**REPUBLIC OF KENYA**

**High Court at Embu**

**Criminal Appeal 160 of 2012**

ROSE JACKLINE KAGENDO.....1ST APPELLANT

OBADIAH NJERU NYAGA Alias SUBAREA.....2ND APPELLANT

JOHN MWANIKI NJERU.....3RD APPELLANT

EPHANTUS IRERI Alias MWALIMU.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(Being an Appeal from the Sentence and Conviction of M.W. WACHIRA Chief Magistrate Embu in Criminal Case No. 1850 of 2009 on 17th October 2012)***

**J U D G M E N T**

ROSE JACKLINE KAGENDO, OBADIAH NJERU NYAGA, JOHN MWANIKI NJERU and EPHANTUS IRERI Alias MWALIMU hereinafter referred to as the 1st, 2nd, 3rd and 4th appellants were charged with the offence of **Manslaughter contrary to Section202 as read with Section 205 of the Penal Code.** The particulars as stated in the charge sheet were as follows:-

***On the 2nd day of June, 2009 in Nembure Sub-location in Embu District within Eastern Province, jointly with others not before court, unlawfully killed JAMES NJAGI.***

They pleaded not guilty and the matter proceeded to full hearing. They were found guilty and convicted each sentenced to life imprisonment. And being aggrieved by the judgment have appealed against both conviction and sentence raising the following grounds:-

1. ***The learned Chief Magistrate erred in law and in fact by convicting the appellants when the prosecution's evidence was full of contradictions.***

2. ***The learned Chief Magistrate erred in law and in fact by convicting the them when the prosecution's evidence cast a lot of doubts as to who beat the deceased.***

3. ***The learned Chief Magistrate erred in law and in fact by failing to find that the prosecution had not proved their case beyond reasonable doubt.***

***4. The learned Chief Magistrate erred in law and in fact in failing to find that the alleged weapon***

***they used to beat the deceased was not produced as an exhibit before the trial court.***

5 ***The learned Chief Magistrate erred in law and in fact by sentencing them to life imprisonment which sentence was harsh and excessive in the circumstances.***

6. ***The learned Chief Magistrate erred in law and in fact by convicting them on insufficient evidence.***

7. ***The learned Chief Magistrate erred in law and in fact by dismissing their defence that they did not commit the alleged offence.***

When the appeal came for hearing, Ms. Muthoni appearing for the 1st and 4th appellants submitted by arguing all the grounds together that the prosecution case was full of contradictions. She cited the evidence of PW2, PW3, PW6, PW7 and PW8 on who beat who and what each of them did. And that PW8 said Accused 2 did not beat the deceased. She also submitted that it was not clear what kind of weapons were used as the witnesses gave different descriptions of the whips seen. She cited the cases of

1. ***MOKAYA VS REPUBLIC Mombasa HCRA NO. 49/2006***

2. ***DORCAS NDUKU & 2 OTHERS VS REPUBLIC Machakos Criminal Case No. 60/2008***

She further submitted that the learned trial magistrate disregarded the defences raised by the appellants. And that the defences of 1st and 4th appellant were not shaken. The appellants were members of community policing. They were first offenders and their mitigation was not considered as the sentence was too harsh. Ref.

1. ***HENRY KORIR VS REPUBLIC [2006] eKLR***

2. ***COURT OF APPEAL NAKURU HCRA NO. 163/2002 – PETER KORIR NGETICH VS REPUBLIC***

Both 2nd and 3rd appellants presented the court with written submissions. They have highlighted what they call major contradictions in the evidence of the prosecution witnesses. They also say they were only arrested and charged six (6) months after the alleged offence yet they had not disappeared to any other place.

The State through Ms. Macharia the learned state counsel opposed the appeal. She submitted that the appellants were identified by PW2, PW4 – PW8 as the people who beat the deceased to death. The 1st appellant said her miraa had been stolen and she called the other appellants. All appellants were members of the community policing. The witnesses knew them and there was no reason for them to lie against them. They had beaten the deceased from 1.30 p.m. to 4.00 p.m. when he died. DW6 had confirmed that the deceased had been beaten from the 1st appellant's home up to where he died. They used whips and sticks to inflict the injuries which were consistent with those inflicted by whips and sticks.

