REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 156 OF 2013

Appeal from the original conviction and sentence of the Chief Magistrate at Garissa in Criminal Case No. 958 of 2013 (Miss H. N. Ndung'u).

MUSEE JOSEPH MUSYOKA…….....APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

Muse Joseph Musyoka, who I shall refer to as the appellant in this judgement, was convicted and sentenced to life imprisonment by the Chief Magistrate at Garissa for the offence of manslaughter. It was alleged in the particulars of the charge that on 30th June 2012 at Madogo Location, Bura District in Tana River County he unlawfully killed J. M.

Facts

The appellant and R.M, the mother of J. M (deceased) who testified as PW1, were friends and the parents of the deceased. It is alleged that on 30th June 2012 the appellant visited PW1 after a period of two weeks' separation. The appellant carried the baby, J. M, who was aged about 7 months and went around greeting and talking to neighbours. He returned to the house of PW1 and placed the deceased on a mattress to sleep. The appellant lay down next to the deceased on the same mattress and fell asleep.

In the meantime PW1 finished cooking and took some food to Anastasia PW2, a neighbour. PW1 stayed with PW2 talking and on returning to her house around 9.00pm she found the appellant lying on the deceased. PW1 started screaming attracting PW2 to her house. They pushed the appellant away from the deceased. To their utter shock, they found out that the deceased had died. Neighbours gathered at the scene. The appellant was locked inside the house and the matter reported to the police. The police arrived and re-arrested the appellant and took him to the police station. The body of the deceased was taken to the mortuary.

The appellant's defence was brief. He told the trial court that the death of the deceased was accidental. In effect he did not deny causing the death of the deceased although he had pleaded not guilty to the charges.

The trial magistrate considered the evidence of PW1, PW2 and Police Constable Mwachama Zakaria,

PW3. The trial magistrate found the offence of manslaughter proved and convicted the appellant. The trial magistrate sentenced the appellant to life imprisonment.

The conviction and the sentence have aggrieved the appellant who has preferred this appeal before this court.

Petition of appeal and submissions

The appellant claims that there was a grudge between him and PW1 as a result of which she fabricated this case against him; that the prosecution evidence was contradictory and inconsistent; that the prosecution evidence was uncorroborated; that the doctor did not testify to confirm the death of the deceased; that the sentence is harsh and excessive and that the trial court did not consider his defence.

In his submissions the appellant stated that PW1 and PW2 who are related fabricated the story in order to ensure the appellant is charged; that their evidence contradict in that PW1 said she was cooking inside the house while PW2 said PW1 was cooking outside her house; that PW1 said the appellant took the child and started greeting neighbours while PW2 said that the appellant took the child and moved about with him.

He submitted that PW1 and PW2 did not mention that the chief went to the scene and that PW1 said the appellant was locked in the house and police informed while PW2 said the appellant was arrested and taken to the police station. The appellant further submitted that the prosecution failed to summon neighbours and the doctor as witnesses. He submitted that the trial court failed to consider his defence and mitigation and that the sentence is harsh and excessive. The appellant asked this court to allow the appeal, quash the conviction, set aside the sentence and set him free.

Respondent's submissions

The respondent, through learned state counsel Mr. Collins Orwa, opposed the appeal. Mr. Orwa submitted that there is no evidence that PW1 and PW2 conspired against the appellant; that the appellant admitted the offence and termed it accidental; that there are no contradictions in evidence and if any this did not weaken the prosecution case; that evidence shows that PW1 and PW2 found the appellant lying on the child; that there is nothing wrong with the mode of arrest and the investigating officer testified; that the appellant did not object to the production of the post mortem report by the investigating officer and it is an afterthought on the part of the appellant to bring the issue now; that the appellant did not suffer any prejudice; that the burden of proof was not shifted to the appellant and that there was ample evidence against him.

Learned state counsel further submitted that the trial court considered the appellant's mitigation which was an admission of guilt; that the appeal lacks merit and must fail. Counsel urged the court to dismiss the appeal.

Determination

This is a first appeal and the duty placed on this court is as stated by the Court of Appeal in **Irene Nekesa Peter v Republic [2014] eKLR** where that Court stated thus:

> "……**we are under a duty to re-examine and re-evaluate the evidence on record with the aim of reaching our own conclusions, subject to the caveat, however, that we had no advantage, as the trial court did, of seeing and hearing the witnesses."**

The Court of Appeal in the above cited case was following the principle set out in ***Okeno vs R [1972] E.A. 32*** where the predecessor to that Court set out this duty in the following manner:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination … and to the appellate court's own decision on the**

evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions…. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses…."

