



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSOLIDATED CRIMINAL APPEALS NOS. 121 & 122 OF 2010

WILLY KIBET CHESIRE.....1ST APPELLANT

WILLIAM KIPCHAPAS CHESIRE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(Being an appeal from the original conviction and sentence in Criminal Case No. 502 of 2008
Republic v Willy Kibet Chesire & another in the Principal Magistrates Court at Kabarnet by H. M.
Nyaga, Principal Magistrate dated 30th July 2010)***

JUDGMENT

1. The appellants were found guilty of manslaughter. The particulars were that on the 26th July 2008 at about 1900 hours at Kimalel Location, Koikoi Village in Baringo District within Rift Valley Province, they jointly and unlawfully killed William Chepkurui Chesaina. They were sentenced to five years imprisonment.

2. The appellants filed separate appeals challenging their conviction and sentence. The petitions were later consolidated. The grounds can be condensed into five: first, that there was no link between the appellants and the death of the deceased; secondly, that there was no direct evidence linking them to the crime, the weapon or the cause of death; thirdly, that the charge was not proved beyond any reasonable doubt; fourthly, that the learned trial magistrate failed to consider their mitigation; and, fifthly, that the sentence handed down was manifestly excessive.

3. The appeal is contested by the State. The learned State Counsel submitted that the charge was proved beyond reasonable doubt. She submitted that the appellants were positively identified. The case for the State is that the evidence was overwhelming and not contradictory in any respect. In a synopsis, the case for the State is that the evidence established the appellant's guilt to the required standard of proof. Regarding sentence, learned State counsel submitted that the trial court considered the mitigation and that the sentence was quite lenient. I was implored not to disturb the sentence. I was urged to dismiss the consolidated appeals.

4. These are first appeals to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. In doing so, I have been careful because I neither saw nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v*

Republic Eldoret, High Court Criminal Appeal 177 of 2011 (unreported), Paul Ekwam Oreng v Republic Eldoret High Court Criminal appeal 36 of 2011 (unreported), David Khisa v Republic Eldoret High Court Criminal appeal 142 of 2011 (unreported).

5. On the evening of 26th July 2008, PW2 shared supper with the deceased. As they sat in the house, the 1st appellant came in. PW2 testified that the 1st appellant (Willy Kibet) asked the deceased where his [appellant's] goats were. The deceased answered in the negative. The 1st appellant left saying "he would kill somebody". He returned the next morning at 5:00 accompanied by the 2nd appellant and two other people known as Ezekiel Kiprop and Chesire Rutto. The four started beating PW2 and the deceased.

6. I will set out the remainder of his testimony in detail-

"The four of them entered the house and started beating us. They did not say anything. I sustained serious injuries. The deceased was also severely beaten. They then started asking us where the goats were. I screamed for help but no one came. The four men then took some goats from the pen. I was dragged outside. I lay outside as the men continued to beat the deceased. Accused 1 then left. He came back later with some medicine. He treated my fractured hand. Unfortunately, the deceased never survived. Accused 1 then went and came back with the Assistant Chief. I left the scene and went to the home of Kaitany and told him what had happened. Police then came to the scene. I was locked up, but later I was released. I was given a P3 form that was filled (MFI-1). A third man, Rutto, was not charged. The accused kept on asking us where their goats were. The deceased had an injury on the head, chest and other parts".

7. That narrative was partly confirmed by PW3. He knew the deceased. They were neighbours in Sabor. He knew both appellants well as they all hailed from Sabor. On 27th July 2008 at about 9:00p.m. he met PW2 at the home of Reuben Keitany. PW2 had a bandaged hand. He told him he had been attacked the previous night by four persons who included the appellants. He went to the home Kiprop and Chesire Rutto. Kiprop was not there but he found Rutto. He questioned him about the incident. He went with him to the home of the deceased. The body of the deceased was still there. Rutto lit a fire as is the custom when a body is in a homestead. PW3 then left for his home.

8. PW5 was at his home on 27th July 2008. He was with Kokoyo. PW2 found them there. His hand had an injury. He said that he and the deceased were attacked the previous night by the appellants and two other persons. PW5 went to the home of the deceased. He saw the body. PW8 said that he and Kokoyo went to the compound of the deceased. PW5 said the body had injuries all over. He also saw some sticks lying in the compound. PW8 on his part said that he did not examine the body closely.

9. PW10 was the investigating officer. He went to the scene with PC Koech. The body of the deceased was next to the house. It had visible injuries. It was photographed by scenes of crime personnel. Peter Yator (PW2) narrated the incident. PW10 then arrested the appellants. He took the body to Kabarnet District Hospital mortuary. He then charged the appellants.

10. On 4th August 2008, PW6 identified the body of the deceased for autopsy at Kabarnet District Hospital. He said the deceased's body had injuries all over. The post mortem examination was conducted by Dr. Felix Atisa (PW9). His report (exhibit 1) was made the same day. He testified that the body had peripheral cyanosis. There were bruises on the face, scalp and left arm. The arm was fractured. There was blood on the face. Internally, the ribs were fractured bilaterally. There was a fracture of the skull on the left parietal region. The brain was swollen. There was blood in the brain. He concluded that the cause of death was intracerebral haemorrhage due to head injury with multiple rib fractures causing haemothorax.

