



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 182 OF 2012

MUSYOKA KYUMU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 101B of 2012 by Hon. S.K. Mutai, SRM on 29/2/2012)

JUDGMENT

1. The appellant was charged with manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**. Particulars of the offence being that on the **10th** day of **February, 2010**, at around **5.30am** at **Ngomano Village, Monguni Sub-location, Maluma Location** in **Ikutha District** within **Kitui County**, unlawfully killed **Mambo Musyoka**.
2. He was tried, convicted and sentenced to **ten (10) years** imprisonment. Being dissatisfied by the decision of the court the appellant appeals on the following grounds:-
 - i. The learned trial magistrate erred in both law and fact by holding that the prosecution had proved the case beyond reasonable doubt.
 - ii. Reaching a finding that the appellant had the intention to cause the death of the child was a misdirection on the part of the trial magistrate.
 - iii. Evidence that the child was thrown in Athi River was based on hearsay.
3. It was the prosecution's case that on the **9th February, 2010** the appellant went home at **5.00am** and asked PW1, **Syombua Musyoka** his wife to accompany him to where they would collect his luggage. She carried their child aged one and half (1 ½) months. They went to Athi River where he purportedly threw the child into the river. She later notified people. The appellant was arrested and later charged.
4. In his defence, the appellant said that he married PW1 who had a child in 1999, 15th May, the child became ill and died. They buried him but 2 weeks later, PW1 insisted that they disinter him. He went back to where he worked in **Wote**. He stayed there but continued sending money to his wife. On the **7th February, 2010** he went home only to find **Kioko Kithendu** in his house. They fought and he chased away his wife away at **5.00am**. They then went and locked him up. Later they took him to the Police Station. He was charged. He denied knowing where they hid **Mambo Musyoka**, the deceased.
5. The appellant filed written submissions which he sought to establish grounds of his appeal.
6. **Mrs Gakobo** for the State opposed the appeal arguing that the child was of tender age who could

- not have saved himself. Further, she argued that circumstantial evidence proved that the child's body was not recovered hence called upon the court to find that death was proved.
7. This being the first appeal it is the duty of the court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind that it neither saw nor heard witnesses who testified. (*See Pandya versus Republic [1957] 336; Okeno versus Republic [1972] E.A. 32*).
 8. The accused was initially charged with the offence of murder. An offer to plead to the charge of manslaughter was made to the State. The facts presented were that the wife to the appellant had conceived the child while the appellant was away. When he went home he ordered them to leave home. He walked going towards Athi River. The wife carried the child and followed him in an endeavor to reconcile with him. The appellant demanded to know the father of the child, he then lost his temper, snatched the child and threw him in the river that was infested with crocodiles. The appellant denied facts hence the case was referred to the Chief Magistrate's Court for hearing.
 9. To prove the case of manslaughter in the instant case the prosecution had a duty of proving beyond any reasonable doubt that the appellant herein caused the death of the deceased during the commission of an unlawful act. This therefore brings in the question whether death was caused?
 10. The body of the deceased was not found. PW1, the mother to the child was woken up by **PW2, Martha Musyoka** who was sent by the appellant. This was at 5.00am. According to PW1, the appellant came home from his place of work and where he resided in **Makueni**. He asked her to go with him to collect luggage. She carried the child. She did not tell the court that the appellant asked her to carry the child with her. However, according to her, on arrival at Athi River he asked her to choose between herself and the child. He then threw the child in the river. In his defence the appellant denying the commission of the offence stated that he did not know where they hid the child. He claimed he arrived home to find **Kioko Kithendu** (PW4) inside his house. They fought as a result and he sent his wife away. **Kioko** called people and they locked him up inside the house only to be charged later.
 11. PW4, on the other hand claimed he got the information from PW1, that is then he called the village elder and other people. Evidence to prove the causation of the act is therefore PW1's word as against that of the appellant.
 12. In his findings the learned trial magistrate stated thus:-

“In view of the foregoing, I find that the evidence of PW1 is fully supported by the evidence of PW2, Pw3, Pw4, PW5 and PW6 respectively and the same confirms that the child called Mambo Musyoka was actually thrown into Athi River and his body was never recovered.”

13. This was a misdirection because PW1 claimed she was the only one with the appellant when the act was committed.
14. The learned State Counsel called upon the court to draw an inference that the child was dead. In the cited case of *Kimweri versus Republic 1967 E.A. 453* – it was held thus;-

“although death may be proved by circumstantial evidence, that evidence must be such as to compel the inference of death and must be such as to be inconsistent with any theory of the alleged deceased being alive, with the result that taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead.”

15. The child was indeed seen with the mother (PW1) by PW2. Thereafter, all witnesses who testified for the prosecution were told that the child was thrown into Athi River. The appellant claimed only PW1 and PW4 can explain the whereabouts of the child. The alleged victim can therefore not be accounted for. Circumstantial evidence would suggest that the child died.
16. After the case was reported to the police, they arrested both the appellant and PW1. The Investigation Officer **PW7 P.C. Dickson Kikenge** stated that he took over the case from **Inspector Mungaro**. He only discharged the duty of producing exhibits in court. At the close of the prosecution's case there was no explanation as to why both PW1 and the appellant were treated as suspects. PW1 having been treated as a suspect would have been a principal offender.

(vide Section 20 of the Penal Code).

17. A court can convict on evidence of a testimony of a solitary witness to the act provided that the witness is reliable. However, in a case where the sole witness was also a suspect, satisfaction by the court of the quality of her evidence comes into question. This would call for some other evidence to corroborate her assertion. In the premises such evidence was lacking.

18. From the foregoing, the appeal must succeed. I therefore quash the conviction and set aside the sentence passed. The appellant shall be released forthwith unless otherwise lawfully held.

19. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 24TH day of JULY, 2014.

L.N. MUTENDE

JUDGE