



**NO. 262/2014**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 111 OF 2011**

**JOSEPH GATHU TUNKEI ALIAS JOSE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Kajiado Senior Resident Magistrate's Court Criminal Case No. 1338 of 2009 by*

*Hon. W.N. Kaberia – S.R.M. on 14/2/2011)*

**J U D G M E N T**

1. The appellant was charged with the offence of manslaughter contrary to Section 202 of the Penal Code. Particulars of the offence being that on the 1<sup>st</sup> day of September 2009 at Kimana Trading Centre in Loitoktok District within Rift Valley Province, unlawfully killed **Tobias Ndoiki**.
2. He was tried, found guilty, convicted and sentenced to serve **fifteen (15)** years imprisonment. Being dissatisfied with the conviction and sentence in his amended grounds of appeal he states thus:
  - i. That the Learned Magistrate erred in law and fact by basing the conviction on the evidence of **NTHIGA (PW6)** which was a mere allegation without scientific proof.
  - ii. That the trial Learned Magistrate erred in law and fact by convicting on hearsay evidence and disregarding discrepancies in the prosecution's evidence.
  - iii. That the Learned Trial Magistrate violated the appellant's constitutional rights by failing to consider that he was held in custody for four (4) days instead of the stipulated three (3) days prior to being arraigned in court.
  - iv. That the trial Magistrate misdirected himself in law and fact by relying on evidence of a government analyst which was just an opinion and by failing to consider the absence of the investigating officer who would have shaken his alibi defence.
3. The case as presented by the prosecution was that on the 31<sup>st</sup> August 2009, the appellant (**Jose**) and another sold some five (5) bags of maize to PW6, **John Kamau Nthiga** at Ksh.10,000/=. He paid them 6,000/=. The following day, the 1<sup>st</sup> September 2009 the accused went to collect the balance, he declined to pay him in the absence of his mate. He therefore left and returned with him. He paid them. They seemed drunk, they left together.
4. At about 7.30 p.m. PW4, **Simon Kiarie** a tout was at the Kiwanja ya Ndege bus stage when he saw two (2) people. One of them was demanding for money and a knife from the other. They

- went towards **Kimana** market. Thereafter he heard screams. He went there to find the person who was demanding for his money and a knife lying on the ground bleeding from the neck.
5. PW8, **Ayule Maithya** a businessman at **Kimana** village was going to purchase sugar when he encountered two (2) people at 6.00 p.m. One was telling the other not to joke with him. Suddenly he saw one of them stab the other on the neck. The victim shouted “**Jose umeniua**” He went to assist him. The assailant ran away as the victim fell down. He raised an alarm. People gathered. The police arrived. He told them the assailant was wearing a light blue jumper (sweater).
  6. PW5, **No.2006064395 APC Peter Mwangi** visited the scene of crime with a colleague. They were led to the home of the appellant. On seeing them the appellant ran off. They pursued him and effected arrest. He had a light blue jumper that had blood stains.
  7. PW3, **Paul Waweru Kangethe** a government analyst carried out a chemical analysis on the Jumper which was stained with human blood of group B. The blood of appellant was found to be of group O. He formed an opinion that the blood stains on the jumper matched in group the blood of the deceased. Therefore the blood stains could have come from the deceased after the injury.
  8. PW7, Doctor **Gakuria Issa Mohammed** produced a postmortem report filled by **Doctor Maina** who performed a postmortem on the body of the deceased. It had a deep penetrating wound on the anterior triangle of the neck. The right lung had collapsed and fluid had collected therein. The right vein of the heart was severed. There were soft tissue injuries through the tract penetration. He opined that the cause of death was external bleeding from the big vein and respiratory failure after the lung punctured.
  9. PW9, No.50895 Corporal **Christopher Biwott** investigated the case and charged the appellant.
  10. In his defence the appellant stated that the deceased was his close friend, however he had no idea whence he was. He testified that on the 1<sup>st</sup> September 2009 he was at home with his mother and sister. He was arrested and taken to the police station where he was held in custody for four (4) days prior to being charged. On cross examination he admitted having introduced the deceased to the person who bought his maize on 31.8.2009 and they parted ways after he found him a lodging to spend a night at 8.30 p.m. He admitted having been at the Kimana market on the 1/9/2009 but stated that he left at 5.30 p.m. going home.
  11. DWI, **Gladys Njeri** stated that the appellant returned home at 7.00 p.m. He was arrested soon thereafter.
  12. The appellant relied on written submissions. In response thereto, the learned state counsel **Mrs. Abuga** opposed the appeal. She submitted that the blood group of the deceased having been found on the appellant’s jumper showed that he is the one who inflicted injuries on the deceased that he succumbed to. She urged the court to find that the trial court was right in finding that the appellant was at the scene and did inflict the injuries that the deceased sustained.
  13. This being the first appeal, I have to re-evaluate all evidence adduced before the trial court and come up with my own conclusions bearing in mind that I neither saw nor heard witnesses. (*See Njoroge versus Republic (1987) KLR 99; Okeno versus Republic (1972) EA 32*).
  14. It has been argued that the appellant’s rights were violated as he was held in custody for four (4) days. The law requires any person arrested to be produced in court within 24 hours. It was the duty of the court to demand for an explanation by the prosecution as to why he was held in custody for more than the prescribed time. If at all his rights were violated, it does not however entitle him to an acquittal but an action in a Civil Suit for damages. (*See Julius Kamau Mbugua versus Republic Criminal Appeal No. 50 of 2008*).
  15. This is a case where it is not in dispute that the victim (**deceased**) died as a result of bleeding which resulted from a punctured lung; external haemorrhage from subclavian vein. The issue of death is not in question.

