



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 130 OF 2011

FREDRICK WANYONYI WACHIZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

This appeal arises from the conviction and sentence delivered on the 8th July, 2011 by Hon. N. Shiundu Senior Resident Magistrate in CMCC case No. 1518 of 2009

A short summary of this case is set out hereunder;

It all started on the 14th January, 2009 when the Appellant came to visit his brother in law (the deceased).

The Appellant injected the deceased and left him with tablets to swallow. The hand that had been injected began to swell and the deceased was taken to hospital. No doctor was found on call and the deceased was taken home. He was taken to hospital the next day but again the doctor was not available. The relatives decided to take him to another hospital and on the 19th January, 2009 the deceased passed on.

The Appellant was then charged with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. That on the 19th January, 2009 at Lukhokho village in Lugari District within Western Province, the Appellant unlawfully killed **KASSIM BIN ISMAIL**.

The Appellant was convicted and sentenced to Ten (10) years imprisonment.

Being aggrieved with both the conviction and sentence the Appellant filed this appeal and relied on the grounds of appeal as are listed hereunder;

- 1) The learned trial magistrate erred in law in convicting the Appellant for the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code when there was insufficient evidence to support the same.
- 2) The learned trial magistrate erred in law and fact by failing to make a finding that medical evidence in support of this charge was inadequate and unsatisfactory.
- 3) The defence of the Appellant was not adequately considered within the requisite standard of

proof, namely, on a balance of probability.

- 4) The conviction of the Appellant is against the weight of evidence adduced.
- 5) The sentence of ten (10) years imprisonment was excessive in all the circumstances of this case.

At the hearing of the appeal Counsel for the Appellant Hon. (Rtd) Justice Etyang opted to consolidate grounds numbers 1, 2 and 4 which relate to conviction on evidence that was insufficient, inadequate and unsatisfactory.

Counsel for the Appellants submissions were as set out hereunder;

The evidence of PW1, PW2 & PW4 was that the Appellant visited the deceased at his home on the 14th January 2009 and injected the deceased and left some tablets for the deceased to take. The injected hand began to swell. Some said he was unwell and some said he had not been unwell and their evidence needed to be reconciled.

PW2 then took the deceased to Webuye Hospital when he was in pain and his hand had become swollen. No doctor was available and they were told to return the next day. The next day a doctor was still unavailable so she took him to Lugulu Mission Hospital but the deceased died.

PW3 – gave evidence that he attended the post mortem carried out on the deceased. At page 13 of the Record of Appeal the witness stated that he did not witness the heart, liver and lungs of the deceased being examined.

PW5 Dr. Stephen Niage the medical doctor stationed at Webuye District Hospital carried out a post mortem on the deceased on the 21st January, 2009. The doctor formed an opinion that the cause of death was due to a reaction that led to the collapse of the heart and the lungs. He then issued a Death Post Mortem Report dated the 21st January, 2009 which was produced in court's "PW EXb1"

The doctor in cross-examination stated that the deceased reacted to a drug that caused his organs to collapse but the doctor could not tell the particular drug that caused the shock.

PW7 PC Godfrey Khisa a police officer based at Lugari Police Post went to the deceased's home on the 20th January, 2009 after a report had been made to them of the demise of the deceased. He stated that he found the tablets the deceased had been given and goes no further to state what he did with the tablets.

He later went to look for the accused person at his home and he found no evidence of any medical equipment and he later arrested the accused person, obtained statements from the witnesses and charged the accused person.

The Appellant's Counsel submitted that the conviction was unsound as the medical evidence was insufficient to support the charge of manslaughter. That the prosecution failed to prove beyond reasonable doubt that it was the injection and or the drugs administered by the Appellant that had caused the death of the deceased. Had there been an analysis of the drugs this would have been the convicting evidence.

In the absence of any analysis the conviction was based on mere suspicion. That however strong the suspicion, it is trite law that suspicion can never be the basis of a conviction

The Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence.

The appeal was opposed by the Learned State Counsel Mr. Kabaka for the Respondent.

Counsel submitted that the State had proved its case beyond reasonable doubt that the Appellant's unlawful act caused the death of the deceased.

That PW1 was present when the Appellant injected the deceased on the hand and left the tablets for the deceased to swallow.

Counsel contended that he PW1's evidence was unshaken in cross-examination.

That PW5 performed an autopsy and the evidence on the cause of death was unrebutted and that the conviction was proper as it was based and supported by the medical evidence of the doctor.

The Report's Counsel urged the court to dismiss the appeal and uphold the findings of the trial magistrate.

After hearing the submissions of Counsel for the Appellant and the Respondent it is the duty of this Appellate court to consider and re-evaluate, the evidence on record and come up with an independent conclusion as was held in **OKENO –VS- REPUBLIC [1972] E.A 32.**

I find that the issues for determination are as set down hereunder:

- (1) Cause of death – possibility death caused by other circumstances.
- (2) Medical evidence adduced sufficient to support the conviction.
- (3) Sentence imposed is it excessive.

ANALYSIS

PW1, PW2 & PW4's evidence is a narrative of the sequence of events leading upto the demise of the deceased. It is not in dispute that the Appellant visited the deceased at his home and gave the deceased an injection and tablets to swallow. PW1 stated in evidence that the Appellant told her that the tablets he had given the deceased were vitamins.

PW7 went to the home of the deceased and was shown the tablets. PW7 did not take custody of the said tablets nor did he send the tablets for examination or independent analysis by the Government Chemist.

Therefore there was no sufficient evidence adduced by the prosecution linking the tablets to the cause of the death of the deceased.

PW3's evidence is also crucial in that it establishes the fact of the failure on the part of the doctor who performed the post mortem to excise specimen samples from the deceased for examination and independent analysis by the Government Chemist to establish which particular drug or toxin or the contents of the injection caused the demise of the deceased.

PW5 the Doctor who performed the post mortem gave evidence that he was unable to determine which particular drug caused the shock.

FINDINGS:

I concur with the Appellant's Counsel that it was incumbent upon the prosecution to have gone the extra mile to have the tablets administered to the deceased analysed to determine whether the same were linked to the cause of death of the deceased.

It was also incumbent upon the doctor to have taken bodily fluids and bodily specimen parts for independent examination and analysis by the Government Chemist to establish whether the toxins that caused the death were a direct result and a consequence of the contents of the injection or that the toxins

supervened independently of the injection.

There is a lacuna in the prosecution's case linking the cause of death to the drugs or the injection administered by the Appellant. This gap could only have been filled by an independent analysis by the Government Chemist.

CONCLUSION:

The court finds that there is a possibility that the cause of death could have been caused by other circumstances unconnected to the injection and this had not been excluded in this case.

The court finds that the medical evidence to be insufficient to conclusively support the conviction.

The appeal is therefore allowed and the conviction for manslaughter is quashed and sentence set aside.

The Appellant to be released forthwith unless he is otherwise lawfully held.

Dated at Eldoret this 26th day of March 2012.

**A.MSHILA
JUDGE**

Coram:

Before Hon. Mshila J

CC: Andrew

Counsel for Appellant.....

Counsel for Respondent.....

**A.MSHILA
JUDGE**