



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO. 81 OF 2010**

**MORRIS JUMA MISUNGA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in Criminal Case number 11 of 2007 of the Chief Magistrate's Court at Kisumu)*

**JUDGMENT**

The appellant was charged in the Lower court with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code, in that **“on the 26<sup>th</sup> day of October 2006 at Rachar Sub location in Bondo District of the Nyanza Province unlawfully caused the death of THOMAS MISUNGU BURU”**.

Evidence was adduced against the appellant as hereunder. PW1 the area Chief received a report from a village elder who was a brother to the deceased that there had been a fight against the deceased and his son who turned to be the appellant herein. PW2 received the report of assault from the assistant Chief who also escorted appellant to the police station.

PW3 a brother of the deceased said the deceased used to have chest problems. PW3 also observed a scratch injury on his left hand and bruises on the back which were fresh. He was called by a daughter of the deceased.

PW4 the doctor who performed post-mortem and observed multiple abrasions all over chest wall, back, abdomen and upper limbs, 2 lacerations over left hand which had been stitched, X-ray of the chest showed features of Pulmonary T. B. Patient. Spleen had laceration on upper pole and blood had clotted

over it and to him cause of death was STI by a blunt object. When cross examined he stated that pulmonary T.B like any other disease, one can succumb to it. That there were extensive soft tissue injuries on the deceased's' body. He does not know for how long the deceased had been suffering from Pulmonary TB, like any other disease one can succumb to it.

PW5 who is a daughter of the deceased and brother of the appellant gave evidence to the effect that accused who is the appellant gave her 100/= to go and buy food from the market. She bought fish, used some money and returned 20/= change. Accused who is the appellant expected more than 20/= and he wanted to beat her up. She made noise which attracted, the father who came out as she was running away and the stick which was thrown at her landed on the father hitting him on the back and he fell down. She reported to the village elder. When cross examined she stated that appellant wanted to beat her up but she ran away and the stick which the appellant threw at her is what hit the father.

In his defence appellant says that he quarreled with the sister over cigarettes it was at night. The father heard the commotion and came out and then, stumbled and fell on rocks. The next day, he requested to be taken to hospital and him, appellant and the uncle took him to hospital where he was admitted and later died. He was later arraigned in court. It is his testimony that witnesses were forced to fabricate the case against him. He was not cross – examined.

Against the afore set out evidence the learned trial magistrate made the following findings:-

- (a) That from the evidence, the issue for determination was whether the prosecution had established beyond all reasonable doubt that accused assaulted the deceased and that he died as a result of injuries sustained in the assault.**
- (b) PW5 and accused said that the deceased had been suffering from chest pain for about two (2) weeks .**
- (c) That PW4 the Doctor who performed the post mortem stated that the X-rays done on the deceased while under going treatment showed features of pulmonary T. B but he concluded that the cause of death was extensive soft tissue injury caused by a blunt object .**
- (d) Accused person's allegation that his father stumbled and fell on rocks in front of the main house could have been bought by the court if any the injuries to the deceased were confined to one part of the body but according to the Doctor the external injuries as well as internal injuries were extensive and not in any way related to pulmonary T. B.**
- (e) PW1 and PW2 said that accused fought his father and PW5 went to call them on the same night of the fight.**

By reason of what has been stated in (a) – (e) above the learned trial magistrate found the appellant to have caused the death of his father, found him guilty, convicted him and sentence him to serve ten (10) years imprisonment.

The appellant became aggrieved and appealed to this court citing eight (8) grounds of appeal and five (5)

supplementary grounds of appeal and in a summary form these are that, the learned trial magistrate erred both in law and fact by:-

- **Failing to examine the contentious issues of who actually killed the deceased.**
  
- **The sentence is harsh and failed to take note of the fact that the deceased was a beloved father of the appellant failed to consider that appellant did not run away.**
  