What had to be determined was whether it was the appellant who caused the deceased’s death?

16. It has been argued by the appellant that the trial court in reaching its finding relied on hearsay evidence. The evidence of **Nthiga** (PW6) was that he bought maize from the appellant whom he knew very well and another person. The appellant sought to be paid the outstanding balance but he declined. He later paid both of them. He did not witness the deceased being killed but the act happened soon after they left him. His evidence could not be dismissed as hearsay. The evidence

he gave was direct evidence in respect of what he perceived with his senses.  
17.PW8 was an eye witness to the act of stabbing. He saw the two (2) people together walking towards him. One of them stated:

***“unanichezea, unanijua wewe”***

Suddenly he saw the other stab him on the neck. The victim said:

***“Jose umeniua”***

He ran to offer assistance. The assailant ran off. He was not able to even recognize the assailant but he identified the light blue jumper he wore. PW5 identified the same jumper in court which they found the appellant still wearing. It had blood stains.

18.Evidence adduced by the government analyst confirmed that the blood type found on the jumper was that of the deceased. Without any other explanation as to how the stains got onto the jumper the only reasonable inference a person can draw is that the appellant who was wearing it on the material date came into contact with the deceased as he bled. The trial Magistrate did not misdirect himself by believing the evidence adduced by the Analyst. This evidence was not weakened or destroyed by any other evidence. This evidence therefore corroborated the evidence of PW8 that the appellant was the person he saw stabbing the deceased. It further confirms evidence adduced by PW6 that they left together. Therefore, there is no doubt that it is the appellant who stabbed the deceased and he succumbed to the injuries sustained.

19.From the evidence adduced, the appellant had gone to collect money in the absence of the deceased but he was not given. After both of them were paid they disagreed. These two (2) were great friends. In his testimony the investigating officer stated that the deceased attempted to stab the appellant who reacted by taking the knife which he used to stab him. He did not divulge the source of his information. This aspect of evidence was therefore hearsay. The evidence on record that stands unchallenged was the fact that the two (2) friends received money, left together then one killed the other. What was not established was intent to cause the death of the deceased. This is evidence that the act that caused the death was unintentional.

20.In the circumstances the case was proved beyond reasonable doubt. I do confirm the conviction.

21.The appellant also appealed against the sentence imposed of fifteen (15) years. The court can only interfere with sentence if it is evident that the trial court acted upon some wrong principles or overlooked some material facts or if the sentence was manifestly harsh or excessive in the circumstances (*See Wagude versus Republic 1993 KLR 569*)

This was a case of two (2) young friends who differed over money realized from the sale of maize. Due to the circumstances that prevailed and the fact that they had also drunk some alcohol; the sentence imposed was harsh. In the premises I set aside the sentence imposed and substitute it with ten (10) years imprisonment.

22.It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 8<sup>TH</sup> day of APRIL, 2014.**

**L.N. MUTENDE**

**JUDGE**