



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.102 OF 2013

BETWEEN

THOMAS MOGERE SONGOROAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from original conviction and sentence in Kisii CMC Criminal Case NO.1674 of 2009 dated 20th September 2013 – Hon. A.C.N. Onginjo, CM)

JUDGMENT

1. The appellant herein Thomas Mong'ere Songoro was the accused in the Chief Magistrate's Court at Kisii Criminal Case No.1674 of 2009. He was charged with Manslaughter contrary to **Section 202** as read with **Section 203** of the **Penal Code**, the particulars of the charge being that on the 20th day of July, 2009 at Kiogoro Sub Location in Central Kisii District within Nyanza Province, he unlawfully killed Patrick Onsare Mong'ere.
2. He pleaded not guilty to the charges and the case proceeded to trial.
3. PW1 was Sarah Kwamboka Onsare, the deceased's wife. She told the court that on 26th July 2009 around 12 noon, she was outside her house when the appellant approached the deceased and herself. The deceased and PW1 were threshing maize cobs. The appellant then told deceased that he had been sent by one Emelda. Appellant then asked deceased in remission to go and beat her (PW1's) children who were by then in church.
4. Deceased then told off appellant and appellant left. Afterwards, while in the company of deceased to the house of one Kennedy Moracha where the said children slept, PW1 met appellant running towards the opposite direction. Shortly thereafter, she heard the deceased screaming and calling her name while lamenting that the person he had refused permission to go to beat the children had other motives. He screamed for about 2 minutes after she had met with appellant.
5. PW1 proceeded to the scene and found both deceased and appellant fighting. They pulled down each other as they tagged each other and wrestled. She then went to deceased's rescue and helped him to his feet. Meanwhile, the appellant rose up and took off. As she helped deceased to his feet, she realized that blood was oozing from his mouth. She proceeded to place him on the ground and screamed as one of the appellant's brothers Samuel Mong'ere came and chased her away. The said Samuel Mong'ere then chased

her and told her not to say anything as her husband was alive. PW1 revealed to the court that deceased and appellant were brothers.

6. On cross examination by Mr. Ochwangi for the appellant, PW1 stated that:-

- *There were no differences between deceased and appellant prior to the incident.*
- *She was the only eye witness to the fight between the deceased and appellant.*
- *Both appellant and deceased fell into a deep trench.*
- *Samuel Mong'ere and OCS took deceased to hospital.*
- *She knew while still at the scene that deceased had died.*

7. PW2 was Josephat Gwaro from Kiogoro, a standard 5 pupil and neighbour to the deceased. He is grandson to both accused and deceased. He told the court that on 16th July 2009 at around noon, he was herding cattle in his grand father's shamba when he saw the deceased passing by from his home closely followed by appellant. Appellant then got hold of deceased and they both fell down. Appellant then got up and ran towards his house. Many people then arrived at the scene and took deceased. As he witnessed this, he was about 15 meters away. However, he did not hear any conversation between the deceased and appellant.

8. On cross examination, he corroborated PW1's testimony that she (PW1) helped deceased to his feet but she realized he was dead; deceased was old and he heard PW1 saying the deceased was dead.

9. PW3 Samuel Gwaro Mong'ere told the court that on 26th July 2009 at noon, he was at his boma when he heard screams. He then got up, went to the scene and found PW1 trying to assist the deceased to get up. He and 2 others jointly proceeded to take deceased to hospital but he was declared dead upon arrival .

10. PW4 was Alfred Gwaro Bosire. He told the court that on 29th July 2009, at around 1.30 p.m. He was at Crista Marianne Hospital identifying the body of deceased for the purpose of a postmortem examination which he attended. After postmortem they took the body home for burial.

11. PW5 was No.65904, PC Amos Manyi of Kisii police station. He recalled that on 26th July 2009 at 3 p.m., he accompanied one IP Cheruiyot, PC Koech and PC Hussein to Kiogoro Location, Matongo hill, to visit the deceased murder scene. On arrival, they were shown a damaged live hedge where deceased had fallen after allegedly fighting with appellant. By then the body of deceased had been removed from the scene.

12. PW5 stated further that on being shown the body, he noted it had bruises on forehead. He then took the appellant to the station and booked him for murder. On 27th July 2009 he accompanied CPL Odero of scene of crime to Kisii Level 5 morgue and photographed the body of deceased. Furthermore, he witnessed postmortem examination on deceased at Christa Marianne Hospital morgue where body had been transferred to. He produced the postmortem report which was marked as **"PMF-1"** and revealed that appellant was later escorted to the Provincial Psychiatrist before being charged. He produced the mental assessment report which was marked as PMF1-2. PW5 informed the court that the appellant surrendered himself at Kiogoro AP Camp.