Manslaughter is defined under section 202 (1) of the Penal Code as the killing of another person by unlawful act or omission.

i. **Any person who by <u>an unlawful act or omission</u> <u>causes the death of another person</u> is guilty of the felony termed manslaughter** (emphasis added).

An "**unlawful omission**" is defined under section 202 (2) Penal Code as **<u>an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm</u>** (emphasis added).

My understanding of this definition is that the prosecutor who bears the burden of proving a criminal case against the accused person must, in a crime of manslaughter, prove that the deceased died as a result of unlawful act or omission and that the appellant is responsible for the unlawful act or omission causing the death.

The record of the lower court shows that the post mortem report that usually confirms that death had occurred and the cause of that death was not produced by the doctor who performed the post mortem but by a police officer, PW3, who doubled up as the re-arresting officer and the investigator. The prosecutor did not lay a basis in regard to the production of the post mortem report and why the doctor was not present to produce it.

PW3 testified that: **"During investigations post mortem was carried out on the body of the child. Post mortem form was filled. Cause of death was due to asphyxiation. Post mortem form (exhibit 1)."**

In addressing the issue of the evidence confirming the death of the deceased, the trial magistrate stated as follows:

"Subsequently, the Doctor ascertained the cause of death as asphyxiation. In my considered view the accused clearly killed the child J.M."

Courts in this country have frowned upon production of expert evidence by witnesses who are not the experts and makers of such reports. Section 48 of the Evidence Act deals with expert evidence by providing that:

1. When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

2.Such persons are called experts.

In Republic vs. Julius Karisa Charo (2005) eKLR, the court stated in respect to production of expert evidence under section 77 of the Evidence Act:

"It is agreed that a document prepared in the circumstances set out above is admissible. The problem that is encountered is who can produce such a document? There have been a

criticism on the manner documents are generally produced in the courts, particularly, the subordinate courts. "

The Court of Appeal in **Sibo Makovo V R [1997] eKLR** pronounced itself as follows in respect of production of expert medical evidence:

> **"The P3 form which was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in Section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in Courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called."**

In the above case, the P3 form was filled by a medical officer was produced by a police constable. The case was in respect of rape.

In the **Julius Karisa Charo case** above, the judge stated in reference to production of expert evidence that:

> **"Decided cases in this point are unanimously that with regard to the production of expert evidence in court, police officers must not be the people to play that role. The ordinary consideration being the chance for the accused person and his counsel to cross-examine the person called to produce the document. Since, medical (or scientific) evidence normally tends to be conclusive, great care has to be taken to ensure that where the person who conducted the examination is not available the person called in his place is technically qualified in the field in question to provide opinion."**

I think I have said enough to demonstrate that the production of the post mortem report in this case was irregular. With this evidence this court is not able to confirm who conducted the post mortem, the identity of the deceased and the cause of death. Further the appellant was not afforded a chance to cross examine the doctor who prepared the report thereby infringing on his rights to a fair trial. This being a criminal case, there is no room left for maneuver. There must be proof beyond reasonable doubt that death of the victim named in the case occurred. This evidence on death leaves this court without such proof.

Even if this court were to assume that the deceased died in the manner alleged in evidence, the next question is who caused that death. In manslaughter cases proof of malice aforethought is not a requirement. It is not denied that the appellant who was the father of the deceased had visited PW1 who was appellant's friend and the mother of the deceased. On 30th June 2013 the appellant visited her and carried the baby around as he greeted neighbours. It is stated that the appellant placed the baby on the mattress to sleep and the appellant too fell asleep next to the baby. What happened thereafter is not clear. Evidence shows that PW1 who was cooking took food to PW2 her friend and neighbour and she stayed there for some time. On returning to her house she found the appellant lying on the baby. According to her evidence the appellant appeared drunk. There is no other evidence to corroborate this. The evidence of PW1 differs from that of PW2 on what happened. PW1 said that with the help of PW2 they pushed the appellant away from the baby. PW2 said they pulled the baby from under the appellant. This court cannot confirm what really happened but whether they pushed the appellant away or pulled the baby from under the appellant, what seems clear to me is that the appellant was not in a state to move himself from the top of the baby. This could either mean he was deep asleep or too drunk to move or realize what was happening.

