



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 10 OF 2016

EDWARD MUINDI NDERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Senior

Resident Magistrate HON. L.N. MESA at Marimanti Principal

Magistrate's Court Criminal Case No. 7 of 2016

dated 16th June, 2016.)

J U D G M E N T

1. **EDWARD MUINDI NDERI**, the Appellant herein was charged with the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** vide **Marimanti Principal Magistrate's Court Criminal Case No. 7 of 2016**. He had denied the charge but upon trial where the prosecution presented six witnesses, he was found guilty and sentenced to serve life imprisonment by the trial court.

2. The brief facts presented by prosecution against the appellant were that on 25th December, 2015 at Tumbura Market in Tharaka South District the appellant unlawfully killed one **JOEL MWITI KANYARU** (deceased herein.) The first prosecution witness called was John Mureithi Muriungi (PW1) who told the trial court that he was playing cards on 25th December 2015 at around 8 pm with amongst others the deceased when the appellant came and snatched some money from him (deceased) and took off. He further added that as the deceased ran after the appellant, he received a cut upon heard the appellant remark that he was going to finish him (deceased). The next day the witness heard that the deceased had passed on and saw the appellant inside a police vehicle under arrest.

3. Geoffrey Mugambi (PW2) another witness present during the incident also testified before the trial court and corroborated the evidence tendered by PW1. He also stated that he was in the group of four playing cards at the material time before they were interrupted by the appellant when he reportedly took some money from the deceased and when the deceased went after him to be given his money back he was cut.

Benson Murimi (PW3) further told the trial court that he found the deceased lying down on the road the

following day the 26th December, 2015 at around 7 am. According to the witness, the deceased requested him to go and look for his brother so that he could be taken to hospital which he did. The deceased's brother David Mutugi Kanyaru (PW4) confirmed that he was fetched from his house by PW3. He went and found his brother (deceased) at the scene where he reportedly told him that he had been cut by the appellant. He hired a motorcycle and took the deceased straight to Marimanti Police Station, where he was advised to first take the deceased to hospital. He told the trial court that the deceased was however pronounced dead on arrival at hospital and the body was later taken to Meru Hospital Mortuary. The witness was categorical that the deceased told him that the Appellant had cut him when he followed him for his money. PC Joab Muande (PW5) the police officer who was at Marimanti Police Station on 26th December, 2015 confirmed to the trial court that PW4 made a report about the assault together with the deceased but due to the condition of the deceased, the officer reportedly advised them to seek for medical attention first. He further testified that shortly after that, the deceased's brother (PW4) returned to the station and reported that the deceased had passed on. He confirmed that he together with officers went to the home of the appellant and arrested him. He told the trial court that he searched for the knife which had been used as a murder weapon at the appellant's house but he could not trace it. He further testified that the deceased reported to him that it was the appellant who had stabbed him with a knife. The witness further testified that the appellant led them to the scene where the incident took place where he saw blood stains on the leave of some green grams and other, plants in the vicinity. The witness stated that he later attended a postmortem examination in Meru where the cause of deceased's death was established. Dr. Muchiri Henry (PW6) testified at the trial and confirmed that one Dr. Bett carried out postmortem examination of the deceased and established that the deceased had suffered from a blunt injury on the head and stab wound on the left arm around the wrist. He further testified that he was conversant with Dr. Bett's handwriting as he studied with him at the University and worked with him at Meru Level 5 Hospital. The postmortem report was then tendered as P. Exhibit 1.

4. When placed on his defence the appellant denied committing the offence and wondered how the witnesses who had testified could identify him when it was dark. He further testified that the deceased's family had a grudge against him because of a complaint he had lodged against PW1 and PW4 at Marimanti Police Station on 23rd December, 2012. He further added that the witnesses had been sentenced to serve 3 years imprisonment and that they were released from prison in September 2015. However could not give the details of the charges or the case number to the trial court. He pointed out at the apparent contradiction between the evidence of PW4 who reportedly stated that the deceased was not talking by the time they arrived at Marimanti Police Station and the evidence of PW5 who stated that the deceased told him that the appellant had cut him.