13. On cross examination by Mr. Ochwangi, PW5 revealed the following:-

- *That the appellant did not confess to the killing but admitted that he and deceased fought.*
- *He did not find the weapon but appellant was present when he viewed body of deceased at Kisii Level 5 Hospital.*

14. On re-examination PW5 confirmed that he found signs of struggle at the scene as part of a hedge had been destroyed.

15. PW6 was NO.209780 AP IP. Fred Oeri of DC's office Kenya. He told the court that on 26th July

2009 around noon while he was at Kiogoro D.O.'s office where he was the in-charge, he heard someone's screams from the market place. He mobilized his officers but as he left the office, one young man came running towards him. The young man was the appellant. The appellant stopped and informed him that he was the one who was being pursued by the mob. PW6 proceeded to the scene of commotion .

16. PW6 testified that when he arrived at the scene, members of the public stopped the commotion, but he saw someone lying down on the ground but the appellant told him that the one lying down was his brother. Someone who identified himself as deceased's parent said that the one lying down was dead. PW6 then immediately arrested the appellant as a suspect and visited the home of the deceased where incident had taken place.

17. Further, PW6 confirmed that deceased was lying along the road; that he did not observe any physical injuries on the body of the deceased. PW6 identified the appellant in the dock as the young man he had arrested.

18. After PW6 testified, the trial in the lower court was marred by several adjournment at the instigation of the prosecution. After being granted a last adjournment and still not availing the witnesses as promised, the prosecution was forced to close its case.

19. After carefully considering the evidence on record, the learned trial court reached the conclusion that the prosecution had established a *prima facie* case against the appellant and proceeded to put the appellant on his defence. Before the appellant gave his defence, the trial magistrate who presided over the prosecution's case became indisposed, thus the matter was taken over by another court pursuant to **Section 200** of the **Criminal Procedure Code**. Upon compliance with the said **Section 200** of the **Criminal Procedure Code**, the appellant opted to proceed with the case from where it had reached. The matter was then set down for defence hearing before the Chief Magistrate, Hon. A.C.A. Onginjo.

20. The appellant in his defence gave an unsworn statement and called no witnesses. He admitted that the deceased was his elder brother but denied the allegation that he killed him. Instead, he contended that the deceased had diabetes (a terminal ailment) from which he could frequently faint and had to be taken to hospital where he could recover.

21. He further contended that on the material day, he was in his house when he heard PW1 screaming. He rushed to the scene and found that deceased had fainted. As he was the first to arrive, his other brother William Momanyi Mong'ere and other neighbours came and helped him rush deceased to Kisii Level 5 Hospital. On arrival at the hospital, the doctors started attending to him but after a short while, they were informed that the deceased had died.

22. The appellant also stated that he was among those who made funeral arrangements and removed the body from mortuary for burial. He contended that his arrest was as a result of malice by neighbours because of a dispute over land and that he was at home one morning when police came alleging he was the one who killed the deceased. Lastly, he termed the charges facing him as false and prayed that the court dismisses them.

23. In her judgment, the learned trial magistrate found that the appellant indeed caused the death of the deceased and sentenced him to serve 5 years in prison.

24. Being aggrieved with both conviction and sentence, the appellant preferred an appeal to this court. In his petition of appeal dated 3rd October 2013, the appellant through the firm of Maroro & Omariba Associates Advocates has advanced 6 grounds of appeal namely:-

1. *The learned trial magistrate erred in law and fact in convicting the appellant against the evidence of the witnesses.*
2. *The learned trial magistrate erred in law and fact in not taking into consideration the evidence of the appellant.*
3. *The learned trial magistrate erred in law and fact in convicting the appellant based on hearsay*

testimonies.

4. *The learned trial magistrate erred in law and fact by not taking into consideration the time the case took.*
5. *The learned trial magistrate sentence was manifestly excessive considering the circumstances. (sic)*
6. *The trial magistrate did not ask for a report on the conduct of the appellant.*

25. The appellant prays that the appeal be allowed, the conviction be quashed and the sentence set aside so that the appellant is set free.

26. When the appeal came before me on 7th May 2014, Mr. Anyona for the appellant submitted that even though a postmortem was done, the same was not produced as evidence. He further submitted that reference to the postmortem report as **PMF1-1** is not sufficient without the production of the report. Further that the pathologist should have produced the postmortem report and proceeded to give the cause of death. Counsel submitted that failure to produce a post postmortem report was a serious omission especially considering the nature of the offence.

27. In reference to the trial court's judgment, Mr. Anyona submitted that the trial court did not analyze the evidence nor did it consider the cause of death, and that for this reason, both conviction and sentence should not be allowed to stand. Regarding the appellant's defence, he submitted that it was likely that deceased died from an attack of diabetes. He further submitted that if it were true that the deceased died from assault by appellant then the sentence of five (5) years imprisonment was excessive.

