



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 512 OF 2010

JAMES OGUNDE ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant **James Ogunde Onyango** was tried and convicted by M. M. Muya, Chief Magistrate Makadara for the offence of manslaughter contrary to Section 202 of the Penal Code. It had been alleged in the charge sheet that on 14th January 2009 at Maziwa village in Kaloleni estate within Nairobi area he unlawfully killed **Erick Silali**.
2. The prosecution called 10 witnesses to prove their case. Out of the 10 witnesses only two of them, PW1 Phanice Chebet and PW4 Elkana Kipkoech Bett said they saw the deceased the evening before his sad demise. All the remaining witnesses saw the deceased the next day when he was already incapacitated or for some of them, when he had already died.
3. Both PW1 and PW4 testified that the deceased stepped in to separate the appellant and P4W who were engaged in a brawl over PW1. PW1, pw4 and the appellant had been drinking at a bar called “Miti ni Dawa.” PW1 was in the company of the appellant but at the time of leaving at about 11 p.m., she asked PW4 who was her neighbour to escort her home. The appellant got incensed and set upon both PW1 and PW4 and started beating them. The deceased was passing by when he saw PW4 who was his friend being beaten. He stepped in to rescue him. The appellant turned his wrath on the deceased allowing PW4 and PW1 to flee.
4. PW1 in her evidence said she did not see any weapon in the appellants possession as he beat them, but that as she ran away from the scene, she left the appellant beating the deceased. PW4 said that the appellant did not have a knife but he threw stones at PW4.
5. The only difficulty with the evidence is that no one knew where the deceased was from 11 p.m. on 14th January 2009 when he fought with the appellant to 5.30 p.m. the following day when PW3 was informed that the deceased was incapacitated and had been taken to Kaloleni Clinic.
6. Indeed PW7 Dr. Ndung’u who carried out the autopsy examination on the deceased after his body was identified to him by the relatives of the deceased, confirmed that the deceased had multiple bruises on the left part of the scalp, bleeding below the skin of the skull, and sub-dural haematoma on the left

cerebral hemisphere. The nervous system also exhibited features of intracranial pressure.

7. The main issue for determination is whether it can be assumed that the deceased sustained a blow to his head at the time of the fight with the appellant. No one testified to having seen the appellant deal the deceased a blow to the head nor having seen him fall and hit his head during the fight.

8. The burden of proof in a criminal case rests unshiftingly upon the prosecution and the standard of proof must be beyond reasonable doubt. The death of the deceased must be inexplicable on any other hypothesis other than that the appellant caused it. In this case I find that there is doubt as to what could have happened to the deceased on his way home or in the intervening time after the fight until he was found in an unconscious state in his house the following day.

9. Indeed the learned state counsel, Miss Mwanza, submitted that there was no evidence as to what happened later when PW1 and PW4 left the deceased and the appellant together outside "Miti ni Dawa" bar engaged in a brawl. The deceased was next found unconscious in his house the following day.

10. The appellant in his defence denied being at the scene and said he knew nothing about the incident. The court chose to believe the two witnesses PW1 and PW4 who placed him at the scene. Having analysed the evidence on record I respectfully agree with the finding of the trial court that the appellant was at the scene. This however being a criminal trial there is no burden on the appellant to prove his innocence or to explain himself.

11. Having carefully analysed and re-evaluated the evidence on record as is my duty to do being the court of first appeal I find that it was not sufficient to found a conviction.

12. I find that the appellant's appeal has merit. I allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this 7th day of **February 2012**.

L. A. ACHODE
JUDGE