



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 107 OF 2009

ELPHAS MASINA ODIEMBO..... APPELLANT
-VERSUS-
REPUBLIC RESPONDENT

JUDGMENT

(Being an Appeal from the Original conviction and sentence of the Senior Principal Magistrate's Court at Migori, Hon. Ezra O. Awino in Migori PMCR Case No. 53 of 2008 dated 15th day of May, 2009)

The appellant **Elphas Masina Odiembo** was charged before the Senior Principal Magistrate court at Migori with the offence of manslaughter contrary to section 202 as read with section 205 of the **Penal code**. The particulars of the offence stated in the charge sheet are that on the 8th day of December, 2007 at Nyakondo village, Muhuru East Location in Migori District within the Nyanza province jointly with others not before court unlawfully killed **Kennedy Opiyo Reuben**. He denied the charge and a plea of not guilty was duly entered leading to trial before Principal Magistrate **Ezra Awino**.

The prosecution called six witnesses. PW1 one **Phoebe Anyango Mugenda** testified on having identified the body of the deceased. PW2 testified that he saw the accused brandishing two runguns and heard him say that they must kill today. He witnessed him hit the deceased on the back of the head. He also stated that he witnessed the arrest of the accused and that the accused was at the time drunk. PW3 identified the accused as **Okonjo** and testified that he was the one who hit the accused on the neck. PW4 also testified to have witnessed the fight. He stated that he had found the accused and others drinking busaa before the fight. PW5 police constable one **Ngweniki** produced the exhibits: - P3 form, post mortem form and one rungun on behalf of the investigating officer one **Samanda**. PW6 one **Dr. Vitalis** **Oguttu** produced the post mortem report in respect of the deceased. The report showed two bruises on the skull and swollen left forearm. He also produced a P3 form filled by a **Dr. Nyamohanga** in respect of the accused. The P3 showed that the accused had been wounded and received stitches. He had also suffered a fracture.

The trial court put the accused on his defence. The accused gave sworn testimony. He denied the offence and the events as narrated by the prosecution witnesses. He conceded that he was at the home where he together with others were drinking busaa but was attacked and beaten on allegation that he was creating disturbance. He denied knowledge of any offence committed by him stating that he only learned of the alleged manslaughter in court. On the issue of his names, he denied that the P3 form produced in court in respect of his alleged medical examination was his as the names in the form was **Elphas Odhiambo Okonjo** while his name is **Elphas Masina Odiembo**. He however did not deny having sustained the injuries indicated on the P3 form.

The learned trial magistrate dismissed the accused's offence and committed him of the offence. He accordingly sentenced him to 10 years imprisonment.

The appellant filed a petition of appeal on 19th May, 2009. He subsequently filed an amended petition of appeal on 19th July, 2010. In summary it is his contention that:

- i. *The prosecution did not call the police officers who took the deceased to hospital to testify.*
- ii. *That the prosecution evidence was contradictory.*
- iii. *That the court did not take into consideration his alibi.*
- iv. *The court did not establish who actually killed the deceased.*
- v. *That his constitutional rights had been violated as he was held for 3 months contrary to section 72(8) (b) of the constitution...*

On 19th September 2011, **Mr. Otieno** came on record to act for the appellant. Subsequently on 21st October, 2011 he filed supplementary grounds of appeal namely:-

- i. *The learned trial magistrate erred in law by failing to comply with the mandatory provisions of section 211 of the Criminal Procedure Code thereby occasioning extreme prejudice to the appellant and failure of justice.*
- ii. *The learned trial magistrate erred in law by proceeding in language the appellant does not understand and/or failing to ensure that the proceedings before him were interpreted in the language the appellant understands thereby violating the appellant's constitutional rights and occasioning failure of justice.*
- iii. *The learned trial magistrate erred in law in failing to appreciate that the testimony of the witnesses before him had material discrepancy and were contradictory and thus were collectively unsafe to form a basis of conviction and sentence...*

Proceedings on appeal.

