



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 66 OF 2017

NICHOLAS K. MUYA.....1ST APPELLANT

JAMES MAINA NGANGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence by Hon. P.O. Ooko PM delivered on 8th May 2017 in Criminal Case No. 588 of 2013 at the Principal Magistrate's Court at Mavoko)

JUDGMENT

The Appeal

The Appellants were convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code, and each sentenced to serve seven years imprisonment by the trial Court. The particulars were that on the night of 29th and 30th July 2012 at New Valley Estate Kitengela within Kajiado County, the Appellants jointly caused the death of Mark Otieno Ogello (hereinafter referred to as "the deceased").

The Appellants are aggrieved by the judgment of the trial magistrate, and have preferred this appeal against the conviction and sentence. The grounds of appeal are in a Petition of Appeal dated and filed in this Court on 18th May 2017, filed by their Advocate, Turunga Ithagi & Associates Advocates, who also filed submissions dated 21st November 2017. The grounds raised by the Appellants are as follows:

1. The Learned Trial Magistrate erred in Law by convicting the 1st and 2nd Appellants for the joint charge of manslaughter contrary to section 205, of the Penal Code, since the deceased met his untimely death when the Appellants responded to their call of duty and they never at any time acted negligently in fighting the armed robbers who reacted on their arrival at the scene by firing back at the Appellants.
2. The Learned Trial Magistrate erred in Law and fact by not adequately informing the 1st and 2nd Appellants of their constitutional right to adduce and challenge evidence as enshrined under Article 50 (2) (k) of the Constitution of Kenya.
3. The Learned Trial Magistrate erred in Law and fact by convicting the 1st and 2nd Appellant purely on very wobbly circumstantial evidence and the weight of PW9's evidence which the trial magistrate treated as a confession contrary to the provisions of Section 26A of the Evidence Act, as the alleged confession was not made in the presence of a third party of the Appellant's choice and therefore was not admissible .
4. The Learned Trial Magistrate erred in Law and fact in convicting the 1st and 2nd Appellant purely based on the alleged and unchallenged prosecution witnesses testimony, and the fact that the accused persons were at the scene of crime where both the robbers and the Appellants (police officers) fired bullets at each other leading to the death of the deceased (Mark Otieno Ogello) herein.
5. The Learned Trial Magistrate erred in Law and fact by finding that the testimonies given by the prosecution witnesses were beyond reasonable doubt in proving the charge leveled against the Appellants, and were mostly hearsay as the prosecution did not call Mr. Michael Muthama as a witness despite him being the origin of the information that a robbery was in progress and the third accused was a victim in the said robbery.
6. The Learned Trial Magistrate erred in Law and fact in meting out a conviction and sentence in disregard of the weight of the ballistic examinations evidence not adduced in the Court to identify which gun fired the bullets which caused the death of the deceased and making an assumption that the ballistic evidence was a cover up for the crime purportedly done by the Appellants.

7. The Learned trial magistrate erred in law and fact in finding that the failure by the accused Counsel to cross examine two witnesses was an admission by the Appellants of the testimony of the accused and that the failure to cross-examine was an instruction by the Appellants.

8. The Learned trial magistrate erred in law in assuming that the accused persons though having pleaded "NOT GUILTY" conceded to all the evidence tendered by the prosecution witnesses after they chose to keep quiet and call no witnesses during their defense .

The Appellant submitted that the Appellants being Administration Police Officers stationed at New Valley Police Post in Kitengela, responded to a call of duty on the night of 29th and 30th July 2012 after being called by the Estate Chairman and PW4 when they reported a robbery. However, that the Prosecution did not call PW4's guard, one Michael Muthama, who was a key witness having reported the robbery to PW4 and witnessed the said robbery.

Furthermore, that the death of the deceased was caused by gunshot wounds which were not occasioned as provided for in Section 202 of the Penal Code to warrant the Appellants conviction for the offence of manslaughter, as the Appellants were tasked to prevent a crime by virtue of their work as a disciplined force being the Administration Police, and were responding to a call of duty during an ongoing robbery incident. That there was no evidence whatsoever tendered in the trial court demonstrating culpable negligence in act or omission by the Appellants, and if a reasonably prudent person would act in the same manner as they did then the Appeal should be allowed.

The Appellant further submitted that Article 50(2) (k) of the Constitution of Kenya guarantees an accused person the right to a fair hearing including the right to adduce and challenge evidence. However, that the learned trial magistrate failed to adequately inform the Appellants of the right to adduce and challenge evidence during the trial, and subsequently the Appellants did not put up a defense despite their wish to do as evidenced by the lower court proceedings. It was submitted that the court did not at this point find it fit to inform and inform the Appellants their rights pursuant to Section 211 of the Criminal Procedure Code when their advocate stated they were willing to change their mode of defense, and when they chose to remain silent in their defense.

Lastly, that the learned trial magistrate convicted the Appellants on circumstantial evidence. In particular, that PW4, PWS and PW6 testified that they were told of an apparent robbery at their estate yet the origin of the news was not brought forth as a witness. Further, that no ballistic evidence was tendered in court to prove that the bullets that led to the death of the deceased came from the Appellants' firearms, neither was there an eye witness. Therefore, that placing the Appellants at the scene of crime is not sufficient evidence to warrant the conviction of the Appellants with the offence of manslaughter. Reliance was placed on the decision in **Republic vs Daniel Musyoka Muasya & 2 Others ,(2014) e KLR** in this regard.