Did the prosecution prove that the appellant caused the death of baby J.M by unlawful act or omission? As I have stated above there is no dispute that the appellant picked the baby and went around greeting

neighbours after which he came back to PW1's house. He then placed the baby on the mattress to sleep. Evidence shows he also slept next to the baby. Is the act of placing the baby on the mattress sleeping next to the baby unlawful? It is common knowledge that there is nothing unlawful about this as it is done all the time unless there is evidence to show that the appellant placed the baby on the mattress and deliberately lay on him with the intention of harming him.

Is the appellant guilty of unlawful omission? As defined above an unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Under English law, where a person causes death through extreme carelessness or incompetence, gross negligence is required. In **R. vs. Bateman 19 Cr. App. R. 8** the Court of Criminal Appeal held that gross negligence manslaughter involved the following elements:

i. The defendant owed a duty to the deceased to take care;
ii. The defendant breached this duty;
iii. The breach caused the death of the deceased; and
iv. The defendant's negligence was gross, that is, it showed such a disregard for the life and safety of others as to amount to a crime and deserve punishment.

Parents obviously owed a duty to take care of their young children and this court is alive to this fact. The issue is whether the appellant breached that duty. In determining that issue, this court must scrutinize the appellant's conduct in all the circumstances. Although evidence of PW1 shows that the appellant had left her for about two weeks, there is no evidence to show bad blood existed between them. She allowed him to visit and take the baby with him as he greeted and talked to the neighbours. She allowed him to come in and lay the baby to sleep and also slept next to the baby. There is no evidence to show that he mistreated PW1 or the baby. It is my considered view that the prosecution has failed to establish that the appellant was guilty of unlawful act or omission. The prosecution failed to establish that the appellant breached the duty to take care of baby J.M; that the breach caused the death of the baby and that the appellant's negligence was gross, that is, it showed such a disregard for the life and safety of the baby as to amount to a crime and deserve punishment.

I have carefully scrutinized the judgement of the lower court. The trial magistrate seemed to read malice in the appellant's actions. She stated in the judgement as follows:

> **"In my view, his sudden reappearance at home, and his taking up the child in his arms walking about with him and later sleeping with him and lying on his until he was dead are all suspect. All said and done his actions were unlawful and there can be no excuse for the same."**

Since we are told in evidence that the appellant had to be pushed away from the baby and/or the baby had to be pulled from under him; and in my view this shows that either he was too sleepy or too drunk to know that he had slept over the baby, it is for the prosecution to prove that the appellant deliberately slept on the baby; it is upon the prosecution to prove that the appellant breached the duty of care and that he was guilty of gross negligence as set out in the **R. vs. Batemant case**, above. I say this because in our African setting, mothers, fathers and sometimes other relatives sleep next to young babies all the time. I would not equate the act of sleeping next to a baby with, for instance, leaving a baby inside a house unattended with fire on. The latter scenario smacks of gross negligence.

The trial magistrate seemed somewhat emotional in the manner she handled this case and seemed to think that the appellant ought to have been charged with murder. She termed his actions as intentional. This is what she stated in her sentencing:

> **"As I have stated although the accused is charged with manslaughter it would appear that the killing of the child was intentional and with malice aforethought. His entire conduct in picking up the child from the mother moving about with him from house to house (as if in**

farewell) is highly suspect."

It is not for the court to fill up the gaps left by the prosecution. It is the prosecution that bears the heavy burden of proving any unlawful act or omission on the part of the appellant. Although the appellant did not say much in defence, he was within his rights. He could have as well remained silent. This would not have implied that he is guilty. He termed the incident as accidental and asked for forgiveness.

To lose a child is painful but emotions cannot be allowed to cloud a judicial officer's higher duty of ensuring that the rights of an accused person as well as those of the victim are taken into account.

It is my conclusion that although the appellant claims that the case was framed up by PW1 due to a grudge, this did not come out during the trial. He did not cross examine PW1 on this issue. While I find there are contradictions in the evidence of PW1 and PW2, these do not go to the root of the case that the appellant lay on the baby perhaps causing his death. I say perhaps because I have already addressed my mind to the inconclusive evidence of death for failure of the doctor to testify. It is my considered view that the trial magistrate misdirected her mind in arriving at a conclusion that the appellant was guilty. I hold the view that the threshold established by the Bateman case above was not reached. This was an unfortunate accident and short of the prosecution proving that the appellant guilty of unlawful act or omission, this court cannot uphold the conviction.

I find the evidence lacking to prove the appellant guilty of manslaughter. Consequently, I hereby quash the conviction, set aside the sentence and order that the appellant be set free forthwith unless for any other lawful reason he is held in custody. It is so ordered.

Dated, signed and delivered this 17th day of September 2014.

S. N. MUTUKU

JDUGE