



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUN GOMA**

**CRIMINAL APPEAL CASE NO.218 OF 2012**

**(Consolidated with CRA No.220 of 2013)**

**(Arising from Webuye Principal Magistrate Hon. E. C. Cheronu in Criminal Case NO.528 of 2010  
Judgment made on 11/12/2012)**

**JOHANNES MATIKO..... 1ST APPELLANT**

**PETER MURITHI KINYUA ..... 2ND APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

1. The Appellants were charged with manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. It was alleged that on the 4/4/2010 at Soysambu Location of Bungoma North District within the Western Province APC Johanes Nyanjari Matiko and APC Peter Muriithi Kinyua jointly killed Eliud Lumbasi Wandati. They were tried and convicted for the offence by E. Cheronu, PM, Webuye Court and subsequently sentenced to 6 years imprisonment.
2. This being a first appeal, the Court is obligated to review and re-evaluate the evidence with a view to forming its own independent conclusions and findings - ***Okeno -vs- Republic [1973] EA.*** I have reviewed and evaluated the evidence presented in the trial Court in order to arrive at my own conclusion and findings.
3. The Appellants have appealed to this Court against their conviction and sentence, on the grounds that:-

1. the trial court erred in law in putting more emphasis on the prosecution as opposed to the Appellants' defence;
2. the trial Court failed to consider the defence by the Appellants and treated the same cursorily;
3. the trial Court relied heavily on circumstantial evidence against the direct evidence which was in favour of the Appellants;
4. the trial Court shifted the burden of proof to the Appellants;
5. the trial Court failed to consider the glaring contradictions in the prosecution witnesses' evidence;
6. the judgment is against the weight of evidence on record;

7. the trial Court imported extraneous considerations and reasons in arriving at the judgment;
  8. the trial Court amplified on the weakness in the defence case to buttress the weakness in the prosecution case;
  9. the judgment, conviction and sentence was based on erroneous findings of law;
  10. the trial court erred in failing to give reasons and or justification to the sentence given to the Appellants which is extremely harsh and manifestly high in the circumstances;
  11. the judgment, conviction and sentence amounts to a grave miscarriage of justice.
4. Mr. Kariah Learned Counsel for the 1st Appellant argued grounds 3, 1, 2, 5, 6 and 8 together and grounds 9, 10 and 11. On ground 3, Counsel argued that the Court was in error in heavily relying on circumstantial evidence. That PW2, 3 and 4 gave different versions of the evidence of the same act. That whilst PW2 claimed that he saw the 1st Appellant wrestle with the deceased, PW3 testified that the 1st Appellant slapped the deceased while PW4 testified that the 1st Appellant did not assault the deceased. PW9 the doctor who gave evidence on behalf of Dr. Gilbert who carried out the post mortem report indicated the cause of death to have been caused by a blunt object that resulted to trauma of the head.
  5. Counsel further submitted that the 3 witnesses confirmed that there was no weapon or blunt object in the possession of the Appellants. That the evidence was circumstantial and was not corroborated. He faulted the Court's finding at page 78 of the record that the Appellants had worked on the deceased thoroughly. That the Court implied that the injuries were sustained whilst the deceased was in lawful custody. This contradicted the evidence of all the witnesses as they alleged that the injuries were sustained outside the police station. That the court relied on extraneous considerations other than the evidence on record to arrive at its judgment.
  6. On grounds 1, 2, 5, 6 and 8 Counsel argued that the court relied on prosecution evidence that was contradictory and disregarded the Appellants' evidence thereby shifting the burden of proof to the Appellants. That the Appellants' evidence raised doubt in the evidence of the prosecution. The cause of death was in doubt as no weapon was produced in Court in consistent with the injuries and the evidence of PW9.
  7. In conclusion, Mr. Kariah submitted that, all the witnesses were in agreement that the deceased was drunk at the time, the Investigating Officer confirmed that at the scene there were stones which was consistent with the testimony of the prosecution witnesses. This fact was disregarded by the trial court. He argued that the evidence of the deceased falling on stones created doubt as to the cause of the death and that the doubt should have been resolved in favour of the Appellants.
  8. On grounds 9, 10 and 11 Counsel argued that the evidence on record was circumstantial, not corroborated and not consistent. In his view therefore, the judgment based on this evidence was erroneous. He urged the court to allow the appeal.
  9. Counsel for the 2nd Appellant, Mr. Onkangi associated himself fully with the submissions of Mr. Kariah and urged the Court to allow the Appeal.
  10. Mr. Kibellion representing the State conceded the Appeal. He reasoned that for conviction to issue the evidence presented must prove the charge beyond reasonable doubt. That there were elements of contradictions in the evidence of the prosecution witnesses. That whereas PW2, 3, 4 and 5 alleged to have all been at the scene of crime, they gave different versions of the incident. PW3 testified of the deceased being slapped, PW2 talked of the 1st Appellant wrestling the deceased to the ground facts which PW4 did not mention. That the evidence of PW4 was consistent with that of the Appellants. That all the witnesses who witnessed the incident stated that, the deceased was in company of one Mwasame Mwatiti who was not called yet his evidence was very crucial.
  11. That the Court did not evaluate the defence evidence but only over emphasized the prosecution evidence. Counsel submitted that there was a theory in the evidence that the deceased fell on a stone. PW8, the Investigating Officer confirmed the existence of stones at the scene. This was confirmed by