5. The trial court evaluated the above evidence and found that the appellant was guilty of the offence he was charged with. The trial court observed the evidence of what the deceased reported to have harmed him amounted to a dying declaration and admissible under the provisions of **Section 33** of the **Evidence Act**. On the basis of that finding the appellant was convicted and sentenced to serve life imprisonment. Aggrieved by both the conviction and sentence meted out against him, he filed this appeal raising the following grounds namely:-

(i) That the trial learned magistrate erred by relying on evidence that lacked credibility.

(ii) That the charge sheet presented was defective.

(iii) That the sentence passed against him was severe in relation to the offence committed.

(iv) That the learned magistrate erred by failing to consider that the police who went to the scene failed to take photographs of the scene.

(v) That the learned magistrate erred by failing to note that it took too long for the report to be made at the police station.

(vi) That the learned trial magistrate erred by failing to note that the appellant was arrested in his home which was not common to a person guilty of a crime.

(vii) That the learned trial magistrate failed to observe the contradictions in the prosecution's case.

(viii) That the learned trial magistrate failed to consider his defence.

6. In his written submissions, the appellant has contended that the incident leading to the death of the deceased occurred at night and that there was no evidence that his identification was positive and beyond reasonable doubt. He has submitted that none of the prosecution witnesses who identified him was able to note the colour of the shirt he was wearing at the material time. He has further contended that the witness should have identified him and alerted other people at the earliest opportunity. He has also questioned why the witnesses went to sleep if it is true that they knew the deceased had been cut. He has questioned why the witnesses never reported the incident to the police that night of 25th December, 2015.

7. The Respondent has contested the applicant's contention that his identification was not positive or credible. The Respondent has submitted that the appellant was known to the prosecution witnesses and pointed out at the evidence of PW1 and PW2. The Respondent contends that the appellant was recognized as opposed to identified. It is further submitted that the evidence by PW1 and PW2 indicated that they saw the appellant snatch money from deceased and heard him uttering words to the effect that he was going to harm the deceased.

8. The first issue for determination posed by this appeal therefore is whether or not the appellant was positively identified and connected with crime.

9. This court has looked at the judgment of the lower court and has noted that the learned trial magistrate grappled with this issue in his judgment among other issues. The appellant has questioned the credibility of eye witnesses (PW1 and PW2) arguing that it was not possible for them not to see the colour of the shirt he was wearing yet at the same time managed to recognize him. The appellant for good measure had raised the same point in his defence at the lower court but the learned trial magistrate found the contention "**absurd and illogical.**" I am however not convinced that the appellant's contention is absurd or can be described as such because unless the lighting or visibility at the scene was poor, the appellant was right to interrogate and question why both the eye witnesses were unable to tell the colour of the clothes he was wearing at the material time. The questions posed by him in my view is legitimate and the prosecution was required through the witnesses to explain why they were not able to tell the colour of the shirt he was wearing. I have re-evaluated the evidence tendered by both PW1 and PW2 in respect to why they were unable to tell the colour of the shirt allegedly worn by the appellant. The first witness (PW1) stated that he would not recall the colour of the shirt because apart from the fact that it was at night he did not take keen interest on the colour. PW2 on his part did not give reasons why he could not be able to tell the colour of the shirt worn by the appellant but added that he knew the appellant well and recognized him. He also heard him (appellant) say that he was going to "**finish**" the deceased. This observation showed that PW1 and PW2 apart from visual identification also recognized the appellant by voice. They both heard him uttering the words that he was going to finish the deceased and this was after the deceased had reported that he had been stabbed by the appellant.

