



IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 38 OF 2013

(From the original conviction and sentence in criminal case no. 1114 of 2009 of the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu – PM)

GEOFFREY NDIMU APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged before the learned Senior Principal Magistrate Malindi with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. Particulars stated that on the 21st day of July, 2009, at Gorbanti village in Tarasaa Division within Tana-Delta District of the Coast Province, unlawfully killed JIMMY DAIDO.
2. The appellant denied the charge. He was represented by Mr. Lughanje. At the end of trial the appellant was found guilty, convicted and sentenced to seven (7) years imprisonment. He has now appealed to this court citing four grounds of appeal as follows:

“1. That the learned honorable magistrate erred both in law and fact in that she did not properly consider the evidence of the prosecution witnesses and the appellant’s evidence.

2. That the learned honorable magistrate erred both in law and fact in that she shifted the burden of proof of innocence on the appellant.

3. That the learned honorable magistrate erred both in law and fact in that she convicted the appellant on insufficient grounds which did not meet the threshold of proof beyond any reasonable doubt.

4. That the learned honorable magistrate erred both in law and fact in giving a sentence that was harsh and excessive in the circumstances.”

3. The first three grounds challenge the sufficiency of the evidence adduced at the trial. The final ground attacks the sentence imposed as harsh and excessive. The State opposed the appeal. The parties filed written submissions in canvassing the appeal.

4. As the first appellate court this court is obligated to review the evidence of the trial and to draw its own conclusions (See **Okeno v R 1972 EA 32**). At the same time the court must bear in mind that the trial court had the advantage of seeing and hearing the witnesses testify. The appellate court will therefore not assail any findings based on the credibility of witnesses called during the trial, unless those findings are plainly wrong and no reasonable tribunal could have reached them. (**See R v Oyier [1985] KLR 385**).
5. The prosecution case in the Lower Court was as follows. The deceased was a nephew to Enoch Daiyo Haya (PW2) a resident of Gorbanti village, Ngao District. The deceased, and a grandson of PW2 (the appellant) and the appellant's wife by the name Lucy Diramo (DW2) all lived in the house of PW2 at the material time. The host had however asked the deceased to leave the home and to return to his father's home because the deceased's father wanted him back home. Thus on the evening of 20th July, 2009 PW2 demanded that the deceased leaves his house. The deceased refused and an altercation ensued between the deceased and the elderly PW2. Presently a scuffle ensued as the deceased attacked the old man by grabbing him so tightly by his shirt that the buttons came off.
6. Despite the intervention by the appellant, the deceased refused to leave even after he was given his shoes which he had demanded in order to do so. It is the prosecution case that the appellant then forcefully dragged out the deceased from the house and thereafter picked a wooden pestle with which he struck the deceased who died a few days later. The cause of death was intracranial bleeding due to skull fracture caused by a head injury. Eventually the appellant was arrested and charged
7. In his sworn defence statement and through the evidence of his wife who testified as DW2, the appellant outlined the sequence of events until the moment when the shoes were allegedly handed over to the deceased stating however that this was preceded by a fight between PW2 and the deceased. And that PW2 wielding a panga while the deceased had the wooden pestle. The defence case is that after the fight both PW2 and the deceased went outside and before long the deceased was heard groaning. It was found that he had been injured and lay on the ground.
8. The learned magistrate in her considered judgment believed the prosecution evidence and gave reasons for their belief. She discounted the possibility, suggested by the defence, that the deceased sustained the injuries in his fight with PW2. I note the substance of the defence submissions consists of an analysis of the evidence of the individual witnesses who testified. Looking at evidence tendered on both sides there is no dispute that the deceased was involved in a scuffle with PW2 before the intervention by the appellant. The sequence of events followed in quick succession. Only two persons could have hurt the deceased, the appellant or PW2. The injury sustained by the deceased as per the postmortem report was not one caused by a panga (allegedly wielded by PW2) but rather one consistent with a hard blunt blow across the head. Hence it is believable that the pestle, rather a panga was used.
9. As to the question who inflicted the injuries, the trial court believed the evidence of PW1, PW2 and PW3 that the wooden accused threw out the deceased from PW2's house and struck him with the pestle which was in PW2's house. Even if, as the defence submits PW3 was a "coached witness", the young boy PW1 gave a clear sequential account of the entire incident up to the point where appellant and the deceased went outside. There is no evidence at that point that the deceased had sustained any serious injury or at all. There was no suggestion by the defence during cross-examination of PW1, PW2 or PW3 that PW2 was the last person in the company of the deceased while outside the house, such that he had opportunity to inflict the fatal blow. On all counts it seems that after the appellant intervened and threw the deceased out of the house, PW2 remained indoors. In my considered view the trial magistrate was entitled to conclude as she did, that the assault occurred outside the house and that the defence version of the incident was not believable.
10. The trial magistrate's finding that the evidence of PW1, PW2 and PW3 was corroborated by the

Assistant Chief Salome Morowa (PW4) was also well founded. This witness in particular narrated what DW2 and PW2 told her about the assault soon thereafter when she visited the homestead, namely that the deceased was assaulted by the appellant, outside PW2's house. The evidence of PW4 corroborates what PW1 and PW2 stated: that DW2 had tried to stop the appellant from attacking the deceased outside the house of PW2. These pieces of evidence appear to destroy the credibility of DW2 as a witness for the defence.

11. More significantly, the defence case is unbelievable for another reason: the sole purpose for the appellant's intervention was to ensure that the deceased left his grandfather's home that night. He was a witness to the earlier attack by the deceased on the elderly man. It is unbelievable that having gone into the trouble of throwing out the deceased, the appellant was content to remain in the house while his grandfather followed the said deceased outside at night. That is not plausible. The entire transaction and the evidence thereof have to be viewed as a whole without segmenting the witnesses or their testimony as the defence has sought to do in its submissions. And it matters not in my view that it was dark outside the house because the transaction and actors therein started in the house and ended up outside. No other combatant was involved. There was no break or interruption from beginning to end.
12. Reviewing all the evidence, I agree with the State submissions that the prosecution evidence was consistent and that the conviction was proper. I do therefore reject the appeal against the conviction. Regarding the sentence however, I do think that the circumstances of the offence should have earned more consideration in the appellant's favor. Although he was not in the initial dispute, and was also attacked by the deceased, the appellant in response may have used excessive force. But considering the quick flow of events which left little time for proper reflection, and that no adverse antecedents against the appellant were proved, a lesser sentence should have been considered.
13. I would therefore set aside the sentence of 7 years imprisonment imposed in the Lower Court and substitute therefor a sentence of five years imprisonment from the date of sentencing. The appeal on sentence is therefore allowed to that extent. Mr. Nyongesa for the State.

Delivered and signed at Malindi this 24th day of **June, 2014** in the presence of the accused.

Court clerk – George.

C. W. Meoli

JUDGE