the sketch produced as P exh.1. That this theory was supported by the doctor's evidence that he found the cause of death to be trauma of the head caused by a blunt object.

12. Mr. Kibellion further submitted that all the witnesses did not mention where the deceased was assaulted by the Appellants. It is PW6 who referred to a previous assault which was however, not considered in the judgment. That the trial court disbelieved the Appellants evidence to the extent that, it challenged the deceased's state of mind. PW5 admitted having sold busaa and chang'aa to the deceased yet the Court found that, there were no specimen taken to the Government Chemist to prove that the deceased had consumed alcohol. In the circumstances, Counsel was not opposed to the appeal.

13. As already stated, as a first appellate Court, it is my duty to re-evaluate the evidence and come up with my own independent findings, I consider the following key issues to have emerged for determination:-

- a) whether the trial court disregarded the Appellants' defence;
- b) whether the trial court erred in relying more on circumstantial evidence that was uncorroborated and inconsistent;
- c) whether the trial court shifted the burden of proof to the Appellants thereby contravening the law.
- d) whether the prosecution proved its case beyond reasonable doubt.

#### **Was the evidence of the Appellants disregarded by the trial court?**

14. In all trials, civil and criminal, all parties have to be accorded a fair hearing. This is the tenet of justice and rule of law. All parties in a case have to be heard and their case properly considered before a court can make a finding and arrive at a decision. In criminal law, there is a unique right bestowed upon an accused – the right to remain silent. This means that even if an accused does not speak or offer any defence, the Court has to weigh the evidence adduced by the prosecution in totality and determine whether a case has been established as against an accused person. What this means is that the burden to prove a case beyond doubt at all times rests with the prosecution and it can only shift to the accused in certain instances in law for example where an accused has raised a point of law and whether the evidential burden weighs on his side. Judgment or conviction is not entered because the accused has not called evidence in rebuttal but because the prosecution has proved its case to the required standard. In the case of **Peter Juma Wafula & 2 others -vs- Republic [2014] eKLR** Gikonyo J observed:

***“Evidential burden initially rests on the party with the legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence..... Evidential burden is the basis for the practice in criminal law where the trial Court makes a ruling as to whether the prosecution has adduced prima facie evidence as to warrant the accused person to be placed on his defence. ....In both cases, where evidential burden has been properly created in law, the accused and the Defendant are entitled to call for evidence in rebuttal, and where the evidential burden is not discharged, judgment may be entered against the Defendant in case of a civil case or conviction in a criminal case. Except, it must be understood that, judgment or conviction will not be entered because the Defendant or the accused did not call for evidence in rebuttal; but because the Plaintiff or the prosecution, as the case may be, has proved its case to the required standard.” (Emphasis added).***

15. A trial court has a duty to weigh the evidence adduced in Court by all parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyze the prosecution evidence and leave out that of the accused is a fatal mistake. It is a duty bestowed on every Court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion and decision.

This is the basic calling of every Court without exception.

16. From the record, it is clear that the trial court failed to perform this basic function by failing to analyze the evidence of the defence. This is clear from the judgment of the trial court at page 76 of the record wherein the Court stated:

***“After hearing the evidence and documents produced by the nine prosecution witnesses, were sufficient evidence to put the two accused person on their defence. The two elected to give sworn testimony and called two witnesses. I have carefully analysed and evaluated the evidence and the documents produced by the prosecution witnesses. I have also considered the explanations and their witnesses in defence.”***

The Court then proceeded to make conclusions on the prosecution evidence; thereby totally disregarding the evidence of the defence. This complaint was well founded.

### **Was the case proved beyond reasonable doubt**

17. Black's Law Dictionary 7th Edition defines the phrase ***“burden of Proof”*** to mean ***“a party's duty to prove a disputed assertion or charge.”*** The Appellants were charged with the offence of manslaughter contrary to Section 202 as read with 205 of the Penal Code. The Appellants disputed the charge and the burden to prove it rested with the prosecution.