10. It is important to note that recognition by voice would suffice to found a conviction where a witness knows or is familiar with an accused person well. PW2, (Geoffrey Mugambi) testimony at the trial in my view was quite crucial in regard to positive identification of the appellant. He told the trial court that he was in the company of John Murithi (PW1), the deceased, and Jason Murithi playing cards at Tumbura Market when the appellant joined them "**after some time**" he heard the deceased complain that the appellant had snatched his money and taken off. This is what PW2 also stated in his evidence and for PW1, the appellant was well known to him as a neighbour while to PW2 the appellant was "**like my uncle**" as he was the one who "**sponsored**" him when he was circumcised. The familiarity of the appellant to both witnesses (PW1 and PW2) was therefore beyond reasonable doubt. When a person familiar with you stay close with you and you have had some conversations like was in this case, it is possible to recognize such people even where visibility is a challenge as the appellant has contended in this appeal.

10. I have noted that the trial magistrate may have misdirected himself when he found that the appellant had the burden of explaining about his whereabouts when the deceased was stabbed or proving that the deceased was stabbed by someone else. This amounted to a misdirection and shifting of burden of prove. The burden of prove is always on the prosecution to prove their case beyond reasonable doubt and an accused person has no burden to prove his innocence in criminal proceedings. I am however satisfied that the learned Magistrate's misdirection did not prejudice the appellant as the same did not negate the weight of the prosecution's case particularly in respect to identification. As I have observed above, I am satisfied on the basis of the evidence tendered that the appellant was positively identified.

11. In addition to the above this court has also noted that the trial court correctly applied the provision of **Section 33** of the **Evidence Act** in regard to what the deceased himself told PW4, (David Mutugi Kanyaru) a brother to the deceased and PC Joab Muande the police officer who was at the report office when the initial report on the assault of the deceased was made. Both PW4 and PW5 testified that the deceased told them that the appellant had stabbed him. Shortly after that report, the deceased passed on and that information by the deceased regarding who had harmed him amounted to a dying declaration which is admissible in evidence (**Section 33 (a)** of **Evidence Act**). The learned trial magistrate correctly applied that provision of the law to the finding on positive identification of the appellant. The evidence of the deceased was reported by PW1 and PW2 in their evidence in chief and corroborated by PW4 and PW5. This court finds that evidence (dying declaration) to corroborate the evidence given by PW1 and PW2 positively identified the appellant. I further find that there must have been sufficient light at the scene at the material whatever the source that facilitated a game of cards. Otherwise that game would not have been possible to be played in pitch darkness and the fact that the witness testified that they were playing a game of cards in my view shows that visual identification of the appellant was possible even at that time of the night. If the players in the game could identify the cards they were playing with, definitely they could identify the players in the game and the appellant who apparently arrived to find the game underway. It is on the basis of the above that this court finds that identification of the appellant as the culprit was free from error. The fact that the murder weapon was not recovered does not mean that the appellant was not guilty of the offence as found by the learned trial magistrate.

12. On the issue of contradictions raised by the appellant, I find though the evidence of PW2 and PW3 are not consistent on the question of who was present at the scene, the inconsistency in my view is insignificant on the overall probative value of their respective testimonies. PW1 in his evidence told the trial court that he was with the following at the scene of crime.

- (i) Charles Murithi
- (ii) Joel Mwiti (deceased) and
- (iii) Geoffrey Mugambi.

While PW2 (Geoffrey Mugambi) testified that he was with following at the same scene of crime.

- (i) John Muriithi
- (ii) Joel Mwiti (deceased) and
- (iii) Jason Muriithi.

The only inconsistency here is presence of Charles Murithi and Jason Murithi. That in my view is insignificant because it might be that both witnesses were referring to one and the same person because both appear to have common sir name Muriithi. The inconsistency between the evidence of PW1 and PW2 is therefore insignificant and did not affect the weight of the prosecution case. I am also not convinced by the appellant's contention that the medical evidence tendered by PW6 (Dr. Henry Muchiri) was inconsistent with evidence of the other prosecution witness who testified that the deceased was stabbed and did not mention the head injuries. The doctor found that the deceased died as a result of both blunt trauma to the head and a stab wound on the arm. The doctor's evidence was more comprehensive as

to what caused the death of the deceased. It is also important to note that PW1 and PW2 both testified that before they left the scene the deceased had been stabbed and in addition, the appellant had threatened to "**finish**" the deceased. That in my considered view made the learned trial magistrate to correctly conclude that the appellant caused the death of the deceased. There was sufficient evidence to make inference that the appellant caused both the stab wound and the head injuries to the deceased. He was the last person seen with the deceased.

