REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 43 OF 2015

EDWIN MWANIKI ITHUMBI…....…….APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makdadara Cr. Case No. 1883 of 2010 delivered by Hon. V. Wakumile on 29th January, 2015).

JUDGMENT

BACKGROUND

Edwin Mwaniki Ithumbi, the Appellant herein was charged with committing the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the offence were that on 26th April, 2010, at Zimmerman Estate within Nairobi province killed Judith Wanjiku Kinuthia.

The Appellant was found guilty and sentenced to 30 years imprisonment. Being dissatisfied with both the conviction and sentence, he preferred this appeal. He set out the following grounds of appeal:

1. That the trial magistrate did not sufficiently evaluate the entire evidence on record as duty bound as a trial court.
2. That the trial magistrate erred in failing to observe that the case of the prosecution did not meet the required standard of proof.
3. That the trial magistrate failed to observe that Section 169(1) of the Criminal Procedure Code was not adhered to in relation to his defence statement.
4. That the sentence imposed was harsh and excessive.

SUBMISSIONS

The appeal was canvassed by way of written submissions and further oral submissions. The Appellant was represented by learned counsel, Mr. Gachie, for the Appellant. He submitted that the magistrate who finally convicted the Appellant arrived at the wrong verdict because he only heard the evidence of PW7 and PW8. That the said magistrate failed to evaluate the evidence of all the witnesses as a result of which he arrived at the wrong verdict. This, he submitted, was evidenced by the fact that he stated that seven instead of eight witnesses testified. In addition, the said magistrate failed to comply with Section 200 of the Criminal Procedure Code when he succeeded the magistrate who was previously conducting the trial. This amounted to a fatal defect in the trial. The case of William Gachunia Ndirangu & Another v.

Republic [2016]eKLR was cited in support of the submission.

Learned counsel submitted that the conviction of the Appellant was based on circumstantial evidence which was not properly evaluated. His view was that the same did not point irresistibly to his guilt. He relied on Gideon Mbuthia Mwangi v. Republic [2014] eKLR. Furthermore, the evidence of two crucial witnesses was not called to the detriment of the prosecution's case. He relied on Bukenya v Uganda [1972] EA and James Omondi Were v. Republic [2014] eKLR to put his point across.

He then submitted that the Appellant's defence was not considered and that the sentence imposed was harsh and excessive in the circumstances. He cited the case of Republic v. Thomas Patrick Gilbert Cholmondeley [2009] eKLR in which only eight months imprisonment were imposed for a similar offence.

Learned State Counsel, Ms. Nyauncho for the Respondent submitted the circumstantial evidence on record was strong and pointed to the Appellant's guilt. That he was at the scene of the crime and the cause of the death of the deceased was proved was caused by a human factor, strangulation.

She submitted that Section 200 of the Criminal Procedure Code was complied with and that the prosecution called all relevant witnesses needed to prove their case. In any case, under Section 143 of the Evidence Act there are no particular number of witnesses required to prove a fact. She relied on J.W.A v. Republic [2014] eKLR. She submitted that the Appellant's defence was considered and that the sentence imposed was reasonable given the gravity of the offence.

EVIDENCE.

This court as a first appellate court is mandated to reanalyze and reevaluate the evidence at hand afresh taking into account the fact that it has not had the opportunity to see the witnesses' demeanor before coming to an independent determination. See: Okeno v. Republic [1972] EA 32.

PW1, ZACHARIA KURIA KINUTHIA recalled that on 26th April, 2010 he was called by one Muiruri who informed him that his sister was assaulted by someone in her house. She lived in Zimmerman. He called his father and informed him what he had been told and asked him to go to her house. His father called him back after he got to the house and informed him that she was in a serious state and had been rushed to the hospital. He went to Zimmerman and found her at Ricardo Giovani Hospital. He found a mob at the location baying for blood of the Appellant whom they wanted to lynch. He decided to go and report the matter to Kasarani Police Station and while there his father called him and informed him that his sister had passed on. He informed the police and scene of crime officers then escorted them to the hospital where they took pictures.

The deceased had scratch marks on her neck, her hair was pulled out and she wore a bloody t-shirt. The body was taken to the mortuary. A post mortem was done on 3rd March, 2010 where he identified it. He testified that it was the Appellant who had assaulted the deceased although he had never met him before the date he testified.

PW2, GEOFFREY KINUTHIA WAITARA the father of the deceased corroborated the evidence of PW1.In addition he testified that the deceased died as he was trying to transfer her to another hospital from the one members of the public had taken her. He testified that the Appellant who was the suspect was arrested by members of the public.

PW3, JOHN KAMAU KARANJA recalled that on 24th April, 2010 he was at work at his butchery and at around 11.00 a.m. he saw some ladies in a group. They were with the Appellant. He saw Judy lying on the floor unconscious as the door to the house was open after a fight with the Appellant. He knew her as she was a customer at his establishment. One Wamucii then called Judy's father who later arrived. They forced the Appellant out of the house and to take her (Judy) to hospital. She was bleeding from the neck. The Appellant took her to the nearby hospital. He later heard that she had passed on. He recalled that during the incident the Appellant was in the house smoking cigarette and he heard him say that she had

not died. In cross examination, he stated that he never saw the Appellant and the deceased fighting.