The appellants were members of the community policing and ought to have arrested the deceased if he had indeed stolen the miraa and berries she submitted. PW11 was called by the 1st appellant at 8.05 p.m. And told that the person who had stolen her miraa was being beaten by a mob and she wanted help. By this time the deceased had already died. So she was not being truthful. She dismissed their defence as not being genuine. They took the law in their own hands. She submitted that even if they did not beat the deceased they failed to seek help for him as he was beaten by the mob. They failed to preserve life. She said the sentence was not too harsh given the circumstances.

Ms. Muthoni further submitted that at page 31 – PW6 never said the appellants beat the deceased at 1st appellant's home. At page 48 lines 18-19 it was not clear when the deceased died. And that the mitigation of the appellants should be considered. There was no reason for the maximum sentence being given she said.

This being a 1st appeal this court has a duty to reconsider and reevaluate the evidence and arrive at its won decision. I am alive to the fact that I did not hear nor see the witnesses. Ref.

1. ***OKENO VS REPUBLIC [1972] EA 32***

2. ***NGUI VS REPUBLIC [1984] KLR 729***

3. ***SIMIYU VS REPUBLIC [2005] 193***

The prosecution called a total of 13 witnesses. The picture emerging from the evidence adduced by these witneses is that the deceased was employed by Victor Mwagire (PW1). On 2/6/2009 9 a.m. PW1 sent the deceased to his farm at Kathigiri to harvest coffee. This farm neighboured that of the 1st appellant. The 1st appellant then alleged that the deceased had stolen her miraa. This was around 1 p.m. She called her colleagues in the community policing group. These were her co-appellants.

They came and tied up the deceased with a rope and beat him with whips and sticks as they walked him to the market. At the shops they approached some shopkeepers to find out from them if the deceased had sold any miraa or berries. The beatings continued until the deceased succumbed to death at around 4.30 p.m. Dr. Silvester Mwangi (PW10) found the cause to be multiple abrasions, head, upper and lower limbs, posterior trunk, both knees etc.

The 1st appellant gave a sworn statement in her defence. She stated that on 2/6/2009 she found the deceased harvesting her miraa. On being asked what he was doing the deceased removed his had and she saw his rasta hair. He started unzipping his trouser ad walking towards her.

She took off screaming towards her home. She called the Subarea (2nd appellant) and informed him. Later 2nd appellant called to ask her to go and identify her miraa. She found it was the deceased whose hands had been tied and he had swollen face. She denied having any whip in his house. She further stated that PW3, PW4 and PW8 had grudges against her for various reasons. She was with her co-appellants as they walked with the deceased who requested to sit down and he died. They were headed to the police station.

The 2nd appellant also sworn stated that on 2/6/2009 1 p.m. - 2 p.m. the 1st appellant called him and told him of a person she found harvesting her miraa. She screamed and the man ran away. Later he saw a rowdy group. He armed himself with a whip to scare them. He then called 3rd appellant and informed him. When these people saw him they took off. He found the deceased having been beaten and was bleeding from nose, mouth, ears.

The 3rd and 4th appellants arrived. They called 1st appellant who later called the police. As they walked with the deceased to the police station he died. He too said he had a grudge with PW6, PW8 and another for having arrested them for traditional liqour brewing. PW8 is his uncle he said. He did not identify any of those beating the deceased.

The 3rd appellant also worn denied the charges. He gave similar evidence to that of 2nd appellant. He too said he had a grudge with Kariuki and PW6. The 4th appellant also denied the charge he gave similar evidence to that f 3rd appellant. The defence called 2 witnesses who said they saw the deceased being beaten by a group of people. They did not identify any of those beating the deceased.

The fact of death was not disputed. The cause of death was also not disputed. This can be seen from the evidence of the doctor (PW6) and the post mortem report (EXB.1).

I will consolidate all the grounds and deal with them together. PW1 who was the employer of the deceased sent him to the shamba which neighbours that of the 1st appellant. He used to work there and had been sent to harvest coffee berries. He stated tat at 11 a.m. He received a call from the 1st appellant who told him that the deceased had stolen her miraa which she had harvested. PW1 told her to calculate the loss and he would pay for it. Its later he got the report on the beating of the deceased by community

policing people.