13. The appellant has also raised an issue with the charge sheet claiming that the same was defective. The respondent has contended that the charge sheet was not defective and that there was no variance between the charge and the evidence adduced in support of the charge. I have perused through the charge sheet and the evidence tendered and I agree with the Respondent that there is nothing to show that the charge sheet was defective in any way. I have only noted that the first part of the judgment by the learned trial magistrate appears to relate to the facts of another case altogether. This court is unable to tell where or why the derailment occurred in the judgment. This is apparent until where the trial court considered the defence where clearly he came back on course with the facts or evidence presented to him as per the court proceedings. This court has however noted that the mix up did not affect the evaluation of the evidence because the learned trial magistrate evaluated the relevant evidence tendered in respect to the appellant. The charge sheet therefore is not defective but the first part of the judgment from page 1 to page 4 indicates that there was a mix up in the judgment which can clearly be seen in cited pages of the judgment where the trial court referred to facts/evidence not tendered in the case before him. But as I have observed, the appellant suffered no prejudice as the learned trial magistrate correctly evaluated the relevant facts and evidence tendered in the trial in respect to this appeal. I find the error by the learned trial magistrate where he made findings under the heading "**undisputed facts**" to be curable under **Section 382** of the **Criminal Procedure Code**. The error in my view did not occasion any failure of justice particularly given the latter part of the judgment where the learned magistrate framed relevant issues for determination and he proceeded to determine the issues. The cited error did not occasion failure of justice to the appellant.

14. The appellant has faulted the trial court for not considering his defence. Although the trial magistrate did not go deep into the defence raised, I do not see whether doing so would have made any significant difference on the direction of the final decision of the trial court. The appellant raised a defence that the murder weapon was not found in his possession. He further said that he led the police officers to his other house within Tumbura Market but the murder weapon was not found. The fact that the murder weapon was not recovered or found in the house of the appellant does not affect the weight of the prosecution's case. The appellant's allegation that the witnesses had a grudge against him was not proved or supported by evidence. His allegations that there were previous proceedings between him and the family of the deceased or the witnesses was not backed by tangible evidence. The appellant should have discredited the witnesses by adducing evidence showing that they were biased against him. He did not do so in his defence when he had the chance. His assertion that the witnesses did not know his voice was outweighed by the evidence of PW1 and PW2. The appellant is not a stranger in Tumbura Market as seen even in the social inquiry report filed after he had been found guilty. The finding by the trial magistrate is vindicated by the social inquiry report in regard to the familiarity of the appellant to PW1, PW2 and the deceased.

15. On the question of severity of the sentence, I note from the provisions of **Section 205** that the sanction prescribed for the offence under which the appellant was charged is life imprisonment. I however note that the learned trial magistrate failed to take into consideration the mitigating factors. This court being an appellate does not usually interfere with the discretion of a trial court unless it is proved that the trial court omitted a relevant factor in the exercise of its discretion. I am persuaded in this appeal that the trial court omitted mitigating circumstances notwithstanding the fact that he called for a social inquiry to be conducted and a report to be filed.

In the premises this court finds no merit in this appeal on conviction but for the above reason, I find merit on the appeal on sentence meted out. Consequently the conviction of the appellant is upheld but the sentence of life imprisonment is set aside and in its place the sentence is substituted with a prison sentence of 20 years.

Dated and delivered at Chuka this 27th day of November, 2017.

R.K LIMO

JUDGE

Judgment signed, dated and delivered in the open court in the presence of the appellant in person and Ndombi for the Respondent.

R. K. LIMO

JUDGE

27/11/2017