PW4, EDMOND ATIKA BOSIRE was a registered nurse who in 2010 was working at Zimmerman Health Center. He recalled that on 25th April at noon the deceased was taken by some people to the Health Centre unconscious. On examining her, he could not feel the vital signs. She was neither breathing nor her heart beating. He informed them that the patient was too serious for him to deal with and referred them to St. Francis Hospital. He later learnt that the lady had been confirmed dead at the Hospital. He knew the deceased as she had bought medicine from the clinic.

PW5, JOHN MUGUNJIA KAMAU lived in Zimmerman Estate. He rented a house in a plot that consisted of two rows of corrugated iron sheets. He lived in the 3rd house from the gate and there was a corridor separating the rows of houses. A lady, the deceased, lived in the house opposite his. He recalled that he had lived in the house for three months. On the fateful day there was a man in her house. PW3's work consisted of supplying milk in the estate. His work began at 4.00 a.m. On 26th April, 2010 he went about his business as usual but returned home at about 12:30- 1:00 p.m. for lunch. When he was leaving to return to work he heard a male voice in the deceased's house. The voice asked in Swahili, "Utatoa ama hutoi?"(Are you producing it or not?). The voice was not familiar. There was a lady sweeping the compound and he asked her to go and check what was going on in the house. When he returned in the evening he was informed that his neighbour had been killed. He identified the Appellant as the man he had earlier seen the deceased with in her house.

PW6, Dr. ZEPHANIA KAMAU of police surgeon in Nairobi examined the Appellant for any physical injury and mental assessment on 5th May, 2010. The patient was aged 33 years and upon examination he noted that his right eye was swollen and reddish. He was informed by the patient that he had been assaulted by a mob on 26th April, 2010. The examination was 9 days old after the assault. He concluded that the injuries had been caused by a blunt object. He also found out that the patient had been treated at Kasarani Dispensary. He assessed the degree of injury as harm. On his mental assessment, he concluded that he had no mental disorder and was mentally fit. He filled a P3 form and signed it at 5th May, 2010 and produced it as an exhibit.

PW7, Dr. ODUOR JOHANSEN the Chief Government Pathologist performed a postmortem on the body of the late Judith Wanjiku on 3rd May, 2010 at the City Mortuary. She had multiple bruises on the neck and forehead. His internal findings were that there were bruises to the neck muscles and extensive bruises to the skull while the other organs were normal. He concluded that the cause of the death was asphyxia due to strangulation. He submitted the postmortem report as an exhibit.

PW8, No. 232272 CIP ABRAHAM NDEGWA was the investigating officer. He recalled that on 26th April, 2010 at around 2:00pm he was in his office when he received a report from members of the public that a murder had occurred in Zimmerman estate. He was informed that the victim had been declared dead at Giovali Hospital. He proceeded to the scene with crime scene officers and later he went to the hospital where the deceased was identified to him. She had scratches on the neck and blood oozing from her mouth. They photographed her body. They also found the suspect within the hospital where he was being held by members of the public. They transferred the body to the mortuary and the suspect to the police station. After investigations were complete the Appellant was found culpable and was charged accordingly.

The Appellant gave a sworn statement of defence. He did not call any witnesses. He testified that on 26th April, 2011 he left his late girlfriend at home in Zimmerman to go search for a casual job. This was shortly before 7.00 a.m. He got to the construction site and was promised work the following day. When he later that day went home he found his wife relaxing and they left the house at 8:30am for a local pub where they drank alcohol before returning to the house at 11:00 a.m. He proceeded to take a nap. When he woke up he wanted to smoke but could not find his match box or money in his trousers. He summoned the deceased who was in the habit of stealing from him when he was drunk. She denied taking the money and he went back to bed. After sometime he heard someone calling for the deceased from outside. He went to check and the man ran away on seeing him. He then saw the deceased lying within the room and

thought she had blacked out. A crowd then converged at the house before attacking him and claiming he had killed his wife. He was saved by a security officer called Martin. They then rushed the deceased to a local dispensary where her father arrived shortly. They were referred to St. Francis Hospital since the deceased needed oxygen. He and the deceased's father rushed her there. Police officers later arrived and he informed them that his girlfriend had passed on. He was escorted to Kasarani Police Station and later charged.

In cross examination he stated that the deceased may have been assaulted from outside given that the door to her house was wide open.

DETERMINATION.

On summary of the evidence, I have crystallized the issues for determination to be whether Section 200 of the Criminal Procedure Code was complied with, whether crucial witnesses were not called, whether the charge of manslaughter was proved beyond reasonable doubt and whether the sentence meted by the lower court was harsh and excessive in the circumstances.

