



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 63 OF 2015

BETWEEN

BARNABAS ABWAO

OMWIMBI AKATCH APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. Ochieng, PM dated 23rd March 2016 at Principal Magistrate's Court at Maseno in Criminal Case No. 1268 of 2011)

JUDGMENT

1. The appellant, **BARNABAS ABWAO OMWIMBI AKATCH**, was charged with manslaughter contrary to **section 202** as read with **section 205** of the Penal *Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 25th November 2010 at Ratta Sub-location, Kisumu West he unlawfully killed **NASHON OUMA AKATCH** ("the deceased"). He pleaded not guilty and after trial he was convicted and sentenced to life imprisonment.
2. The appellant now appeals based on the petition of appeal filed on 6th August 2015. He assails the judgment on the basis that the trial magistrate assumed that there was a land dispute between him and his brother, a matter that was never proved. That he was convicted on the basis of testimony of a single witness and that the panga that was used to commit the act was never produced. He also argued that the prosecution failed to call an important witness. The appellant further attacked the prosecution case as being weak on account of fabrications and shoddy investigation. The appellant urged that his defence of alibi was strong and was not considered.
3. Counsel for the respondent, Ms Osoro, opposed the appeal and submitted that the appellant's conviction was supported by the testimony of an eye witness, PW3 and other corroborating evidence. Counsel submitted that the trial magistrate warned himself against convicting the appellant on the basis of the testimony of a single witness but was nevertheless satisfied that the evidence was sufficient to sustain a conviction. Counsel further submitted that the sentence imposed was lawful.
4. As this is the first appeal, I am required to evaluate the evidence afresh and reach an independent conclusion as to whether or not to uphold the conviction (see *Njoroge v Republic [1987] KLR 19*). This exercise calls for me to set out the evidence as it emerged before the trial court and it was as follows.
5. The principal witness in the case against the accused, Peter Juma Okaka (PW 3) recounted how at

about 1.00pm on 25th November 2010, he met the deceased who asked him to assist in watering some trees. As they were going to his farm, he saw a young boy herding cattle near the deceased maize shamba. The deceased complained about the boy, picked a stick and hit the boy on the back. The boy took off while the deceased decided to drive off the animals to the area Chief to report the trespass. At that moment, the accused appeared and started chasing them with a panga. He was threatening to attack the deceased. PW3 ran into a bush fearing for his life. In the meantime, he saw the deceased turn and the accused raise his panga and cut him on the left hand wrist. The accused raised his panga again and cut the deceased on the left cheek. PW 3 took off and reported the matter to the police two days later.

6. Shortly after the incident people began to gather in response to the screams. James Charles Okello (PW 1) recalled that in response to the screams, he went to the area by the road side and recognized that the body lying with a wound on the forehead was that of the deceased. He called the area Chief, David Odon (PW 6) and the police who arrived and removed the deceased body and took it to New Nyanza Provincial Hospital Mortuary. Kefa Nyariro Adeny (PW 5) recalled that at about 2.00pm, he was at the scene after being called by (PW 6) called him. He testified that he took the accused to the police station.

7. The deceased wife, Mary Adhiambo Akatch (PW 2) also testified that she went to the scene in response to screams and identified the deceased. She told the court that the appellant was the deceased step brother and they had a land dispute. The investigating officer, Corporal Michael (PW 8) conducted the investigation. He produced photographs of the deceased and organized for the post mortem.

8. The post mortem on the deceased's body was done by Dr. Ndinya on 30th November 2010 after the body was identified by Joseph Oloo Akatch (PW 4). The post mortem form was produced by Dr. Daisy Ndege (PW 7). According to the post mortem report the deceased sustained multiple deep cut wounds on the face, deep cut wounds on the right side of the neck, and the right foot was amputated. The doctor concluded that the cause of death cardiopulmonary arrest secondary to multiple deep cut wounds.

9. When put on his defence, the appellant elected to give an unsworn statement. He told the court that on the material day, at about 1.00 pm, he went home and as he was on the way, he saw two people, one armed with a stick and another with a panga taking away his cattle. Since they were armed he decided to run home. Later on that day, only four cows out of his five cows returned so he decided to report the incident at the Police station but he was arrested instead.

