



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Criminal Appeal 137 of 2007

JULIUS KINYA KIBORO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence by J.N. ONYIEGO Senior Resident Magistrate at Kerugoya in Manslaughter No. 1 of 2007 on 24th September, 2007)

J U D G M E N T

The Appellant was charged before Kerugoya Senior Principal Magistrate's Court vide Criminal Case No. 1 of 2007 with the offence of Manslaughter contrary to section 202 as read with Section 205 of the Penal Code. The particulars as stated in the charge sheet are as follows:-

JULIUS KINYUA KIBORO: *On the night of 13th day of November 2006 at Raimu Village in Kirinyaga District within Central Province unlawfully killed BERNARD GICHOBI IRERI.*

The matter proceed to full hearing and the Appellant was convicted and sentenced to serve 15 years imprisonment. Being aggrieved by the Judgment he filed this appeal raising the following grounds:-

- 1. *That the learned Senior Resident Magistrate erred in law and in facts in convicting the appellant when there was no evidence at all to warrant a conviction.***
- 2. *That the learned Senior Resident Magistrate convicted the appellant while relying on hearsay evidence which is not admissible.***
- 3. *That the learned Senior Resident Magistrate erred in law and in facts in convicting the appellant while relying on uncorroborated evidence of the prosecution witnesses.***
- 4. *That the learned Senior Resident Magistrate erred in law and in facts in relying on the evidence of the prosecution witnesses not withstanding that it had several inconsistencies and contradictions rendering it incredible.***

5. *That the learned Senior Resident Magistrate erred in law in shifting the burden of proof from the prosecution to the witness.*

6. *That the learned Senior Resident Magistrate erred in law in that the sentence was excessive I the circumstances and the accused was said to be a 1st offender.*

7. *That there were no aggravating factors to warrant such a long jail term.*

The Appellant prosecuted the Appeal in person. He filed written submissions. He is in fact saying nothing about the conviction. He is asking the court to be lenient and reduce the sentence as he has been in prison since 2007. He is also saying he was kept in police cells for 5 months before being arraigned in court i.e. 13/11/2006 to 13/4/2007. This was in violation of his constitutional rights.

The State opposed the appeal on sentence saying the sentence was deserving as the evidence was overwhelming. Since the Appellant decided to pursue the grounds on sentence only the State Counsel did not ague the other grounds on conviction.

However, this being a first Appeal, this court is enjoined to re-consider and re-evaluate the evidence and arrive at its own conclusion. It also has to bear in mind that it never saw nor heard the witnesses. ***ODHIAMBO VS REPUBLIC [2005] 1 KLR 564.***

The brief facts of the case were that PW1 who is the mother to the accused was at her house on 12/11/2006 10 p.m., when the deceased came there for cigarettes. Thereafter the accused (her son) came and was heard asking who was lighting a cigarette. She heard the deceased and accused quarrelling. Later the accused came and told her he did not want to see the deceased again. She again heard the deceased calling outside. She then heard a loud bang. When asked what it was the accused responded that the deceased had fallen down. She went outside with a lantern and asked the accused why he had beaten the deceased who was lying on the ground and unable to talk. The accused was holding a stick. She screamed and the accused left saying he was going to call the deceased's wife. PW1 said the accused was feared after drinking. Villagers came to assist and took the deceased to the police station then to Hospital but succumbed to the injuries.

PW4 the doctor stated that the deceased had a fracture on the right side of the skull extending to the mastoid bone. There was bleeding in the brain tissue underlying the fracture. He formed the opinion that the deceased had died of the head injuries due to blunt trauma on the head (EXB1).

PW6 also confirmed hearing the deceased and accused (his brother) abusing his brother. He even heard them fight near their house. He went out and found them fighting still. He then heard a bang. He woke up every family member. They found the deceased lying on the ground senseless. Accused was arrested and charged.

Accused in his defence which was unsworn denied the charge. He stated that he was attacked as he came from his place of work while drunk. TheHe trial magistrate analyzed the evidence and arrived at the conclusion that the accused committed the offence.

PW1 and PW6's evidence is very consistent. They are mother and brother respectively to the appellant. They heard the deceased and accused quarrel, fight and finally a loud bang. They found the deceased on the ground and being unconscious. It is just the two (appellant and deceased) who had been out there. There is no reason why these two witnesses would lie against the appellant.

PW1 says she found the appellant holding a stick. The evidence pointed out irresistibly to the Appellant as the person who killed the deceased. The Appellant was unscathed and one wonders why he had to use such excessive force on the deceased. The learned trial magistrate analyzed the evidence well and arrived at the right decision. In his submissions the Appellant says he was in police custody for a period of five (5) months before he was arraigned in court.

The record shows that the Appellant was arrested on 13/11/2006 and was arraigned in court on 13/4/2007 for plea. The issue of his prolonged stay in police custody was not raised by the Appellant nor the learned trial magistrate. At the time of his trial we were still governed by the old constitution which provided under Section 72(3) as follows:-

A person who is arrested or detained

(a)

(b) Upon reasonable suspicion of his having committed or being about to commit a criminal offence, and who is not released shall be brought before a court as soon as is reasonably practicable, and where he is not brought before court within twenty four hours of his arrest, or from the commencement of his detention or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging the provisions of the subsection have been complied with”.

This provision is replicated in Article 49 of the 2010 Constitution. The appellant was not facing a capital offence and so had to be arraigned in court within 24 hours.

Going by the Judgment in ***JULIUS KAMAU MBUGUA VS REPUBLIC – CRIMINAL APPEAL NO. 50/2008 [200] eKLR*** the proof unexplained violation of one’s right does not lead to automatic acquittal or discharge of an accused or appellant. All other circumstances of the case must be looked into, as closing our eyes to these other circumstances would lead to an injustice to the person who was offended.

It is the duty of the Court to balance the accused’s rights *vis a vis* those of the complainant. After being arraigned in Court the trial proceeded on well up to the conclusion. Even if his rights were violated, I do find that the violation had nothing to do with the court that tried him. The Appellant may pursue that issue before the right forum as there are ways in which he may be compensated for that violation.

Coming to the sentence of 15 years, I wish to point out from the onset that the punishment. I am convinced that the trial magistrate considered all that the witnesses had stated. It had also come out from the evidence that the Appellant was a violent person after drinking alcohol. Even his own mother feared he would kill her while in that state. There is nothing to show that has changed.

A life was lost through the brutality of the appellant. The sentence handed to him is lawful. I have however considered his mitigation and substitute the sentence of 15 years with one of 13 years from date of conviction. To that extent only is the appeal allowed. Otherwise the Appeal stands dismissed.

DELIVERED, SIGNED AND DATED AT EMBU THIS 3RD DAY OF MAY 2012.

**H.I. ONG’UDI
JUDGE**

In the presence of:-

Ms. Matiru for State

Appellant

Njue CC