18. PW2 gave evidence that on the fateful day, he saw the first Appellant wrestle with the deceased whereby the deceased fell down. But he stated that he could not tell what caused the death of the deceased. PW3 saw the 1st Appellant slap the deceased but could not tell what killed the deceased. PW4 stated that he did not see the deceased being beaten by either of the Appellants. He only saw the deceased and his other colleague one Mwasame walking and were falling down. He also stated that he did not see PW3 who claimed to have been at the scene. PW9 stated that the post mortem report indicated the cause of death to be trauma of the head caused by a blunt object but none of the witnesses testified to the effect that they saw the Appellants with any object or weapon in their possession. There was undisputed evidence that the deceased had been drinking at the residence of PW5. There were also suggestions that the repeated falls of the deceased may have been caused by the state of his drunkenness.

19. From the foregoing, a doubt is created as to who or what actually killed the deceased. There is no direct evidence that links the death of the deceased to any act by the Appellants. The two eye witnesses PW2 and 3 gave a different version of the story while PW4, the other eye witness, said that he did not see the Appellants beat the deceased. It is thus difficult for one to conclude that the Appellants had a direct role in the death of the deceased. This doubt in my view should have been resolved in favour of the Appellants. There having been doubt on the actual cause of death, it cannot be said that the prosecution proved its case beyond reasonable doubt. This complaint was also merited.

### **Whether there was an error in reliance on uncorroborated circumstantial evidence.**

20. The trial court in its Judgment stated at page 77 of the record that. ***“..... I also find the accused guilty of manslaughter based on circumstantial evidence.”*** And at page 78 ***“consequently I find both accused persons guilty on direct evidence and circumstantial evidence and convict them accordingly.”*** I have on my part carefully analysed the evidence on record but could not see the direct evidence referred to.

21. In the case of **Nzibo -vs- Republic(2013) eKLR** the Court observed that:-

***“In a Case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt ..... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to***

**be sure that there are no other coexisting circumstances which would weaken or destroy the inference: (Emphasis added)**

22. PW4 who was at the scene stated that when the deceased together with his colleague Mwasame escaped from the holding cell at Soysambu AP Camp, they were walking while falling. That he did not see the Appellants beat them when they apprehended them. That the Appellants while following the deceased and his counterpart shouted at them saying “*Ninyi mnaenda wapi*” whereupon the other person Mwasame dropped holding the deceased, the latter fell down and people came. When the Appellants asked why they escaped, Mwasame said that, it was as if drunkenness had become too much for the deceased and by that time foam was coming out of his mouth. PW5 admitted to the fact that the deceased and Mwasame had been drinking at her homestead prior to them being apprehended by the Appellants. PW6 testified that her daughter had previously had a scuffle with the deceased and had assaulted the deceased in the head with a piece of fire wood. PW8 the Investigating Officer, told the Court that he visited the scene of crime and noted that there were stones on the ground where the deceased had fallen. PW9 a Medical Doctor testified that the postmortem report showed the cause of death to be trauma of the head caused by a blunt object. There was no direct evidence of the Appellants assaulting the deceased.

23. My view of the foregoing evidence is that there were other co-existing circumstances that only served to weaken the inference of guilt on the part of the Appellants. It is therefore, clear that the trial Court erred in relying on circumstantial evidence.

**Whether the trial Court shifted the burden of proof to the appellants Court thereby contravening the law.**

24. In criminal cases, the burden of proof lies entirely on the prosecution which duty is to be discharged beyond reasonable doubt. The burden only shifts when the evidential burden has been established against the accused where he will be required to adduce cogent evidence in rebuttal. In the judgment, the trial court observed at page 76:-

***“If indeed Eliud Lumbasi Wandati (deceased) and Mwasame were suspects who had been booked in the O.B., why did the accused persons release them to take them to the hospital without being accompanied. What happened with the case in which the two had been arrested for.”***

And at page 78:-

***“The theory that the deceased was too drunk and fell down while escaping from the cells is cover up.... there are no specimens taken to the Government Chemist showing that the deceased had consumed any alcohol.”***

25. This is a clear indication that the Court shifted the burden of proof to the Appellants. Whereas it was clear from the testimony of PW4 that, the deceased and Mwasame had escaped from the cell where they were being held, that of PW5 that the deceased had been arrested from her residence for consuming chang'aa and from PW8 that he noted that the two had been booked for being in possession of two litres of chang'aa, by the Court asking why the Appellants released the deceased and his counterpart and that there were no specimen from the Government Chemist amounted to shifting the burden of proof to the Appellants.

26. I think I have said enough to show that the Appellants' complaints and Mr. Kibellion's concession was merited. I therefore find the prosecution did not prove the offence of manslaughter against the Appellants in accordance with law. I find that the conviction and sentence to be unsafe.

27. I allow the appeal, quash the conviction and set aside the sentence. The Appellants are hereby set at liberty unless otherwise lawfully held.

Dated and Delivered at Bungoma this 17th day of February, 2014.

**A. MABEYA**

**JUDGE**