The appeal came before me for hearing on 1st November, 2011. **Mr. Otieno**, learned counsel for the appellant relied on the supplementary grounds filed on 21st October, 2011 to with:-

- i. *That the trial court did not comply with the provisions of section 211 with respect to the right of the accused to have the charge explained to him when being put on his option of giving defence and the right to exercise the sworn and unsworn testimony as well as to call any witnesses. He argued that such omission vitiates the entire proceedings.*
- ii. *That there was material discrepancy in the testimony of PW2 and PW3 as they were not precise on the time of the incident. PW2 indicated the time as 1.45p.m while PW3 indicated 11.00a.m.*

In his submission, **Mr. Otieno** cited the following 3 persuasive authorities:-

- i. *James Maina Mwaura –vs- Republic (Unreported) Nakuru Criminal Appeal No. 30 of 2006.*
- ii. *Paul Kangeru Mwangi –vs- Republic (unreported) Nyeri HCCRA No. 128 of 2004.*
- iii. *Peter Koech & Others –vs- Republic (unreported) Kisii HCCRA No. 241, 242, 243/2010 consolidated.*

In response, **Mr. Mutai** learned counsel for the respondent conceded the appeal on grounds that the trial court did not comply with section 211 of the **Criminal Procedure Code**. He submitted that such an omission amounted to a mistrial. He however did not urge the court to allow the appeal nor order a retrial preferring instead to leave the decision of the court.

I have reconsidered and evaluated the evidence as borne by the record of the appeal as presented in

the amended petition, the supplementary grounds and submissions by both counsel for the appellant and counsel for the state. In the amended petition, the appellant alleges violation of his constitutional rights contrary to section 72 8(b) of the Constitution by being held for over 3 months.

The record does not indicate whether this issue was raised at the trial or not. The same was not also pursued by counsel for the appellant at the hearing of the appeal. Despite this, I note from the record that the accused/appellant was arrested on 8th December, 2007 and plea was taken on 27th February, 2008. Such period in the absence of any cogent reason on the delay is clearly unconstitutional. It is however not settled that a violation of nature can be compensated by way of damages.

Secondly, the appellant alleges violation of his rights vide failure of the court to comply with section 211 of the **Criminal Procedure Code**. The section provides for the right of an accused while being put on his defence to have the charge explained to him and be informed of the option to give evidence on oath from the witness box in which case he will be cross examined or to make a statement not on oath; and the right to call any witnesses.

The record does not show specifically whether this was done or not. It only specifically states that the accused gave sworn testimony. Whereas it cannot be taken for granted that the court informed the accused, the appellant has not demonstrated the prejudice suffered by the accused.

N/B:

i. *How did he arrive at giving sworn testimony? I can only conclude that he was exercising one of the options explained to him.*

ii. *Call any witnesses one cannot infer that he was not aware of such a right.*

iii. *3rd ground - The trial court did not indicate the language of the proceedings and interpretation thereof. In support of this ground, counsel for the appellant supplied authorities which I have carefully perused. The contention of the appellant is that the court did not indicate the language used in the trial. The record however indicates that on the 27th February, 2008 when the accused took plea as follows: "interpretation Dholuo/Kiswahili/English". I can only interpret that to mean that there was interpretation. While I agree with counsel that the record does not show throughout the proceedings the languages used in court, it is instructive that the accused was represented (though midway through the trial) by learned counsel, Kisera. I therefore find it inconceivable that such an omission would have occurred under the watchful eye of the accused's counsel without him raising the red flag (May be for ground of appeal).*

iv. *Fourthly, issue of inconsistency of the prosecution witnesses testimony. I have carefully perused the record and find no inconsistency in the testimony of PW2 and PW3. PW2, 3 and 4 all testified that there was a busaa drinking session at on Kabogemi's home and that a fight in which the deceased was killed ensued. The witnesses gave various times ranging between 11.00a.m and 1.00p.m. To my mind, that cannot be deemed to constitute material discrepancy. It cannot also be asserted that the trial court convicted on contradictory evidence. No contradiction has been demonstrated by the appellant and neither has my perusal of the record revealed any material contradictions.*

For the foregoing reasons I find the appeal unmerited and dismiss it accordingly. Further right of appeal 14 days.

Judgment dated, signed and delivered at Kisii this 23rd day of January 2012.

R. LAGAT KORIR
JUDGE

Before:

Hon. R. Lagat Korir J.

..... court clerk
Appellant
Respondent