



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 97, 98, 99 & 100 of 2012

NASHON MANYI OMULUBI 1ST APPELLANT

EVANS OMULUBI 2ND APPELLANT

WALTER AMBUKA 3RD APPELLANT

WILLIAM OTARO 4TH APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from an Inquest No. 3 of 2011[L. N. KINIALE, RM] in Butere Senior Resident Magistrate's Court)

J U D G M E N T

The Butere Resident Magistrate conducted an inquiry into the death of **WILLIAM NASENGO ASHIEMBA** who died on the 5.2.2011. In her ruling the magistrate recommended that **NAHASHON MANYI OMULUBI, WALTER AMBUKA, WILLIAM OTARO** and **EVANS OMULUBI** be charged with the murder of the deceased. That ruling resulted to the filing of this appeal. The appellants in their respective petitions of appeal contend that the ingredients of murder were not proved, there was no sufficient evidence that would warrant to have the appellants charged with the offence, the trial court did not give the appellants the opportunity to be heard, the proceedings were irregular and the burden of proof was shifted to the appellants.

Mrs. Muleshe, counsel for the appellants submitted that although the trial court found that the ingredients of murder had been established the same was not the case as the ingredient of mensrea is missing. There was no evidence that the appellants committed the offence. The deceased was caught stealing a cow and he was killed by a mob of people who went to the scene. The offence occurred at night and the prosecution evidence was that there was torch light. Three suspects were called to the court and that was irregular as PW1 had already testified. The ruling did not give any reasons. Mr. Orinda, state counsel, conceded to the appeal. Counsel submitted that most of the witnesses were members of the same family and that the evidence on record was not sufficient to sustain a charge of murder. Under **Section**

385 of the Criminal Procedure Code, magistrate court are empowered to hold inquests. **Section 387(3)** of **Cap 75** states as follows:-

387(3)

(1)

(2)

(3) If before or at the termination of the inquiry the magistrate is of the opinion that the commission by some known person or persons of an offence has been disclosed, he shall issue a summons or warrant for his or their arrest, or take such other steps as may be necessary to secure his or their attendance to answer the charge: and on the attendance of the person or persons the magistrate shall commence the inquiry de novo and shall proceed as if he had taken cognizance of an offence.

From the above section it is evident that the magistrate who is conducting an inquest is empowered to summon anybody who is adversely mentioned in an inquest and make him answer to those allegations. I have gone through the evidence before the trial magistrate. Fourteen witnesses testified. William Otaro, the 4th appellant testified as PW11. The other appellants did not testify. The appellants contend that they were not given an opportunity to defend themselves and further that the ingredient of mensrea is missing. The prosecution evidence does establish that **PW10 EMILY OMWAKA** heard her cows running. This was the night of 5.2.2011. She went out and saw two cows were missing. She flashed her torch and saw somebody leading the cows. She screamed and many people went to the scene and the suspect was assaulted and he died. She did not identify anyone as there were many people.

From the prosecution evidence it is clear that the deceased was assaulted by many people. Some of the prosecution witnesses testified that they saw the appellants assaulting the deceased. It is clear that an offence was committed as those who assaulted the deceased took the law into their hands. It is not established that it is the appellants who assaulted the deceased. That can only be established by a trial court. The magistrate merely conducted an inquest and her decision is not a judgment that can be said to have committed the appellants or that it held the appellants guilty of murder. Indeed the trial magistrate could not have tried the appellants with the offence of murder as it lacked jurisdiction to do so. The only misgiving of the trial court is that it did not call upon the other appellants to testify before it. I have also noted from the record of the trial court that the witnesses simply testified and they were not cross-examined by anybody. It would have been advisable if the trial court had given notice to those who were suspected of having committed an offence to appear in court with their counsels if they so wished so that they could have cross-examined the witnesses.

I do agree with the submissions of the appellants' counsel that the ingredient of mensrea is missing. However, I do find that those who assaulted the deceased could have caused his death without their intention, and it is only fair that those who were suspected by the police to have caused the deceased's death be charged with the offence of manslaughter before a subordinate court. The investigating police station shall be at liberty to conduct further investigations and decided on who to charge including the appellants herein. The fact that most of the witnesses are from one family does not matter.

In the end, the appeal herein partially succeeds and the ruling made by the Butere Court is hereby varied. The OCS Butere Police station is hereby directed to conduct further investigations and charge all the suspects who caused the deceased's death with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. Before that is done the appellant shall be at liberty.

Delivered, dated and signed at Kakamega this 7th day of February, 2013

SAID J. CHITEMBWE
J U D G E