



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HCCRA NO 25 OF 2017

JOSEPHAT MALUSHA MGHANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 885 of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon. E.G. Nderitu (SPM) on 19th January 2017)

JUDGEMENT

INTRODUCTION

1. The Appellant herein, Josephat Malusha Mghana, was charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code Cap 63 (Laws of Kenya). The particulars of this charge were that on the night of 21st October 2014 and early morning of 22nd October 2014 at Ghazi Village in Voi area within Taita Taveta County, he unlawfully killed Francis Mkala Mwasaru, (hereinafter referred to as "the deceased").
2. The Learned Trial Magistrate, Hon E.G. Nderitu, Senior Principal Magistrate, convicted him and sentenced him to fifteen (15) years imprisonment.
3. Being dissatisfied with the said judgment, on 19th January 2017, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed. He relied on seven (7) Grounds of Appeal. His Written Submissions were dated 24th August 2017 and filed on 25th August 2017. The State's Written Submissions were dated 11th December and filed on 14th December 2017.
4. When the matter came up in court on 17th January 2018, the Appellant and the State informed the court that they would rely entirely on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor”.

6. It appeared to this court that the issues that had been placed before it for determination were:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt;

b. Whether or not the sentence that was meted upon the Appellant by the Learned Trial Magistrate was severe, harsh and manifestly excessive in the circumstances.

7. The court therefore dealt with the said issues under the following heads.

PROOF OF THE PROSECUTION'S CASE

8. The Appellant submitted that he acted in self-defence and that if he had not done so, he might have been killed. He faulted the Trial Court for failing to apply the subjective test (sic) in evaluating whether the defence of self-defence was material herein and instead introducing its own presumptions and evidence.

9. In this regard, he relied on the cases of **Republic vs Joseph Kibet Rotich [2010] eKLR** and **Beckford vs Ford [1987] ALL ER 425** where the common thread was that a person under attack by another and where bodily harm was imminent, could use reasonable force to defend himself against his attacker.

10. He therefore submitted that the Prosecution failed to disprove his defence that he acted in self-defence and urged this court to allow his Appeal.

11. On its part, the State argued that the ingredients of manslaughter in this case had sufficiently been proven. The same were:-

a. The death and cause of death of the deceased;

b. That the accused person committed unlawful act which caused the death of the deceased.

12. It pointed out that the Trial Court did not err in shifting the burden of proof to the Appellant herein as the Prosecution witnesses placed him at the scene of the incident. It added that he also placed himself at the scene of the incident.

13. It referred this court to the cases of **Ahmed Mohamed Omar and 5 Others vs Republic [2014] eKLR** where it was held that a defence of self-defence could only be sustained if an accused person demonstrated that he believed that he was being attacked or that he was in imminent danger of being attacked and that such belief was based on reasonable grounds.

14. A perusal of the Prosecution's case shows that on the material date, time and place, Rose Mwanyika (hereinafter referred to as "PW1") heard the Appellant herein, whose house was about fifty (5) meters from her house, screaming "Thief, thief".

15. She took a torch and went to his house and found him hitting a man who was on the ground with a log. She left after she was unable to stop him from beating the man. When she returned, she found him tying the man with a rope. Later, he went to her house and informed her that the man he had tied had died.

16. At about 4.00 am, the same day, the Appellant went to the house of the chairlady of Nyumba Kumi and member of Community Policing, Sabina Vughanga (hereinafter referred to as "PW2") and informed her that he had caught two (2) thieves. She said that she only saw one (1) person.

17. At about 5.25 am, he went to the house of the Assistant Chief Ngazi Ngolia Location, Elisha Mwanyika Mwakazi (hereinafter referred to as "PW3") and told him about the two (2) thieves. PW3 went to his homestead and found the dead person who had been tied with a nylon rope.

18. He observed deep cut wounds on the deceased's forehead and injuries below his knees. The Appellant found him at the scene and was smelling of alcohol and appeared to have been proud of what he had done. The Appellant was wearing blood stained jeans and told him that the deceased was a thief.

19. Previously, on 21st October 2014, the Appellant had gone to the house of Danson Mwazo Mwakatuia (hereinafter referred to as "PW4"). PW4's wife was the Appellant's cousin. The deceased was at the said house at the time. Both the deceased and the Appellant had an altercation and exchanged words as they left PW4's house.

20. The following day, PW4 heard that the deceased had been killed at the Appellant's house. PW4 confirmed that the deceased used to construct the Appellant's house and they knew each other, a fact that was confirmed by Alex Mwakaramba Mwasaru (herein after referred to as "PW5").

21. The Postmortem on the deceased's body was done by Dr Lukas Mugandi (hereinafter referred to as "PW 9"), a doctor at Moi Hospital, Voi. He observed that the deceased had a depressed fracture of the cranium, cut wound on the head, fractures on the left tibia and fibula. He concluded that the deceased's death was cardio respiratory arrest secondary to head injury.

22. The Principal Chemist, George Lawrence Ogunda (hereinafter referred to as "PW 10") confirmed that the DNA profile generated from the Appellant's pair of jeans matched the blood samples that had been taken from the deceased.

23. The Appellant's involvement in the deceased's death was also confirmed by Defence Mukamanga, George Mbogo, No 60035 PC Paul Oumo, the Arresting Officer and PC No 69298 Corporal William Kamau, the Investigation Officer (hereinafter referred to as "PW7", "PW8", "PW11" and "PW12" respectively).

