



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 2 OF 2011**

***(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF KEAGO E.H. - SRM.  
DELIVERED ON 19<sup>TH</sup> JANUARY 2011 IN BUSIA SPMC.CR. CASE NO. 998 OF 2009)***

**PATRICK WARIKOI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Patrick Warikoi, was charged with the offence of **Manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The particulars of the offence were that on 30<sup>th</sup> December 2008 at Kocholoi Village of Walatai Location in Busia District, the Appellant, jointly with others not before court unlawfully killed Patrick Wawire Wanyama (hereinafter referred to as the deceased). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged and sentenced to serve five (5) years imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the prosecution's evidence that did not establish his guilt to the required standard of the law. He faulted the trial court for failing to acquit him despite correctly finding that the evidence that was tendered was flawed. The Appellant took issue with the fact that the trial court relied on exhibits which were produced to convict him despite reaching the finding that the said exhibits had not been properly handled. He was aggrieved that the trial court had convicted him against the weight of evidence and which raised reasonable doubt as to his guilt. He was finally aggrieved that the trial court had failed to take into account his mitigation before sentencing him to serve a custodial sentence that in his opinion was harsh. In the premises therefore, the Appellant prayed that his appeal be allowed.

During the hearing of the appeal, this court heard oral submission made on behalf of the Appellant by Mr. Nyambegera and by Mr. Ombiri for the State. Whereas Mr. Nyambegera made submission urging the court to allow the appeal as the prosecution had not proved its case to the required standard of the law, Mr. Ombiri urged the court to find that the prosecution had indeed established that the Appellant participated in the unlawful killing of the deceased. He therefore urged the court to dismiss the appeal.

Before giving reasons for its decision, it is imperative that the facts of this case be set out, albeit briefly. On 30<sup>th</sup> December 2008 at about 7.30 p.m., at Musikoto Shopping Centre in Busia County, a bicycle was stolen from a veranda of a shop. According to PW3 Nathan Otuki Okware, while he was at the said shop, he saw someone take the bicycle and ride off. The bicycle belonged to the Appellant. It was suspected

that the bicycle had been stolen by the deceased. According to the testimony of PW7 Chrispinus Sidialo Makana, after the theft, a group of youths, with the Appellant went in pursuit of the deceased. According to the witness, the group found the deceased and started beating him. Other witnesses who heard people screaming “*thief thief*” included PW2 Margaret Musumba Toto and PW5 Thomas Oseme. From the testimonies of the prosecution witnesses, it was clear that the deceased was beaten to death by the group of people in what is referred to euphemistically as “*mob justice*”. The deceased was killed using crude weapons including sticks and stones. What was evident from the prosecution witnesses’ evidence was that the deceased was not actually found with the stolen bicycle. In fact, the stolen bicycle was found abandoned some distance from the shop. The bicycle was at the time the deceased was killed, in possession of the Appellant.

Having re-evaluated the evidence adduced by the prosecution witnesses, it was apparent that the evidence that was relied on by the prosecution to secure the conviction of the Appellant was that adduced by PW7 which was to the effect that the Appellant was among the persons who assaulted the deceased causing him to sustain fatal injuries. The other evidence was that of PW11 PC James Maina who testified that upon arrest of the Appellant, they discovered that the clothes he was wearing, particularly the trouser, was bloodstained. The trouser was taken to the Government Chemist for further analysis. According to PW12 Albert Khaduli Waneke, a Government Chemist, the bloodstains found in the trouser of Appellant were of the same blood group with that of the deceased. According to PW13, Dr. Zacharia Njau, the deceased sustained multiple injuries that included cuts and bruises which were consistent with being cut with sharp objects and being assaulted with blunt objects.

In his defence, the Appellant denied participating in the assault of the deceased. He denied being at the scene where the deceased was killed. He however conceded that after his bicycle was stolen he raised alarm after which the thief abandoned his bicycle and ran away. He recovered the bicycle and returned to his house. He told the court that at about 10.00 p.m. on the material night, he heard people screaming in the neighbourhood. He went to investigate and found the deceased being dragged from a sugar plantation. At that time, the deceased had already been injured. He testified that his effort to stop the people from further assaulting the deceased were futile because the crowd was rowdy.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its decision, this court is required to take into consideration the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comment regarding the demeanour of the witnesses (see **Njoroge –Vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved to the required standard of proof beyond any reasonable doubt that the Appellant unlawfully caused the death of the deceased.

Having considered the submission made by counsel on this appeal, in light of the above facts, it was clear to this court that the evidence adduced by the prosecution witnesses indeed pointed to the guilt of the Appellant. It was the Appellant who raised alarm when his bicycle was stolen. It was the Appellant who identified the deceased as the person who had stolen his bicycle. Matters were not helped by the fact that the deceased already had reputation as a thief in the community. After raising the alarm, the deceased abandoned the bicycle. The attempted theft took place at about 7.30 p.m. The bicycle was recovered soon thereafter.

However, it was apparent that the Appellant, accompanied by a group of youths went looking for the deceased. The deceased was found at about 9.30 p.m. He was dragged from where he was found and was beaten to death. Although the Appellant denied that he was in the company of the group of youths who assaulted the deceased, bloodstains were found in his trouser were of the same blood group as that of the deceased. The Appellant in his defence did not challenge this evidence. The prosecution therefore proved that the Appellant was in close proximity to the deceased at the time of his assault to the extent that his trousers were smeared with bloodstains from the deceased.

While it is true that the prosecution did not adduce direct evidence to place the Appellant at the scene at the time of the assault of the deceased, the circumstantial evidence adduced pointed to the fact that the

Appellant was among the people who took the law into their own hands and assaulted the deceased thus causing him to sustain fatal injuries. The bloodstains from the deceased found in his trousers placed him at the scene where the deceased was assaulted and fatally injured. This court finds that the Appellant was engaged in the prosecution of unlawful purpose whose intention was to cause the death of the deceased. In this regard, under **Section 21** of the **Penal Code**:

*“Where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*

The prosecution was therefore not required, as submitted by the Appellant, to establish that the Appellant administered the fatal blow which caused the death of the deceased. In this case, the prosecution discharged its burden of proof by establishing that the Appellant was the instigator of the series of events that led to the death of the deceased. He also participated in the search and eventual assault of the deceased. There was time-lag of about two (2) hours between the attempted theft of the bicycle and the eventual assault of the deceased. The prosecution proved common intention by the Appellant and his accomplices to cause harm to the deceased. The death of the deceased was therefore a natural consequence of their unlawful action. The appeal on conviction lacks merit and is hereby dismissed.

On sentence, this court agrees with the Appellant that the trial court did not take into account his mitigation and the entire circumstances of the case. The Appellant is a first offender. The offence was committed by a group of people, including the Appellant. While this court does not condone a situation, such as pertaining to the present case, where a person decides to take the law into his own hands, this court is of the considered opinion that the Appellant has learnt his lesson. The period that he has been in prison is sufficient punishment. This court commutes the sentence of the Appellant to the period already served. He is set at liberty unless otherwise lawfully held. It is so ordered.

**L. KIMARU**

**JUDGE**

**DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 31<sup>ST</sup> DAY OF JULY, 2013.**

**F. TUIYOT**

**JUDGE**