11. The appellants denied killing the deceased. The 1st appellant is a medical officer. He testified that on the material day he was at home. He stated on oath as follows-

"I went to the goat pen and released them. I passed near the deceased's home. I saw Yator

[PW2]. He said that he had been attacked the previous night. He showed me where he was injured. I am a medical officer. I told him to come to the hospital. I called the chief to inform him what Yator had told me. Later, I passed by where Yator was. I saw the deceased lying on the floor. I asked Yator what had happened to him. I checked him and found that he was dead. I treated Yator and went back to hospital. My brother Chesire came. I called the chief and told him that the deceased was dead. He told me to wait for him at the centre. He came and we went to see the deceased. On the next day, police officers came and we went to the scene. I was interrogated. At the police station, I was locked up. I did not kill the deceased”.

12. The defence of the 2nd appellant on the other hand was brief. He said that on the material day, he found the 1st appellant at the hospital. The 1st appellant sent him to the Chief. He said he accompanied the Chief to the scene. The police came the next day, he was asked to record a statement. He was thus surprised when he was arrested and charged with the offence.

13. A number of matters arise from that evidence. First, the offence took place in the early hours of 27th July 2008. To be precise, some moments after 5:00 a.m. The appellants were not strangers to PW2. He knew them as his neighbours. The 1st appellant had come to the house of the deceased on the night of 26th July 2008. He asked the deceased where his [1st appellant's] goats were. The deceased answered in the negative. The 1st appellant left saying “he would kill somebody”. He returned in the morning at 5:00 accompanied by the 2nd appellant and two other people known as Ezekiel Kiprop and Chesire Rutto. The four started beating PW2 and the deceased. When cross-examined by the 1st appellant, PW2 was emphatic that he knew him very well; and, that he beat him and the deceased. PW2 denied that the 1st appellant had come to assist or attend to them.

14. Considering it was early in the morning (5:00 a.m. on 27th July 2008) and that PW2 knew the appellants, I do not entertain any doubt that he *positively* identified them. This was not a simple case of *identification*: nay, it was strong and reliable evidence of *recognition*. See generally *Wamunga v Republic* [1989] KLR 424, *Joseph Ngumbao Nzaro v. Republic* [1991] 2 KAR 212, *Richard Gathecha Kinyuru & another v Republic* Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR, *Obwana & Others v Uganda* [2009] 2 EA 333.

15. When viewed against the evidence of PW2, it is evident that the defence tendered was a red herring. The prosecution was not obligated to prove motive. But from the evidence, the appellants had a clear motive to attack the deceased. They had a dispute over livestock. The 1st appellant said the night before that he would kill someone. The intention to commit the offence is evident. The appellants gave the deceased and PW2 a nasty beating. They were using sticks. The appellants and the accomplices then took some goats from the deceased's pen. They dragged PW2 outside. As he lay there, they continued to beat the deceased. PW2 was injured on the hand. The deceased suffered serious injuries to the head and chest. From the autopsy, the cause of death was intracerebral haemorrhage due to head injury with multiple rib fractures causing haemothorax.

16. I have thus reached the inescapable conclusion that the appellants were the persons who attacked the deceased and PW2; and, that the deceased died as a result of those injuries. I find that the appellants were properly convicted of the offence of manslaughter. I thus concur with the findings of the learned trial magistrate when he observed-

“I have examined Paul Yator's evidence and though he is the only one who identified the accused persons, his evidence appears forthright. He was a victim of the violence meted out by the accused persons and Chesire Rutto and Ezekiel Kiprop. Surprisingly, Chesire Rutto was called as PW8. I am of the view that the accused were the ones who unlawfully attacked the deceased on the ground that he had stolen a goat. The injuries sustained were the direct cause of death. There can be no justification for the action that the accused persons took. I find them guilty as charged. I have noted that 2 other people namely: Chesire Rutto and Ezekiel Kiprop have also been implicated. It is not clear why they were not charged yet PW2 has identified them. The 2 should also be

arrested and be charged forthwith with the death of the deceased”.

17. That leaves the matter of the sentence. After the conviction, the prosecutor informed the court that the 1st appellant was a first offender. The appellant was given an opportunity to mitigate. He stated as follows-

“I pray for leniency. I am a single parent; my wife died. I also take care of my aged father”.

18. The 2nd appellant was also a first offender. In mitigation, he prayed for leniency. He said he had five children. The trial court observed that the appellants *“took the law into their own hands; and that the habit needed to be discouraged”*. The appellants were jailed for five years.

19. Sentencing is at the *discretion* of the trial court. But power still reposes in an appellate court to *review* the sentence if material factors were overlooked; or, if the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

20. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or..... ”

21. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

“The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. ...The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.”

22. The charge facing the appellants was a *felony*. Section 205 of the Penal Code provides that any person who commits the felony of manslaughter is liable to imprisonment for *life*. Although the appellants were treated as first offenders, the offence was *grave* and called for a *custodial* sentence. The appellants meted out an unlawful punishment on the deceased and PW2. I have considered that the appellants turned themselves into the jury and executioner.

23. Sentencing must take into account the unique circumstances of each case. The sentence of *five years* was well merited in this case. It was within the law. The sentence handed down was *commensurate* with *moral blameworthiness* of the appellants. I cannot say in this case that the learned trial magistrate overlooked material factors; or, that the sentence was founded on erroneous principles.

24. The upshot is that the two consolidated appeals are devoid of merit. The appeals are dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 15th day of June 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

The appellant.

Mr.....for the
appellant.

Ms.....for the
State.

Mr. J. Kemboi, Court Clerk.