28. Thirdly, with reference to the lower court file, he submitted that the court record does not contain copy of original postmortem report and the P3 form on mental status of the appellant thus mere reference to these reports by PW5 without producing the same did not amount to the documents being produced. In conclusion, Mr. Anyona submitted that there was no corroboration of evidence and that being the case, he prayed that conviction be quashed and sentence be set aside.

29. The appeal was opposed by the Learned Prosecution Counsel, Miss Mbelete. In opposing and responding to the appeal, she submitted that if indeed appellant knew that deceased suffered from diabetes, he must be held responsible for the deceased's death. That the Appellant's entire defence contradicts the evidence adduced by the prosecution and on sentence she submitted that the same was not excessive in the circumstances as PW1 lost her husband because of the appellant's illegal acts. Lastly, she prayed that the appeal be dismissed.

30. Mr. Anyona in reply submitted that it was not correct for the State to assert that the appellant caused the death of deceased when nowhere in the court records such a suggestion is made. That in the absence of the postmortem report in evidence, the conviction was unsafe and ought to be quashed.

31. This appeal before me is a first appeal. In this regard my duty as the first appellate court is to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter, remembering only that I do not have the privilege of seeing and hearing the witnesses who testified before the trial court. See generally **Pandya -vs- R[1957] E.A 336; Okeno -vs- Republic [1972] E.A 32 and Selle & another -vs- Associated Motor Boat Co. Ltd. & others [1970] E.A 123.**

32. I have now considered and fully evaluated all the evidence adduced during the trial court. The following are the issues to be determined by this court:-

- *Was there a fight between deceased and appellant before deceased's death?*
- *Did the prosecution prove beyond reasonable doubt that the death of the deceased was caused by the appellant?*

33. In order for this court to answer the above questions, I need to consider the evidence adduced by the prosecution witnesses.

34. PW1 who said she witnessed the fight between the appellant and the deceased said the following in part of her evidence in chief:-

“Shortly I heard deceased screaming and calling my name. He was saying the person he had refused to beat the children had other motives. He screamed for about 2 minutes. It was after about 2-3 minutes after I met the accused.

I rushed to the scene and found the deceased and accused fighting. I saw deceased and accused pulling down as they tagged at each other and wrestled. I went to deceased's rescue and helped him to his feet. The accused rose up and took off. As I was helping the deceased to get up, I reached there and saw blood oozing from his mouth. I placed him on the ground and screamed and one of the accused's brother Samuel Mogere came and chased me away.”

35. On cross examination she testified that:-

“I could see blood oozing from the deceased's mouth. I noticed that the deceased had lost balance and fell.

I further realized he was dead at that point I cannot tell how old he was. I recorded statement with the police. I stated inter alia that I heard the deceased saying that his brother who had gone ahead of him had started assaulting him (the deceased). When I got to the scene, I heard the deceased asking the the accused “It is me you have beaten this way?”

36. PW1's testimony was corroborated by the testimony of PW2, a standard 5 pupil and grand child to the deceased who stated:-

“I was herding cattle in my grand father's shamba. When I saw one Onsare, the deceased passing by from his home. I did not know where he was going. I saw one Thomas, the accused following the deceased. The accused got hold of the deceased and then fell down. The accused got up and ran towards his house. Then many people came to the scene and took the deceased.”

37. From the testimonies of both PW1 and PW2, there is no doubt in my mind that the appellant and the deceased were together, that there was a scuffle between them before the deceased fell and the appellant ran away to his house.

38. Furthermore, PW6 attested to the fact that the appellant stormed into his (PW6's) office in a frantic way and informed him that he was the one who was being pursued by the mob as he and deceased had been fighting prior to the death of deceased.

39. In addition, PW5 who visited the scene of crime attested to the fact that at the scene, there was a damaged hedge where deceased person had fallen through after allegedly fighting with the appellant.

40. All in all, the above evidence which was not rebutted by the appellant throws out of the window the appellant's contention that he was not at the scene of crime and only heard screams and came out of his house only to find that the deceased had fainted and was lying on the ground.

41. Now I turn to the more contentious part of this appeal which is whether or not the prosecution presented evidence before the trial court to prove beyond all reasonable doubt that the actions of the appellant caused the death of the deceased.

42. I have looked at the lower court record and according to the evidence of PW4, the witness identified the body of the deceased for the purpose of a postmortem examination. His evidence (PW4) was corroborated by that of PW5 who stated that he witnessed the postmortem examination on deceased body

at Christa Marianne Hospital. PW5 then proceeds to produce the said postmortem report for identification which was marked as **PMF1-1**. It is the prosecution's failure to produce the postmortem report as an exhibit that forms the cornerstone of Mr. Anyona's oral submission in opposing the appellant's conviction and sentence.

