



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 100 OF 2013

(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's Court

Criminal Case No. 3389 of 2011 delivered by A. Alego Principal Magistrate on 31/5/2013)

BONFACE KAKAI KHAYAKI.....1ST APPELLANT

FRANCIS MASINDE WANJALA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellants were charged with the offence of **Manslaughter** contrary to **Section 202** as read with **Section 205 of the Penal Code**. Particulars of the charge were that **on the 12th day of December 2009 at Misemwa village Sango Sub-location Kongoni Location Lugari District within Western province jointly and unlawfully killed Felix Kandarerwa. The appellants were convicted and sentenced to Life imprisonment.**
2. They have appealed citing several grounds. The facts and evidence as presented during trial were as follows:-
3. **PW1 Joseph Sivanga Livaga** were drinking alcohol on 12/12/2009 at 7.00 pm together with the deceased and others. The appellants then came and drunk their changaa. The appellants later left and was followed by the deceased. One Mike came and informed the witness that the deceased had been injured. He went to the scene and found the deceased severely beaten and a jembe lay next to him. The blood was all over. He went and called his brother and came back to the scene. The police came and collected the deceased body as well as the jembe.
4. When cross-examined he said that the 1st appellant hit in the toilet which caved in and he was removed the following day.
5. **PW2 Catherine Nanyama** testified that she was called by PW1 who informed her of the incident. He rushed to the scene and found the deceased dead. The 1st appellant was bathing himself with the deceased blood and stating that “*afadhali afanye kesi na mtu amekufa.*”
6. **PW3 Jason Wasike Nyambira** a village elder was informed by one Michael Waswa the appellant's co-accused. He informed the Assistant Chief as well as the police.
7. **PW4 Robert Agesa** an Uncle to the deceased identified the body at Webuye district hospital for purposes of post mortem. He said that the deceased had injury on the head.
8. **PW5 P.C. Leonard Sabayi** received the report from the village elder as well as the appellant's co-accused. He went to the scene and found the deceased already dead. He arrested the 2nd appellant while hiding in the toilets. The 3rd appellant went into hiding for 2 years before he was arrested.
9. **PW6 C.I. Julius Gitahi** carried out the investigations after visiting the scene. He recorded statements from the witnesses and preferred charges against the appellants.
10. **PW7 P.C. James Obiri** arrested the 3rd appellant.

11. **PW8 Dr Alex Munyendo** carried out post mortem exercise on the deceased body and his findings on the cause of death was severe head injury cracked skull and blood to the brain caused by trauma by blunt object.

12. When put on their defence both appellants gave sworn evidence. The 1st appellant stated that he worked till 7.00 pm on the material day and when he came back home he found people (crowd) and his mother told him that there was a dead body at home. He went to the scene and 30 minutes thereafter the police came and collected the body. The following day he was arrested. He denied ever going to any body's house to drink changaa.

13. The 2nd appellant said that he worked in Mombasa and was arrested on 3/12/2011 as they were drinking with three others. He said that the rest were released but was charged with the offence of Murder. He denied seeing the deceased on 12/12/2009.

Analysis and Determination

14. The court has carefully read the proceedings herein as well as written submissions by the appellants and the State. It is evidently clear that there was no eye witness to the incident. The same occurred at around 7.00 pm. No mention however was made in respect to the nature of light.

15. The evidence as recorded is purely circumstantial. PW1 the star witness saw the two appellants leave and immediately followed by the deceased. Shortly thereafter the appellants co-accused came and told him of what was taking place. As he went to the scene, he found the deceased already bleeding and injured and the hoe used was next to him. He went to inform his brother.

16. PW2 was called and when she arrived she saw the 1st appellant bathing in the water which I supposed contained the deceased blood. He was equally licking the blood. He hit in a toilet which later caved in and was rescued the following day at 10.00 am.

17. Clearly the bizarre things by the 1st appellant led the trial court believe that he must have been involved in the deceased murder.

18. The only connection to the 2nd appellant Francis Wanjala Masinde was his disappearance after the incident. He was arrested 2 years later.

19. Did the disappearance of the 2nd appellant a pointer towards a guilty conscience? There was every possibility that that could be so. However there was no evidence to suggest that the police or any other law enforcement agency attempted to trace and apprehend him for the two years. No evidence was led to suggest that he was being sought all over especially where he worked or lived. The mere strong suspicious in a borderline case like this is not enough. Cogent evidence ought to be presented to show that the appellant was keeping house.

20. More particularly, there was no eye witness to the incident or any attempt to show that during the drinking spree he had a quarrel or had altercation with the deceased. To sustain the charge against the 2nd appellant would be too heavy in the circumstances.

21. Consequently, the appeal by the 2nd appellant is hereby allowed. He is set free unless lawfully held.

22. As regards the 1st appellant I find the strange and bizarre behaviour after the death of the deceased a pointer to his guilty conscience. He was licking the deceased blood as well as bathing with the flowing water which had the deceased blood. Equally he hit inside a toilet which later caved in. He was rescued and arrested the following day at 10.00 am. There was no any other explanation to the same.

23. His defence did not aid him at all. The same was a sham.

24. In the premises the 1st appellant Bonface Kakai Khayaki appeal is dismissed. On the question of sentence this court is inclined to interfere with the same considering the nature of the charge and the circumstances.

25. Consequently the sentence of life imprisonment is hereby set aside and substituted with an imprisonment of 12 years from 26/9/2011 noting that he did his case while in custody.

Orders accordingly.

Judgment read, delivered, signed and dated at Eldoret on this 19th October 2018.

H.K. CHEMITEI

JUDGE

19/10/18

In the presence of:

R. Karanja for the Respondent

Appellant – present

Court Assistant – Christine

Judgment read in open court.