



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 85 OF 2013

(APPEAL FROM THE JUDGMENT OF HON. N. SHIUNDU IN MALINDI CR. CASE NO.303 OF 2012)

LAZARUS KIVITI KITEMA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellate was charged with the offence of manslaughter contrary to section 202 as read with Section 205 of the Penal Code. The particulars of the offence are that the Appellant on the 24th April 2012 at Tetesa village, Magarini District within Kilifi County unlawfully killed Karisa Ziro Gohu.

The trial court convicted the Appellant and sentenced him to serve 15 years imprisonment. The grounds of appeal are that the first report by PW1 did not give the Appellant's name, that the trial court erred in law by connecting the Appellant's arrest to the case, that the prosecution evidence was full of contradiction and was based on assumptions and that the appellant's reliable defence was not considered.

The Appellant in his written submissions argue that there was no first report to the police or the neighbours giving the appellant's name- PW1 alleged that the appellant is his neighbour and that the incident occurred during the day yet he did not give the Appellant's name to the police. It is further submitted that the deceased was unconscious and did not give the Appellant's name to the police. The identification was only done at the dock. It is also contended that PW1 referred to an incident which occurred on 24th November 2012 yet the charge sheet refer to 24th April 2012.

The Appellant further maintains that when he was arrested his clothes had no blood stains. He had reported to the police about having been attacked and robbed. Since no one saw him killing the deceased, he could have decided to keep quite and not report the robbery incident indeed if he is guilty. There was evidence that the Appellant employee went to the scene but he was not called to testify, the evidence was based on speculations and did not prove the case.

The state opposed the appeal. Mr. Mongesa, prosecution counsel submitted that the deceased mentioned the Appellant's name to PW1. PW1 testified that it was the Appellant who killed the deceased. The Appellant himself reported to the police that he had fought with someone who cut him with a panga. The Appellant's defence was considered and there was no contradiction on the evidence. The Appellant's employer testified. The incident occurred on 24th April 2012. The cause of death was proved as a

postmortem report was produced. The sentence is lawful and sufficient.

The trial court's record show that seven witnesses testified for the prosecution. Although the typed proceedings give a date of 24th November 2012, the handwritten record shows that PW1, CHARO KARISA KAJEMBE informed the court that on 24th April 2012 at around 9.00 am he was from his farm when he met the deceased running. The deceased was bleeding on the head and hand and he showed PW1 the Appellant as the person who had assaulted him. The deceased collapsed. He knew the Appellant as he is his neighbour. The Appellant was not very far when he met the deceased. He knew the Appellant had been employed as a herder. The deceased was taken to hospital and he died.

PW2 CHARO KAZUNGU was the Appellant's employee. On 24th April 2012 at around 10:00 am he got information that there was a fight between the Appellant and the deceased. They were both his employees. He went to the scene and found blood. The deceased was taken to Marereni police station and later to Malindi Hospital where he was pronounced dead.

PW3 JULIUS JEFWA MKARE was at his home on 24th April 2012 at 9.30 am. He got information about the incident and assisted in rushing the deceased to hospital. The deceased was pronounced dead on arrival.

PW4 Dr. ABDUL AZIZ DHUQUARNAIN was based at the Malindi District Hospital. He produced the postmortem report prepared by Dr. Tayabali. The postmortem indicate that it was done on 27th April 2012. The deceased had laceration on the forearm and deep laceration measuring 10 X 3 cm on the head. The cause of death was due to acute bleeding.

PW5 KADZO MASHA is the deceased mother. She was informed about the incident on 24th April 2012 at 10:00 am. She went to the hospital and found her son had already died. PW6 PC LABAN KAMEI was stationed at Marereni, police station. On 24th April 2012 at around 10:14 am the Appellant went to report that he had been cut with a panga by Karisa Ziro while he was herding cattle. PW6 recorded the report and told the Appellant to go to hospital. The Appellant went to Marereni dispensary for treatment. At about 10:45 on the same day, many people went to the police station with the deceased who was bleeding. He advised them to rush him to hospital. PW6 went to Marereni dispensary and found the Appellant on his way back. He arrested him and took him to Marereni police station. The Appellant recorded his telephone number.

PW7, inspector JACKIM GICHARU was at the Marereni Police Station when several people took the deceased on a bed. At 4.00 pm he received a phone call that the injured person had died. The Appellant was arrested and charged with the offence.

In his unsworn evidence, the Appellant testified that he operates a video show. On 24th April 2012 he was on his way to work when he met someone not known to him. The person told him to hand over what was in his pocket. He declined and was cut with a panga and his money was stolen. He went to report the matter at the police station and was given an OB number. He left the police with his mobile phone number.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. There is the evidence of PW1 who testified that he met the deceased running. The Appellant was not far from the scene and he saw him. The Appellant's position is that PW1 did not give his name to the police. Both PW6 and PW7 testified that the group of people who went with the deceased to the Marereni Police Station alleged that it was the Appellant who had assaulted the deceased. The police simply realised that the Appellant was the first one to report as his injuries were not serious and they quickly went for him the same day. I do find that the evidence of PW1 is quite in order and corroborates that of PW6 and PW7.

According to PW2, both the deceased and the Appellant were his employees. PW1 knew that the Appellant had been employed as a herder. PW2 went to the scene and PW1 saw him. It was established that there was a quarrel between the two workers. The Appellant's contention that the alleged employer

did not testify is misplaced. I am satisfied that both PW1 and PW2 knew the Appellant. The defence evidence that the Appellant was attacked by someone unknown to him does not raise any doubt on the prosecution case.

The evidence show that no one witnessed the fight between the two. However, the timings show that it was a fight between the Appellant and the deceased. PW1 met the deceased at around 9.00 am. He also saw the Appellant at that time. The fighting had already occurred. According to PW6, the Appellant went to Marereni police station at 10:14 am. PW2 was called at around 10:00 am. PW3 became aware of the incident at 9.30 am. The deceased's mother, PW5 came to know about it at 10:0 am. The evidence clearly points at the Appellant. There is no doubt that it is the Appellant who killed the deceased. The defence evidence did not raise any doubt to warrant consideration of benefit of doubt. The trial court properly evaluated the evidence and came to the correct conclusion. I do find that the prosecution proved its case beyond reasonable doubt.

In view of the fact that source of the fight is not part of the evidence, I do find that the 15 year sentence is a bit excessive. There is the possibility that it could have been the deceased who started the fight.

In the evidence, the appeal on conviction lacks merit and is hereby disallowed. The fifteen year imprisonment sentence is hereby set aside and replaced with nine (9) years imprisonment. The Appellant to serve 9 years imprisonment from the date of conviction.

Dated, signed and delivered at Malindi this 10th day of December 2015.

SAID J. CHITEMBWE

JUDGE