Ms Mogoi Lillian, the learned prosecution counsel, also filed written submissions dated 19th December 2017. It was indicated therein that the Prosecution was conceding the appeal for the reason that there was insufficient evidence linking the Appellants to the offence. After summarizing the evidence in the trial Court, the Prosecution submitted that it is true that there could have been a mistaken identity which led to the deceased losing his life. However, the prosecution did not lead any evidence to link any of the two Appellants to the shooting, especially in view of the fact that the ballistic report indicated that the two spent cartridges were from the same gun which rules out the possibility that two people could fire the same gun at the same time.

Further, that PW13 never received any rifle to compare the cartridges with in order to determine whether any of the rifle used to shot the deceased had been allocated to any of the Appellant hence linking either the 1st or 2nd Appellants to the shooting of the deceased; and the prosecution did not produce the inquest proceedings as exhibit to shed light at to what kind of evidence was available at the proceedings of the inquest which informed the decision for the court to order for the Appellants to be charged with manslaughter.

The Determination

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

Thirteen witnesses testified for the prosecution. PW1 (Godwin Bill Onyango) and PW2 (Simon Sakwa) testified as to the events of 29th July 2010 when they were with the deceased at a bar at Kitengela, and left him alive, and how they later received news that he had been killed. PW3 (Jack Onyango Ogello), who was the Deceased's brother, PW6 (Elger Akinyi Mboya) who was the deceased's neighbor, and PW10 (Jerome Ogelo) the Deceased's father, testified as to how they received the information of the deceased's death. PW10 also testified that he identified the deceased's body before the conduct of the post mortem examination.

PW4 (Samuel Mbithi Matibo) testified that he received a call from his guard a Mr. Michael Muthama who told him that his neighbor one Boniface had been followed by thugs who also robbed him and that he had taken refuge in another neighbor's house. PW4 testified that he then alerted the Chairman of New Valley Estate one Wilson Tanui who alerted the police officers and later on gave PW4 the contact number of an A.P Officer whom he had contacted.

That after sometime, PW4 heard gunshot and went to the scene together with Boniface and another neighbor where they saw a car that had veered off the road and the car's driver who appeared dead. He testified that he did not know the driver and could not identify the police officers who were at the scene as it was dark.

PW4's testimony was corroborated by Wilson Tanui who was PW5, and who testified that after receiving the call from PW4 he called an AP officer called Muya and informed him of the robbery. Further, that after hearing gunshots he called the said Muya who informed him that they had gone to the scene of the robbery and gunned down one of the robbers.

PW7 who was Dr. Andrew Kanyi Gachie, and PW8, Dr Njau Mungai, both conducted a post mortem examination on the body of the

deceased, and found the cause of death to be multiple gunshot wounds. PW9 (Chief Inspector Gabirel Mirew) testified as to receiving the report of the shooting incident and went to the scene where he found the 1st and 2nd Appellants who explained what had transpired including returning fire at a motor vehicle which was alleged to have been involved in a robbery.

PW 12 (Cpl. Dickson Musya Mutemi) testified as to the investigations that he undertook on the shooting incident, and that he sent two spent cartridges he found at the scene of the shooting to a ballistic expert for examination. He also testified that it is the magistrate who conducted an inquest into the killing of the deceased who recommended that the Appellants be charged with manslaughter. The evidence by PW11 (Simon Mureithi Maina) was to confirm that he knew and worked with the deceased at Co-operative Bank.

The last witness was Emmanuel Langat (PW13), who testified that he was an examiner attached to the Forensic Laboratory at CID headquarters in Nairobi and he confirmed receiving two spent cartridges from PW12 which he examined and found that they had been fired from one gun. He produced his report as an exhibit. He also testified that he did not receive any firearm to examine.

Upon consideration of the grounds of appeal, submissions made and evidence in the trial Court, I find that the substantive issue raised in this appeal is whether the Appellants' conviction for the offence of manslaughter was based on sufficient evidence.

The offence of manslaughter is defined in section 202 of the Penal Code as follows:-

“(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”

The ingredients of the offence of manslaughter are therefore an unlawful act or omission that causes the death of another person. For the prosecution to succeed in proving the charge of manslaughter, they were thus required to prove that the Appellants' unlawful acts or omission caused death of the deceased.

In the instant appeal, none of the Prosecution witnesses testified in this regard to witnessing the Appellants commit acts that caused the death of the deceased, and majority arrived at the scene of the crime when the deceased had already died, while the rest were not present at the scene of the crime. PW5 and PW9 testified that it is the Appellants who told them the deceased was shot and killed during a shootout with robbers.

However, there was no evidence produced linking the gunshot wounds the deceased suffered to the Appellants, as PW13 in his evidence did not link the spent cartridges found at the scene of crime to any firearms that were in the Appellant's possession. In addition, the account of the witnesses that there was an exchange of gunshots between the robbers and Appellants raises doubts as to the origin of the gunshots that caused the deceased's death in the circumstances.

I therefore find that the evidence by the prosecution in the trial Court did not establish beyond reasonable doubt that the Appellants by their acts or omissions caused the death of the deceased. I accordingly allow the appeal, and quash the conviction for the offence of manslaughter and set aside the sentence of seven years imprisonment imposed on the Appellants by the trial Court. It is further ordered that the Appellants be and are hereby set free unless otherwise lawfully held.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF JANUARY 2018.

P. NYAMWEYA

JUDGE