



IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 29 OF 2014

DICKSON MURIITHI NJERU.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by M. WACHIRA Chief Magistrate Embu in Criminal Case No. 1343 of 2009 on 11th December, 2013)

J U D G M E N T

1. **DICKSON MURIITHI NJERU** the appellant herein had been jointly charged with **DAVID KIAMATI JESSE** with the offence of **Manslaughter contrary to Section 202** as read with **Section 205 of the Penal Code**.
2. The appellant denied the charge and the matter proceeded to full hearing with the prosecution calling ten (10) witnesses. The appellant was convicted of **Assault contrary to Section 251 of the Penal Code** and sentenced to two (2) years imprisonment. His co-accused was convicted of Manslaughter and sentenced to ten (10) years imprisonment. He filed an appeal (Embu HCRA 81/2013) which was allowed by this Court on 9th May 2014.
3. The appellant filed this appeal against conviction and sentence. His main ground of appeal is that there was no evidence that the appellant assaulted the deceased.
4. The prosecution case was premised on the evidence of ten (10) witnesses. I will only deal with the evidence that is relevant to the case related to the appellant. PW1 testified that on 9th August 2009 7pm he was going to the appellant's shop for cigarettes when he heard noises. He was with one Solomon. They rushed in the direction of the noises and found the appellant and the deceased on the ground. The appellant asked them to separate them as he had been beaten by the deceased. They recovered a whip at the scene and he later heard that the whip belonged to the deceased.
5. PW2 - Samuel Njeru Njoka testified that on 11th August 2009 11am he was at Iringa dam with many other people drawing water. He had found the deceased there. The deceased was drunk and was hitting people with fists. He attacked one Githae and also knocked the appellant down and bit his chin. PW2 separated them and went home.
6. It was also the evidence of PW2 that on the same evening the deceased had gone to the home of David Kiamati and caused some drama there by throwing stones at Kiamati and insulting him and even stripped himself naked. His wife PW3 - Lydia Mbura Njuki confirmed that the deceased had come home drunk and naked that night.
7. PW3, PW4, PW5 confirmed that the deceased had a burn wound on his back. PW10 - Dr. Silvester Maingi who conducted the postmortem found the deceased to have had several external healing wounds (abrasions). The cause of death was chronic subdural which is a slow leakage of blood which can take up to a month before someone complains. The leakage of the blood vein

- could have been caused by exerting force on the scalp.
8. The appellant gave unsworn evidence in his defence. He denied the charges saying he had on 11/9/2013 9am found the deceased without a shirt crying at his home. He was later taken away. At 3pm he went to fetch water at the community dam and found the deceased fighting people as he was drunk. He pushed Githae inside the dam and he was beaten by those present. He too was pushed into the dam by the appellant. Later while at his shop at 7pm the deceased came without a shirt with a pullover around his waist. The appellant declined to sell him any goods and the deceased whipped him and knocked him down and even bit his chin. They were separated and he reported the matter to the police.
 9. When the appeal came up for hearing Mr. Momanyi substantially submitted that there was no evidence that the appellant assaulted the deceased. Secondly some of the findings by the learned trial Magistrate were not borne by the evidence for example when she stated that the deceased suffered whip marks. He also submitted that the appellant was denied an opportunity of being represented by counsel when the learned trial Magistrate forced him to proceed with his defence in the absence of counsel. Finally his defence was not considered.
 10. The appeal was opposed by the State. Mr. Miiri submitted that the deceased fought with the appellant and inflicted whip marks on him. He referred to the evidence of PW1 and PW10.
 11. This Court as a first appeal Court has the duty to reconsider and re-evaluate the evidence on record and arrive at its own conclusion. I am alive to the fact that unlike the trial Court, I did not see nor hear the witnesses. See

(I) OKENO VS REPUBLIC [1972] EA 32

(II) SIMIYU & ANOTHER VS REPUBLIC [2005]

1 KLR 192

12. I have carefully considered the submissions by the State and the Appellant, the grounds of appeal and the trial Court's findings plus the evidence on record.
13. The only issue for determination is whether there was sufficient evidence to support a conviction of assault.
14. The doctor who did the postmortem (PW10) did not anywhere say the deceased had whip marks on any part of his body. He said he had external healing wounds which were abrasions on several parts of the body.
15. The question then is whether it is the appellant who caused these abrasions. PW1 and one Solomon on 9th August 2009 11am found the appellant and the deceased fighting and they were on the ground with the deceased was on top of the appellant. They were separated. There is no witness who saw the appellant assaulting the deceased. PW2 saw the deceased knock down the appellant and also bite his chin. On the same night the deceased was at the home of Kiamati fighting and was even burnt on the back.
16. There is also evidence from PW1, PW2 and others that the deceased was violent whenever he was drunk. PW2 explained what he had witnessed the deceased doing to others at the dam on 11th August 2009 11 am. It is therefore clear from the evidence of the prosecution witnesses that the deceased was involved in fights with several people before his death. There is no evidence that he was ever whipped by anyone. Even PW2 confirmed that the whip that was produced in Court belonged to the deceased and had been recovered from where he had pinned the appellant on the ground.
17. My finding is therefore that there was no evidence upon which the conviction of assault can stand. The best the prosecution could have done was to charge the appellant and deceased with the offense of affray contrary to Section 92 of the Penal Code. I find the appeal to be well founded. I allow it and quash the conviction. The sentence is set aside. The appellant shall be released unless otherwise held under a separate warrant.

DATED, SIGNED AND DELIVERED AT EMBU THIS 31ST DAY OF JULY, 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Momanyi for the Appellant

Mr. Miiri for the State

Appellant

Njue/Kirong CC