PW4 was with the deceased who had come to get drinking water from her. The 1st appellant who is her sister in law then called the deceased and told him he was the one who used to steal her miraa and coffee berries. He denied. The 1st appellant called somebody on phone. Soon they were joined by 2nd appellant. The 3 left together i.e. 1st, 2nd appellants and the deceased.

PW7 who is an immediate neighbour to 1st appellant was in his house when he heard that somebody was stealing coffee. He went out and found the deceased and the 1st appellant. The 1st appellant then called 2nd appellant who came with the 3rd and 4th appellants. All the appellants left with the deceased after the 3rd appellant had tied him with a rope and they carried a bucket with coffee. As they took him away they beat the deceased with whips. PW2, PW3, PW5, PW6 and PW8 also echoed this evidence of PW7. They all said the four appellants were the ones beating the deceased.

This incident took place in broad daylight. Their evidence is that 1st-3rd appellants used whips to beat the deceased while 4th appellant used a stick. This evidence is os systematic. And the cause of the beating was the 1st appellant's report to the 2nd appellant. She gave a similar report to the deceased's employer (PW1). PW3 went further and told them the deceased had not stolen any miraa as she had sold him miraa that morning. They would hear none of this and instead continued to beat the deceased.

The appellants all denied the charges. They said community policing members they had grudges with literally all eye witnesses. They attributed this to their nature of work. Secondly they said they found the deceased being beaten.

It is not disputed that the appellants were members of community policing in their community. The alleged mob which beat the deceased were from this community. The appellants all denied knowing any of these mob members. Even their witnesses DW6 and DW7 when asked if they knew any of those who were beating the deceased they vehemently denied.

An issue was raised about the details of the whips used to beat the deceased as the witnesses said it is whips which were used to beat him. PW2 and PW3 stated that the whips were made of tyre material. PW8 said that the whip used by the 3rd appellant was made from rhinoceros skin. PW8 only referred to the whip the 3rd appellant was using. He did not refer to all whips being of rhinoceros skin as submitted by Ms. Muthoni.

I therefore do not find that to change the evidence that whips were used to assault the deceased. The fact that the weapons used to inflict the injuries were not recovered does not mean the deceased was not injured. The evidence adduced was so overwhelming and went beyond the defences of grudges raised by the appellants. There were no grudges. The 1st appellant had told the deceased in the hearing of PW4 at page 27 lines 5-6

***"She told him that no one ever steals there and she has called someone and he will never steal again".***

What clearly comes out of the evidence of the witnesses is that the 1st appellant caused the arrest of the deceased by the 2nd – 4th appellants. Instead of taking him to the police station for whatever offence he may have committed they decided to beat him. By the time they were calling the police to allegedly report his having been beaten by a mob they were just covering up. The reason being they had already beaten the deceased to death.

My finding therefore is that the learned trial magistrate considered well all the evidence on record (including the defences of the appellants) and arrived at the correct decision. The only other ground I would wish to deal with is ground 5. The appellants were each sentenced to life imprisonment. That is the sentence provided for under Section 205 of the Penal Code. The record shows that the appellants were 1st offenders.

It has now been claimed that the 4th appellant is challenged health wise while the 1st appellant was a sole bread winner of 2 children. It is also noted that the appellants were serving as community policing members. But what they did was contrary to protecting life, and what they had been called to do for the community.

Considering sentences meted out in the cases of

1. ***WANJEMA VS REPUBLIC [1971] EA 493***

2. ***PETER KORIR NGETICH VS REPUBLIC CRIMINAL APPEAL NO. 163/2002, COURT OF APPEAL NAKURU***

I do find the sentence of life imprisonment to have been excessive. I therefore set aside the sentence of life imprisonment and substitute it with a sentence of ten (10) years for each appellant. The result is that the appeal succeeds to that extent only.

Right of appeal explained.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF MAY 2013.**

**H.I. ONG'UDI**
**J U D G E**

**In the presence of:-**
**Mr. Miiri for State**
**Mr. Ithiga for 1st & 4th appellants**
**All Appellants**
**Njue CC**