case as the evidence taken as a whole is clear that the deceased died on 2/10/2015 and an autopsy was carried out the following day on 3/10/2015 at 4pm. The witnesses may have been confused on this aspect as the postmortem could not have been carried out before a death had occurred. I also observe that the P3 form in respect of the deceased child is dated 30/9/2015 and most likely, the witnesses were confusing the P3 form and the Post mortem form dates. Accordingly, I find the inconsistency not material as to vitiate the trial of the appellant.

29. It was further submitted that the initial charge of defilement was not established since no report was made and recorded with the police and that there was no evidence linking the alleged defilement with the death of the deceased. That no post mortem report was produced to show the probable cause of death.

30. However, a postmortem form was produced as exhibit 4. It is dated 3/10/2015 and it shows the cause of death of the deceased to be septicemia with a multiple organ injury probably from introduction of infection per vaginal. Accordingly, the assertions by the appellant that there was no postmortem report on the cause of the deceased's death or that there was no evidence linking the defilement of the deceased and the death of the deceased are not correct.

31. On whether the manslaughter charge was proved beyond reasonable doubt, the evidence on record shows that the offence of defilement occurred on 19/9/2015 at 7.30 am but was not reported to the police until 28/9/2015 at 13.00hours, nine days later as per the P3 form dated 30/9/2015 and the appellant was arrested on 25<sup>th</sup> September, 2015 but released and rearrested on 30/9/2015. The treatment notes exhibit 2 are dated 26/9/2015 from Manyala Dispensary and on 30/9/2015 the deceased was taken to Yala level 4 Hospital. Throughout this period, from 19/9/2015 to 26<sup>th</sup> September 2015, the parents of the child knew and had been told by the child that she had been defiled by a person well known to her. The question is why did they take so long to take her to hospital and to report the incident to the police?

32. From the evidence on record, I am of the view that the deceased died due to negligence of her guardians and caregivers who never took her to hospital immediately after the defilement. By the time she was taken to hospital she had developed serious infections which led to her death as per the postmortem report. Her parents and uncle regrettably do not explain why they never took the child to hospital immediately

and neither does the investigating officer give the reasons.

33. In addition, the prosecution relied on the dying declaration by the child who is said to have told the witnesses being her uncle, father and mother that she was defiled by the appellant herein. However, her father did not know the appellant who was a herdsman in the neighborhood as the appellant had been therefor just about three weeks. What baffles this court is that despite this information being given to the said close relatives of the child, they only reported to the police on 28/9/2015 nearly ten days later yet the child had been seriously injured and had been talking and even walking with difficulty.

34. The child aged 11 years could have recorded her statement with the police during her hospitalization which statement would have been produced as evidence by persons who cannot be called as witnesses. As at the time the accused was arrested on 25<sup>th</sup> September 2015 and rearrested on 30/9/2015, it was not shown that the child was unable to talk and tell her story to the police. A dying declaration which is not made in the presence of an accused person and which is not recorded by the police as a statement can only be admitted in evidence with caution. The trial magistrate did not warn himself of the dangers of such evidence which was not corroborated.

35. In my humble view, I am in agreement with the appellant on this aspect of this case that the investigations in this case were carried out in a shoddy manner and in addition, I find that the negligence of the guardians of the child led to her developing serious infections that led to her untimely death. In my humble view, the testimony of the witnesses who claimed to have been told by the child that she was defiled by the appellant was nothing but hearsay and unreliable to sustain a conviction. I reject that evidence.

36. Furthermore, the trial Magistrate shifted the burden of proof from the prosecution to the accused person when he stated:

***“He did not rebut the prosecution’s evidence which placed him at the scene or even have any alibi. The appellant never bothered to explain how he spent the 19<sup>th</sup> September 2015. He completely avoided it and referred to the 25<sup>th</sup>, September when he was first arrested. There is clearly no other explanation about his whereabouts except the way it has been vividly put by the prosecution: the appellant was carrying out this heinous act, consequently wherefore he must deal. If he would have talked about the 19<sup>th</sup>, he would only have said 4 words: ‘I committed the offence’.***

37. Therefore, although the postmortem report was produced on the probable cause of death of the deceased child, which death was unfortunate, the prosecution in my humble view failed to discharge the burden of proof beyond reasonable doubt that it was the appellant who defiled the child thereby inflicting on her fatal injuries.

38. I reiterate that the parents of the child were all to blame for not taking her for urgent medical attention and for not reporting the incident to the police immediately so that her statement could be recorded by the police on who defiled her, since there was no eye witness to the incident.

39. For the above reasons I find the conviction of the appellant for the offence of manslaughter to have been erroneous and unsafe, I allow this appeal, quash the appellant’s conviction and set aside the life imprisonment imposed on him.

40. Therefore, unless otherwise lawfully held, the appellant is hereby set at liberty forthwith.

**Dated signed and delivered at Siaya this 18<sup>th</sup> day of December 2019**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for the State

CA: Brenda & Modestar