43. The said postmortem report does not even seem to exist on the the trial court's file. The judgment of the trial court clearly refers to the postmortem report as **PMF1-1** but the doctor who conducted the postmortem examination did not adduce evidence on the same nor did it come out clearly from the judgment of the trial court what caused the death of the deceased.

44. Chitembwe J sitting at the High Court in Kakamega in **Republic -vs- Aggrey Isiaho [2014] e KLR** while facing similar predicament held the view that:-

“Although no postmortem was produced, there is no evidence that the deceased is still alive or that there was no such a person in the names of the deceased. The fact that the postmortem was not produced cannot disprove the other evidence to the effect that the deceased died and a postmortem was conducted on his body. The mother of the deceased testified that after the postmortem they were given the body for burial. Ignoring all that evidence and making a conclusion that the absence of the postmortem report disproves the allegation of death is tantamount to applying the law mechanically. The main question is, where is the deceased? The answer is he died, a postmortem was conducted on his body, people saw his body, the body was released to his relatives who proceeded to bury it. That is the fact which cannot be refuted.”

45. In the instant case, although the postmortem report would have given the doctor's opinion of the cause of death of the deceased, the evidence on record shows that the deceased was alive and was not physically sick on the material day. PW1 saw the deceased being taken away by the accused. The investigating officer testified that the deceased fought with the appellant. It is clear therefore that the deceased was alive and well before the fight with the appellant. PW1 and PW2 witnessed the fight. As a result of the fight, the deceased fell into a hedge and sustained injuries. The defence evidence is to the effect that the appellant was arrested while preparing his food and was told to go and assist in carrying a body, which turned out to be that of his uncle the deceased. It is clear from the prosecution evidence that the appellant went on his own to report the matter at the AP Camp and thereafter he was arrested. PW1 saw the appellant assaulting the deceased. The defence evidence does not raise any doubt on the prosecution evidence.

46. I have no doubt in my mind that the deceased died out of injuries sustained after the two fought. The appellant's contention that the deceased died because of diabetes is far fetched. The prosecution thus proved beyond doubt that the death of the deceased resulted from the fight. The appellant was therefore correctly convicted of the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code**.

47. I am also aware of the case of **Republic -vs- Cheya & another [1973] E.A. 500** in which the learned judge rendered himself thus:-

“.....However the absence of medical evidence to death and the cause of it is not fatal because as I said at that stage postmortem reports are evidence of two things, the fact of death and cause of death. Therefore it was open to the prosecution to produce and rely on other evidence to establish these facts.”

48. Although the **Cheya case** was decided by a court of concurrent jurisdiction, namely the High Court of Tanzania, and is therefore only of persuasive authority, I am satisfied that I can safely rely on it. Although the court did not expressly say so, this was the same principle applied by Chitembwe J in the Aggrey Isiaho case where eye witnesses have witnessed a fight which results in the death of a person whose body is identified by a brother during postmortem and the brother and other relatives are given the body of the deceased, there cannot be doubt that the deceased died as a result of the unlawful acts of the

appellant.

49. In any event, this is not a case based on suspicion. It is a case based on facts that were witnessed by two of the witnesses. I therefore reject the defence contention that the appeal herein ought to be allowed because of failure by the prosecution to produce the post mortem report as an exhibit.

50. I now turn to the final question as to whether the sentence meted out to the appellant was excessive in the circumstances. **Section 205** provides that “**any person who commits the felony of manslaughter is liable to imprisonment for life**”. The appellant was sentenced to five (5) years imprisonment.

51. It is now established that an appellate court can only interfere with sentence imposed by a trial court unless it was evident that the judge acted upon some wrong principle or over looked some material facts. See **Omuse -vs- Republic [2009] KLR 214**. Thus, an appellate court is not entitled to alter sentence on appeal unless convinced that the trial court erred in principle in imposing the sentence or that the sentence was so manifestly harsh or excessive that it was evident that the trial court erred. See **Amolo -vs- Republic [1991] KLR 392**.

52. Applying the above principles to the instant case, I do not find any justification to interfere with the sentence of five (5) years. There is no evidence that the learned trial magistrate either acted on wrong principles or over looked some material facts. Nor do I find that the sentence was manifestly harsh or excessive in the circumstances.

53. Accordingly the appeal be and is hereby dismissed in its entirety. R/A to Court of Appeal within 14 days from today.

Delivered, signed and dated at Kisii on 23rd day of October, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Majale (present) for Respondent

Present in person for Appellant

Mr. Bibu - Court Assistant