



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Criminal Appeal 41 of 2012**

**MELKIO ONYANGO NYABALA.....APEPLLLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence in Rongo SRM's court by*

*Hon. Z. Nyakundi, SRM, dated 7th October, 2010 in criminal case No.160 of 2010)*

**JUDGMENT**

1. The appellant MELKIO ONYANGO NYABALA was convicted by Senior Resident Magistrate's Court at Rongo (Hon. Z.J. Nyakundi, SRM) of the offence of manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code**.
2. Particulars of the offence are that on the 15<sup>th</sup> December 2009 at Awendo Sare Estate in Rongo District within Nyanza Province the appellant unlawfully killed JOSEPHINE AWUOR. The prosecution called a total of four (4) witnesses to support its case.
3. PW1 was PAUL OJWANG OGWENO an Assistant Chief of the area. He testified that on the 16<sup>th</sup> December 2009 at 18.00 hours he was at Awendo town within his work area when he was approached by members of the public who informed him that one Nyabala had killed his wife and was ready to escape.
4. On receiving the said report, PW1 reported the matter to the area D.O.'s office and they started looking for the suspect. They later arrested the appellant at the mortuary where he had gone to dump the body. The appellant was alone at the mortuary where the body of the deceased was lying on the floor with the neck twisted. He was later taken to the police station. PW1 says that he knew the appellant before the incident in question.
5. On cross examination, PW1 confirmed that he knew the appellant as he is a resident within his (PW1's) area of jurisdiction and when he went to the mortuary he found the appellant carrying HIV drugs. He also found the body of the deceased.
6. PW2, HEZRON PANGA a fundi at Awendo told the court that on 16<sup>th</sup> December 2009 at 10.00 a.m. he got a report from a person by the name Jagem that a person had been killed in one of the houses to which he (PW2) was an agent. He went to the place and found that the husband of the deceased had taken her body to the mortuary. Inside the house, PW2 found the sister of the deceased. PW2 knew the appellant as a jua kali person. PW2 stated further that the deceased was taken to hospital by the appellant.

7. On cross examination, PW2 confirmed that he knew the appellant before though he did not know his name. PW2 also stated that he did not know anything about the case.
8. PW3 No. 07206 ZACHARIA KIMSOP told the court that on the 16<sup>th</sup> December 2009 he was at Awendo police station when he was informed by the Assistant chief (PW1) that the appellant was found at Rapcom Mortuary trying to dispose the body of the deceased. PW3 together with the reportee and other Officers then went to the said mortuary where they saw the deceased's body. The appellant had already been arrested by Administration Police. On investigations they found that the appellant had differences with the deceased regarding the hospital from which they would get their ARV's, because whereas the deceased preferred to get her ARV's from Migori, the appellant preferred Awendo. It was PW3's testimony that the body of the deceased was strangled leading to her death.
9. At the mortuary a post mortem examination was performed on the body of the deceased and the postmortem form filled (**MF1P1**). PW3 subsequently charged the appellant. He stated that he filled the P3 form in respect of the mental assessment of the appellant who was certified fit to stand trial. The P3 form (**MF1P3**) was filled by Dr. Oyier Emmanuel. PW3 said that they did not recover anything from the scene.
10. PW4 DR. EMMANUEL ODHIAMBO OYIER, who was stationed at Awendo District Hospital told the court that on the 27<sup>th</sup> December 2009 at 3.45 p.m. he conducted a postmortem examination on the body of JOSEPHINE AWOUR at RAPCOM HOSPITAL. Apart from his evidence touching on the clothing, nutrition and height of the deceased, Dr. Oyier said that the deceased's age was 30 years. Dr. Oyier testified that on examination he found rigor mortis and liver mortis and that the body of the deceased had been dead for 5 days. On external appearance Dr. Oyier said that there was presence of blue colour, mild pallor, and bruise in the anterior part of the neck which was warbling (*sic*). That the deceased's lungs were cyanosed but the heart was normal. The doctor said that whereas there was food in the stomach, the intestines were normal but there was cervical fracture. The spinal cord was damaged. He signed the postmortem report and produced the same as prosecution's exhibit 1.
11. Dr. Oyier also said he examined the appellant to confirm if he (appellant) was fit to stand trial. He confirmed that from the examination, the appellant was fit to stand trial. The P3 form on the appellant's mental status was produced as **P Exhibit 2**.
12. On cross examination PW4 stated that the body was properly identified before postmortem was done and further that at the time of the post mortem, the deceased had not been buried. The prosecution closed its case.
13. After having carefully considered the prosecution's case the learned Senior Resident Magistrate found that the accused had a case to answer and therefore put him on his defence. **Section 211** of the **Criminal Procedure Code** was explained to the appellant who elected to give sworn statement but called no witnesses.
14. The appellant stated that the deceased was his wife and that after she died he took her body to RAPCOM. He also testified that she had been sick for some time. He stated further that he was arrested by someone who looked like the chief and taken to the D.O.'s office and later to the police station and up to the moment he was giving his testimony he did not know why he was arrested.
15. On cross examination the appellant reiterated that his wife was sick and that they had been using HIV drugs. He stated that the deceased suffered from backache; and that when she fell sick he told her sister that the deceased was sick. The appellant also stated that he was with his minor children when he took the deceased to the mortuary, though he was unable to call either his sister-in-law or any of his children as witnesses.
16. In his judgment the trial court found that that the deceased person was strangled and had died due to strangulation, and for the deceased to sustain a fracture of the cervical bone, some force must have been applied on her.