10. The main issue in this appeal is whether the prosecution proved that the appellant unlawfully killed the deceased. The fact of death of the deceased was not in dispute and that he died, not from natural causes, but from massive cut wound injuries inflicted by a person.

11. The evidence implicating the appellant was the direct testimony of PW 3 who gave an account of how the deceased was attacked in broad daylight. His description of the attack and the injuries was corroborated by the witnesses who saw the deceased and the post mortem report. Furthermore, the accused, deceased and PW 3 were not strangers to each other. In light of the clear evidence and circumstances under which the attack took place, I reject the appellant's contention that the court could not rely on testimony of one witness in circumstances that were conducive for positive identification (see *Abdalla Bin Wendo & Another v R* [1953] 20 EACA166).

12. Although the appellant submits that the child who was beaten by the deceased ought to have been called as a witness, I do not think that failure to call him is fatal to the prosecution case or invites a negative inference as the evidence against him was direct and clear. **Section 143** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* does not require that all or any number of witnesses to be called to establish a fact. In any case, by the time the assault took place, the child had already run away and could not have given an account of the incident. Nor is the fact that the panga was not produced in evidence fatal to the prosecution case (see *Ekai v R* [1981] KLR 569, *Karani v R* [2010] 1 KLR 73). The evidence shows that the accused took off with it and it is only he who can explain where he took it.

13. The appellant's unsworn statement when placed alongside all the prosecution evidence falls under the weight of its falsity. All it confirms is that the appellant was in the area where the incident took place and

that he surrendered himself to the police. I therefore affirm the conviction as the prosecution proved the offence beyond reasonable doubt.

14. In his written submissions, the appellant contended that he was not accorded a fair trial as his right to be represented by counsel of his choice and for counsel to be provided for him at State expense was violated contrary to **Article 50(2)(g) and (h)** of the Constitution. I have read the proceedings and they confirm that the appellant was represented by an advocate throughout the prosecution case. Before he made his defence, he told the court that he did not need an advocate and would represent himself. I therefore reject his contention that his rights to counsel were violated.

15. As regards the sentence, the trial magistrate after considering the mitigation and having noted that the maximum sentence for the offence of manslaughter under **section 205** of the *Penal Code* was called for, imposed a life sentence.

16. Sentencing is an exercise of discretion and the appellate court will not interfere in the sentence unless it is shown that the trial court took into account an irrelevant factor, or that a wrong principle was applied or short of that, the sentence was so harsh or excessive that it manifests an error of principle (see *Ogalo s/o Owuora v R* [1954] EACA 270, *Nilsson v R* [1970] EA 599 and *Wanjema v R* [1971] EA 493). In imposing a sentence, the court should always bear in mind the principles of proportionality, deterrence and rehabilitation and in considering these factors the court ought to weigh both mitigating and aggravating factors (see *Arthur Muya Muriuki v R* NYR HCCRA No, 31 of 2010 [2015]eKLR).

17. The trial magistrate took into account the fact that the assault was so vicious as evidenced by the nature of the injuries. He concluded that the appellant's conduct bordered on murder. It is apparent from the sentencing notes that the aggravating factors were given more weight despite the fact that the appellant was a first offender. Other mitigating factors that emerged at the trial were that there was a land dispute between the accused and the deceased and that the deceased may have been provoked. Given that the law provides for a maximum sentence of life imprisonment, due allowance ought to have been made for this, noting what was stated in *Josephine Arissol v R* [1957] EA 447 that, "*The general rule is that a maximum sentence should not be imposed on a first offender*".

18. Failure to take into account the mitigating factors and imposing the maximum sentence on a first offender constitutes an error of principle entitling this court to interfere with the sentence. Consequently, I reduce the sentence to 15 years' imprisonment.

19. I affirm the conviction. The appeal is allowed only to the extent that the sentence of life imprisonment is reduced to a term of 15 years' imprisonment to run from the date of conviction.

DATED and DELIVERED at KISUMU this 31st day of July 2017.

D.S. MAJANJA

JUDGE

Appellant in person.

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