- **Failed to evaluate the Doctors report which confirmed his innocence.**
  
- **His constitutional rights were violated**
  
- **His sworn evidence was not properly evaluated.**
  
- **The charge sheet was defective.**
  
- **Section 85 (i) of the penal code was not observed during plea taking.**
  
- **The evidence was in consistent**

The appellant relied on the written submissions filed in court and oral high lights which are a reiteration of the grounds of appeal set out above and more particularly and in a summary manner the following were stressed:-

**(i) The charge sheet is defective because it indicates he was arraigned in court on a date before his arrest ,it does not indicate the object used to inflict the injury, it does not contain names of prosecution witnesses.**

**(ii) The language used to read the charge to him is not indicated.**

**(iii) Hearsay evidence was admitted.**

**(iv) It was not ruled out that the injuries described by the Doctor were not inflicted on the deceased when he fell down.**

**(v) The fact that he threw a stick is not justification for the court to find that the appellant inflicted those injuries.**

**(vi) His conduct towards his father negatives is will and is a demonstration of his innocence.**

The state responded to the appellant's submissions and stated that they do not support the conviction because medical evidence was not conclusive on the cause of death.

This court has given due consideration to the above concurrent submissions from both parties and in the exercise of its appellate mandate, there is need to re-evaluate the evidence that was adduced before the lower court to determine whether the concurrence of both sides is to stand or not, in doing so, the court will bear in mind the cardinal principle of law applicable that the court has judicial notice of and the court proceeds to make the following findings:-

**(i) With regard to a defective charge sheet, the complaint is that the weapon used to cause the injury has not been disclosed, it is erroneously indicated that he was taken to court on 3<sup>rd</sup> day of November 2006, when in fact he was arrested on 6<sup>th</sup> November 2006 and lastly that the names of witnesses are not stated. The court has given due consideration of this complaint and the court is of the opinion that it is now trite law that a defective charge sheet becomes fatal if allowing it to pass in the form it is and base a conviction on the same amounts to a miscarriage of justice, and also the defect is not curable.**

**(ii) The complaints are curable in that they do not go to the root of the charge and they did not cause any miscarriage of justice to the appellant.**

**(iii) As for the language used to read the charge to the appellant not being indicated, indeed the language used to read the charge is not indicated, but having perused the record, the court finds nowhere in the record where the appellant raised that issue with the court. He participated in the proceedings fully and cross-examined witnesses, meaning that he understood what was going on. The court finds no prejudice to have been suffered as a result of this. The court also watched appellant argue his appeal in court. He has a good command of English and appears intelligent, if indeed he had been prejudiced in any way, we could have raised complains.**

**(iv) As regards the merits of the case, the court agrees with both sides that the issue of the cause of death of the deceased was crucial.**

The evidence on the record is that the deceased intervened in the quarrel between appellant and PW5. It is in agreement that PW1 and PW2 who were believed by the learned trial magistrate were not eye witnesses. They relied on what PW5 told them allegedly that the deceased and appellant had fought which differed with what PW5 said in her evidence. Her testimony is that the stick was thrown at her but when she ran away it hit the father on the back and he fell down.

PW5 did not elaborate on the terrain of the place where the deceased fell down to discount the presence of stones. No other person saw the fight or cause of the other injuries. In the absence of evidence on a fight between father and son, and only having evidence of a stick hitting the deceased on the back, it means that the other physical injuries may have been as a result of the fall. It is surprising to note that none of the witnesses who talked with the deceased namely PW1 and PW2 testified to the effect that the deceased gave a dying declaration that he was fought by his son.

There is the issue of sickness. The Doctor was categorical that this too could cause death but as submitted by the state, he did not state categorically that it was the physical injuries and not the sickness which was the likely candidate for the cause of the deceased's death. For this reason a doubt was raised which was not resolved by the lower court. As submitted by the state, any doubt raised should be resolved in favour of the appellant and it is so resolved. The net result of the assessment is that the conviction cannot be supported. The same is quashed and set aside. The appellant is ordered to be set at liberty forthwith in

connection with the conviction which led to this appeal.

**Dated, signed and delivered at Kisumu this 16<sup>th</sup> day of March 2011.**

**R. N. NAMBUYE**

**JUDGE**

RNN/aao