On compliance with section 200 of the Criminal Procedure Code, it is clear that there were two succeeding magistrates. Honourable R.A.A.Otieno over the conduct of the trial from Hon. T. Murigi. Before proceeding with the evidence of PW4, he explained the provisions of Section 200. Likewise, Hon. Wakumile did the same when he succeeded Hon. R.A,.A.Otieno and before proceeding with taking the evidence of PW7. In the case of Hon. Wakumile though, the learned magistrate did not give the Appellant the opportunity to elect to choose to proceed with matter from where it had reached. From the record, it is clear that it is the learned magistrate who chose that the matter proceeds from where it had reached. Section 200 is in clear terms that the court must accord the accused the opportunity to elect on how the matter should proceed once a succeeding magistrate takes over the conduct of the trial. For avoidance of doubt, the relevant part of the provision is sub-section (3) which provides as under;

> "Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.''

In the present case, the learned magistrate recorded the proceedings as under;

> "Section 200 CPC complied with to proceed with the evidence on record. Previous proceedings to be typed''

Although it is not mandatory that the wish of the accused will carry the day, the law provides that the magistrate must accord the accused the chance to state how he/she wished the trial proceeds. The failure to comply with this mandatory provision definitely vitiates the entire trial and occasions the accused prejudice as it denies him the right to a fair trial. Having observed that trial was tainted with a fatal defect, the same can only be corrected by ordering a retrial. The court of Appeal has set guidelines to be followed before ordering a retrial. In the case it was held thus;

> "That a retrial should not be considered unless the appellate court is of the opinion that, on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result; Braganza-Vs Republic [1957] E.A. 152 (kA) Pyarwa Bussam – vs- Republic [1960] E.A. 854.

Several factors have therefore to be considered. These include:

1. When the original trial was illegal or defective a retrial will be ordered.
2. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.
3. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.

4. A retrial should not be ordered where it is likely to cause an injustice to the accused person.
5. A retrial should be ordered where the interest of justice so demand.
6. Each case should be decided on its own merits.
7. Whether there is evidence to support the conviction."

In the present case, the appellant was convicted purely on circumstantial evidence. This was because at the time of the death of the deceased, there was no other person at the scene other than the appellant himself. Therefore, no eye witness could attest that indeed the deceased was killed by the appellant. That being the case, the test is whether the circumstances surrounding the death of the deceased were inconsistent with the innocence of the appellant. An avalanche of case law exists that guides courts on principles governing circumstantial evidence. To cite one or two of the cases, in R versus Kipkering Arap Koskei and Another [1949) 16 EACA 135, the court of appeal delivered itself as follows:

> ''That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecutions and never shifts to the accused".

The deceased was last seen in her house with only the Appellant. This is attested by the evidence of PW5, who lived in the same plot with her. PW3 , who ran a butchery in the same plot had also seen the Appellant in the deceased's house. The evidence on record attests that both deceased and the Appellant were had quarrelled before the former was found unconscious on the floor of the house. The Appellant in his sworn defence also admitted having been with the deceased save that he denied killing her. Further as evidenced by the testimonies of PW1 and 2, the Appellant was smoked out of the house of the deceased by members of the public and forced to take her to hospital. PW7, the doctor who conducted the post mortem also confirmed that the death of the deceased was attributed to human factors. All the evidence crystallized together points that it is the Appellant who killed the deceased.

The offence of manslaughter is a serious offence. The prosecution cannot be compelled to evidence which they do not deem necessary to prove their case.

Furthermore, under Section 143 of the Evidence Act, "no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact''. In that respect, what would be of importance in the trial is whether the prosecution shall discharge their burden in proving the case at hand. In my view though, the witnesses who the prosecution called sufficiently established that the appellant caused the death of the deceased. In that regard, a retrial would not be aiding the prosecution to fill gaps in their case. I am of the view that the retrial will most likely succeed. Again, under Section 205 of the Penal Code, a person convicted for the offence of manslaughter is liable for imprisonment for life. The appellant was convicted on 29th January, 2015. He has therefore served 1 year and 9 months in jail which is not an inordinately long period in jail that would prejudice a retrial. Although the trial court will be enjoined in sentencing to consider the period the Appellant served in the remand, the sentence imposed will be mitigated by many factors. As at now, justice demands that the case should be heard objectively so that a fair decision can be arrived at and justice done to all parties involved. Having ruled that a retrial shall be conducted, I will not comment on the sentence that was imposed.

In the end, this appeal partially succeeds. I quash the conviction and set aside the sentence. I order that a retrial be conducted. Any exhibits that were produced by the prosecution in the trial shall be released to the investigating officer for use in the retrial. I further order that the trial be conducted on a priority basis on noting that the trial commenced in the year 2010. In that respect, the order of this court shall be served to the trial court for compliance. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST OCTOBER, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. **Mr. Wachira h/b for Mr. Gachie for the Appellant.**
2. **Ms. Atina for the Respondent.**