PENINAH JOSHUA KATHUVA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in criminal case No.1205 of 2007 in the Principal Magistrate's Court Kitui by Hon. E. J. Osoro SRM. dated 22nd July, 2010

JUDGMENT

The appellant, together with her husband, **Joshua Kathuva Nzau** were jointly 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 the two on the 28th April, 1998 at Unyaa village Kyangwithya sub-location in Kitui District of the Eastern Province jointly and unlawfully caused the death of **Kathuku Maithya**.

The two pleaded not guilty to the charge.

The evidence of PW.1 the widow of the deceased **Mrs. Catherine Kathini Kathuku Maithya** was that on 28th April, 1998 at around 7 p.m. herself and her late husband, **Kathuku Maithya** hereinafter referred to as "***the deceased***" were walking to their home along Kitui Machakos road. Before they reached Unyaa Primary School they passed by Matumbo Butchery which was being operated by the two accused. An oncoming vehicle from Machakos side approached and they gave way to the vehicle each going on the opposite side of the road. After the vehicle passed, the deceased crossed the road to join PW.1. That is when PW.1 saw the Appellant's co-accused who is a cousin to the deceased following the deceased while holding something behind him. PW.1 suddenly heard a sound with her husband asking the co-accused whether he had way laid him and why he was assaulting him. PW.1 ran back and saw that the co-accused was armed with a whip which he used to assault the deceased. While they were there, suddenly the appellant ran towards them while armed with a club and using both hands, she hit the deceased on his neck and he fell down. While on the ground the appellant continued to hit the deceased with the same huge stick on the head. According to her the two attacked the deceased over alleged love affair between the deceased and the appellant which had resulted in a child. After the attack the two accused left. Meanwhile, PW.1 assisted the deceased to get up and she took him home. On the way, they reached a place with stagnant water. The deceased washed his face with the dirty water and told PW.1 that he was getting weak. They proceeded on and when they reached a place with electricity lights, PW.1 observed the deceased and saw a deep wound with white discharge on his face and his neck was swollen. She left the deceased and ran to call her sister and brother in laws. When she returned where she had left the deceased he was not there. She followed him to their home where she found the deceased asleep on the bed facing up with his eyes wide open. The deceased had actually passed on.

The evidence of PW.2 one **Francis Kisakwa** was that on the material day at 7.00 p.m. he was walking to his home via a shop which was then being operated by the appellant and her husband, co-accused. He

found the co-accused armed with an iron bar while the appellant was armed with a club. The co-accused was angry and quarrelling that a person must stop bothering his wife. PW.2 did not talk to the two, however. Later he learnt that the two assaulted the deceased.

The evidence of PW.3 and PW.4 was that they were called from their respective homes and informed that their brother had been attacked. They went to the home of the deceased and found him dead. The deceased had physical injuries and was bleeding from his head. They learnt from PW.1 that the appellant had fatally wounded the deceased.

PW.5 **Dr. Maina** produced the postmortem report and the opinion expressed therein was that the deceased died of the head injuries.

When placed on their defence both the co-accused and the appellant gave sworn evidence and called no witnesses. They both denied committing the offence. According to them on the material day at 7.00 p.m. they were at their business premises at Maanzoni market when the deceased called the co-accused to the road. Co-accused went to where the deceased was and found him drunk. The deceased told him that he had found his wife in Syongila bar, Syongila market with an Administration Police Officer. As they talked, PW.1 complained to co-accused that the deceased had embarrassed her at Syongila market by assaulting her and even undressing her in public. The co-accused advised the two against washing their dirty linen in public and the two left for home. At that time the appellant was unwell and sleeping in the shop and never got out. As for the appellant, she stated that she heard the deceased calling her husband co-accused who responded and went to see the deceased at the road side. She never accompanied him as she was unwell. The two denied that the deceased had sired a child with the appellant. They both denied having any grudge with the deceased who was a cousin to the co-accused. They maintained that the case was a set up.

The learned magistrate having evaluated the evidence adduced by the prosecution witnesses on one side and the defence by both accused on the other, reached the verdict that the prosecution had made out a case against the appellant. Accordingly, she convicted her and sentenced her to five (5) years imprisonment. She however, acquitted the co-accused under section 215 of the Criminal Procedure Code. Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal on the grounds that the case was not proved beyond reasonable doubt, hearsay evidence, was acted upon by the learned magistrate, there was no forensic report nor were the weapons used in the attack exhibited in court.

When the appeal came up for hearing, the appellant opted to abandon the appeal on conviction but prosecute the appeal on sentence instead. In support thereof, she submitted that she was first arrested over the offence in 1998 together with her husband and were subsequently released. 10 years later they were again arrested and tried for the same offence. However, her husband was acquitted but she was convicted. The foregoing notwithstanding, the sentence imposed was manifestly excessive. She pleaded for leniency. The families from both sides of the divide had apparently sat and agreed on compensation.

Mrs. Gakobo, learned Senior State Counsel opposed the appeal on sentence stating that the offence carried a maximum of life imprisonment. The sentence of 5 years imposed was thus legal. The court considered that she was a first offender. The sentence should therefore not be interfered with.

Much as the appellant abandoned her appeal on conviction, I have nonetheless had occasion to read through and evaluate the record of the trial court. I am left in no doubt at all that in convicting of the appellant, an injustice was committed.

The learned magistrate held in her judgment that the deceased was first attacked by the co-accused. It was only later that the appellant joined the fray. She later went on to hold that "***Although the two acted in concert to perpetuate the offence, the fatal blow was inflicted by the 2nd accused***". There was no basis for that finding. The trial court was not in a position to determine whether the assault by the co-accused or the subsequent one by the appellant delivered the fatal blow. The medical evidence tendered did not reach that conclusion and or verdict either.

The learned magistrate went on to further hold that "***from the eye witnesses account, it is obvious that it is the 2nd accused who inflicted the fatal blow...***" There was no such eye witness account. It has always been said that trial courts should resist temptations of advancing theories unsupported by the evidence on record. That they should always leave the evidence to speak for itself. In this case, the learned magistrate clearly distorted the evidence for reasons that are not quite apparent resulting in prejudicial conclusions with regard to the appellant.

In any event, why should the appellant be convicted, when on the same evidence the co-accused was acquitted. It smacks of discrimination and selective treatment of evidence to reach a desired end, the rights of appellant notwithstanding.

In the premises, I would allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Ruling dated, **signed** and d**elivered** at **Machakos**, this **29th** day of **February**, 20**12**.

ASIKE-MAKHANDIA

JUDGE