24. In his defence, the Appellant confirmed that the deceased had been his employee. A disagreement over payment of their dues arose and PW5 took his nails, tape measure and hose pipe. At about 10.00 pm, he heard noises outside his house. When he opened the door, he saw two (2) people. One (1) person threw a rod at him. He struggled with them and managed to pin the deceased on the ground and started screaming. It was then that a woman came and he realised that the thug was someone he knew. The other person escaped.

25. He said that he tied the person so that he could go after the other person. He expressed surprise that when he returned, the person had

been tied all over the body and was about twenty (20) meters from where he had tied him. He confirmed that his pair of jeans had blood stains but denied ever having killed the person.

26. It was correct as both the Appellant and State submitted that a person who believes that he is under attack or faces imminent danger of being attacked can defend himself by applying force. However, the use of force must be reasonable and proportionate to the danger that is posed to him.

27. Notably, from the facts of this case, it was not clear under what circumstances the deceased found himself at the Appellant's house. Indeed PW4 testified that both the deceased and the Appellant left his house after an altercation and were exchanging words. PW5 stated that they left the Appellant's house after he refused to pay them for the work they had done at his house. On his part, the Appellant stated that the deceased and PW5 went to his house to steal his things

28. What really transpired before the deceased was found dead at the Appellant's homestead was not clear to this court. However, whatever the circumstances, it was clear that the deceased was found dead in the Appellant's homestead tied with ropes. The Appellant confirmed the fact and thus placed himself squarely in the scene. The question before this court therefore was whether or not the Appellant used excessive force upon the deceased.

29. From the injuries that were confirmed by PW 9, there was no doubt in the mind of this court that the depressed fracture on the cranium, three (3) cut wounds on the head, multiple facial bruising and fractures of the left tibia/fibula and right femur were indicative of multiple blows on the deceased. This corroborated PW1's evidence that she found the Appellant continuously hitting the deceased who was not talking at the time.

30. Her evidence that she found the Appellant tying the deceased with a rope was confirmed by the Appellant himself, PW2, PW3 and PW4. The Appellant's assertions that he did not tie the deceased all over but that he only tied him on the hands and legs were neither here nor there. This is because it was evident that the Appellant intended to demobilise the deceased even after having hit him repeatedly. The Appellant's assertions that he found the deceased tied at a different spot from where he left him to have been were a mere denial of what really transpired.

31. Going further, PW5 testified that the Appellant went to his home and told him that the deceased was dead and also threatened him. These actions could not in any way be said to have been actions of a person who was defending himself from an attacker. Although the Appellant may very well have been defending himself as he had contended, it was clear that the force he used on the deceased was unreasonable and was intended to cause him maximum injury. It was an overkill.

32. The cases the Appellant relied upon to support his case were therefore rendered moot. He failed to discharge the burden of proof that had been shifted on him as contemplated under Section 111 (1) and 119 of the Evidence Act Cap 80 (Laws of Kenya).

33. Section 111(1) of the Evidence Act provides as follows:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence...”

34. Accordingly, having analysed the evidence that was adduced by the Prosecution witnesses *vis-à-vis* the Appellant's defence, this court came to the firm conclusion that the Learned Trial Magistrate arrived at a correct conclusion when he determined that the extent of attack by the Appellant on the deceased was not proportionate to the danger he may have anticipated. It was therefore the considered opinion of this court that the Prosecution proved its case beyond reasonable doubt and that the Learned Trial Magistrate acted correctly when he convicted the Appellant for manslaughter.

SENTENCING

35. The Appellant argued that the sentence that was meted upon him by the Learned Trial Magistrate was harsh and excessive noting the circumstances leading to the deceased's death. He stated that he was first offender and was adamant that he was acting in self-defense.

36. On its part, the state submitted that Section 205 of the Penal Code provides that an offender who is found guilty is liable to life imprisonment.

37. Section 205 of the Penal Code stipulates as follows:-

“Any person who commits the felony of manslaughter is liable to imprisonment for life.”

38. In the case of **Republic vs Jayani and Another KLR (2001) 593** paras 3 and 4 that was relied upon by the State, it was held as follows:-

“The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for term done to victims in particular and to society in general. This is also seen as promoting a source of responsibility in offenders.”

39. As this court observed, whatever the circumstances, the Appellant’s actions were an overkill. He intended to kill the deceased. Whereas under normal circumstances this court would have reduced the sentence of fifteen (15) years, it was not persuaded that this was a good case for it to interfere with the sentence that was meted upon the Appellant by the Learned Trial Magistrate.

40. In fact, this court was of the considered opinion the Appellant was guilty of having murdered the deceased whose penalty would have been the death sentence. However, in view of the nature of the sentence, this court was not inclined to enhance the sentence from fifteen (15) years to death sentence as prescribed by the law.

DISPOSITION

41. For the foregoing reasons, this court found the Appellant Appeal that was filed on 26th April 2017 was not merited and the same is hereby dismissed. Instead, it hereby affirms the conviction and sentence that was meted upon the Appellant by the Learned Trial Magistrate as the same was lawful and fitting.

42. It is so ordered.

DATED at NAIROBI this 25th day of May 2018

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED at VOI this 30th day of May 2018

F. AMIN

JUDGE

In the presence of:-

Josephat Malusha Mghana Appellant

Miss Anyumba for State

Josephat Mavu– Court Clerk