17. The trial court also found that the appellant was the one with the deceased person at the time of her death and that in the circumstances; the only reasonable inference was that it was the appellant who strangled the deceased and thereby caused the deceased's death.
18. The trial court in its judgment further stated that the appellant conducted himself in a suspicious manner because if he had indeed found out that the deceased had died in unclear circumstances, he should have first called the police which he failed to do. It was the trial court's considered opinion that the appellant was concealing the deceased's death by attempting to take the body to the mortuary all by himself. The trial court concluded that the prosecution had proved its case beyond any reasonable doubt to warrant a conviction of the offence of manslaughter as charged.
19. Upon hearing and considering the appellant's mitigation the trial court went ahead and sentenced him to 7 years imprisonment with the right of appeal within 14 days.
20. Being dissatisfied with the conviction and sentence herein the appellant exercised his right of appeal by filing the present appeal after leave was granted to him to file the same out of time and as a pauper.
21. The grounds of appeal are contained in a document entitled "**submission**". The appellant contends that on the 15<sup>th</sup> December 2009 he was taken to Awendo police station where he was charged after two (2) months and 15 days which is unlawful.
22. He further contends at paragraph 2 of his "submission" that PW1 gave wrong information when he said that accused wanted to escape whereas he never escaped. He submits that it is not true that he was arrested while he was alone but he was with his two children and the deceased's sister. The appellant also says in his submission that PW2 who did not even know his name was forced by the Assistant Chief (PW1) to make false information in court. He further says that PW2 knew nothing about the case.
23. It is also the appellant's case that PW3 deceived the court by stating they were at RAPCOM mortuary on the 16<sup>th</sup> December 2009 and yet it was the 15<sup>th</sup> December 2009. He submits that all the evidence purporting to link him to the manslaughter charges was not brought out as no one witnessed directly what had transpired, and further that no clan members were called to testify. He also said that during the post mortem examination, no member of either his family or that of the deceased was present.
24. The appeal was opposed by Mr. Mutuku, counsel for the Director of Public Prosecutions. In his oral submissions he supported the conviction of the appellant on the charge of manslaughter. Counsel submitted that the deceased was the appellant's wife and that on the 15<sup>th</sup> December 2009 the appellant was seen taking the body of the deceased to a mortuary at Rapcom in Awendo Town, that since he had not informed anyone about the death of the deceased, his act raised suspicion. It was counsel's further submissions that when PW1 and PW2 went to find out what was happening, the appellant informed them that the deceased had died. The two not being satisfied with the answer reported the matter to the police.
25. Counsel stated further that a post mortem examination conducted by PW4 revealed that the cause of death was strangulation of neck and fracture of cervical spine. It was also submitted that the investigations revealed that prior to the deceased's death the appellant and the deceased had quarreled as to the place where each was to get ARV's. Counsel further submitted that though nobody witnessed the incident; the circumstantial evidence shows that it was only the appellant who was with the deceased and therefore he had the singular opportunity to cause the death of the deceased. It was also submitted that the manner in which the appellant acted after the deceased died was suspect by taking the deceased to the mortuary all by himself. It was counsel's further submission that the trial court was right in inferring that it was the appellant who killed the deceased.
26. In his defence appellant only stated that the deceased was sick. He did not however explain the cause of the injuries found on the deceased. Counsel for the Respondent submitted that the circumstantial evidence was sufficient to support the charge of manslaughter.
27. On sentence counsel submits that the appellant got only 7 years imprisonment as opposed to life

imprisonment. Counsel contended that the deceased did not deserve to die even if she was sick, and that the seven (7) years was deserved. He urged the court to dismiss the appeal on both conviction and sentence.

28. As this is a first appeal the court must reconsider and evaluate the evidence afresh and make its own findings as was stated in **Okeno –vs- Republic [1972] EA 32** and subsequent judgments of this court.

29. From the charge sheet the appellant was arrested on the 16<sup>th</sup> December 2009 and was brought to court on the 1<sup>st</sup> March 2010 which was about 2<sup>1/2</sup> months after his arrest. No reason has been given by the prosecution as to why the accused person had to be kept in custody for all that period. **Articles 49 and 50** of the **Constitution** are very clear on the rights of an arrested person and to fair hearing. I have considered this appeal and it is my view that the appellant was made to stay in custody for a long time for no fault of his own. Nonetheless, this fact alone does not mean that the appellant should be acquitted of the offence if there is sufficient evidence to support the charge of manslaughter.

30. I have carefully reconsidered and evaluated the evidence afresh and I am satisfied that the circumstances prevailing prior to the death of the deceased gave the appellant the singular opportunity to kill the deceased. And he did so by strangling the deceased, a condition which PW1 described as the deceased having a twisted neck. Although the deceased was sick, the injuries that were found on her could not have been inflicted by herself. It is also clear that the appellant's conduct of taking the body to the mortuary all by himself raised suspicion as to how the deceased died. My conclusion, like that of the trial court is that it is the appellant who strangled the deceased, breaking the bones of her neck and also the spinal cord. For the above reasons, the appeal on conviction has no merit.

31. As regards the appeal on sentence, I do not think that the appellant has demonstrated to this court the need for this court to interfere with the same. See generally **Diego –vs- Republic [1985] KLR 621** and **Dismas –vs- Republic [1984] KLR 634**.

32. In the result, the appeal on both conviction and sentence is dismissed.

33. I now turn back to the issue of violation of the appellant's constitutional rights. The appellant was kept in custody for upwards of two (2) months and for this, I think he is entitled to damages. I accordingly award him the sum of Kshs. 50,000/= as compensation for the long and unexplained incarceration. R/A within 14 days from today.

34. It is so ordered.

**Dated and delivered at Kisii this 31<sup>st</sup> day of January, 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Present in person for Appellant

Mr. Shabola (present) for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE**