REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 54 OF 2008

SUSAN NGINA KINYANJUI ....1ST APPELLANT

JOHN NJUGUNA KINYANJUI ....2nd APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Appeal against Judgment from Chief Magistrate's Court Eldoret Criminal Case No. 191 of 2007

delivered on 1st July, 2006 by W.N. Njage – Senior Principal Magistrate)

J U D G M E N T

The two appellants, **Susan Ngina Kinnyanjui** and **John Njuguna Kinyanjui**, appeared before Senior Principal Magistrate at Eldoret charged with the offence of Manslaughter contrary to section 202 as read with section 205 of the penal code.

The particulars of the charge were that on the 22nd November, 2006 at Langas Estate, Uasin Gishu District, Rift Valley Province, unlawfully killed Edwin Sakwa.

Both appellants pleaded not guilty. They were tried, convicted and sentenced to serve ten (10) years imprisonment. Being dissatisfied with the conviction and sentence the appellants filed separate appeals on the basis of the grounds contained in the petitions of appeal dated 25th February, 2009 and 31st July 2008. The appeals were consolidated and heard together. At the hearing of the appeal, learned counsel, **Mr. Kipnyekwei** represented the two appellants while the learned state counsel **Mr. Kabaka**, represented the respondent.

Through Mr. Kipnyekwei, the appellants submitted that PW1 was the only witness who gave direct evidence. The evidence by the rest of the witnesses was circumstantial. Heavy reliance was placed by the learned trial magistrate on the evidence by PW1 which evidence ought to have been disregarded for lack of credibility due to the fact that PW1 was related to the deceased and that the first appellant (Susan) was

indebted to her in the sum of Kshs.500/-. These facts were not considered by the learned trial magistrate. The appellants submitted that PW1 said that she heard screams and proceeded to their house where she allegedly saw the first appellant (Susan) seated down while the second appellant (John) was holding a metal bar with the deceased lying down on the floor. The appellants wondered how PW1 heard the screams seventy (70) meters away yet she said that it was raining. They also wondered why it was only PW1 who responded to the screams yet there were other neighbours more closer to their (appellant's) house than her. The said neighbours were not called by PW1, not even her step-mother who was the mother of the deceased.

The appellants went on to submit that PW1 did not show the police the spot where the deceased was lying down in the house and although she said that the body of the deceased was found a kilometer away from the first appellant's house, there was evidence that the body was found three hundred (300) meters away.

The appellants submitted that there was contradiction with regard to where the body of the deceased was found and if the offence was committed in the first appellant's house, why was the body of the deceased found a kilometer away. Anybody could have committed the offence since nobody saw the appellants killing the deceased.

The appellants wondered whether there were two bodies in view of the fact that PW1 alleged that the body was recovered on 23rd November, 2005 while PW2 alleged that it was recovered on 27th November, 2006. So whose body related to the offence in court? It was further admitted by the appellants that the post mortem form filled by PW5 indicated that the injuries inflicted on the deceased were very fierce thereby manifesting a fierce struggle yet PW1 did not find the appellants savagely attacking the deceased.

The appellants contended that there was no evidence of a struggle and all that the police did was to go to the appellant's house, recover a metal bar and produce it in court as an exhibit. On the exhibits, the appellants submitted that PW3 indicated that a knife and a metal bar found in the appellant's house were blood stained yet there was no forensic evidence to link the blood stains to the appellants. There was also no link between the exhibits and the death of the deceased.

In contending that the prosecution failed to prove the case against them, the appellants submitted that the learned trial magistrate failed to consider their defence. It was therefore unsafe to be convicted on the basis of the evidence adduced by the prosecution. Lastly, the appellants contended that their right under the then constitution were violated in that they were not taken to court within a period of twenty four (24) hours and were instead held in police custody for forty eight (48) days for the second appellant and forty seven (47) days for the first appellant.

The respondent urged the court to dismiss the appeal on the basic ground that both the conviction and sentence of the appellants was within the law and that all the five prosecution witnesses adduced evidence which was very compelling. The respondent submitted that the most incriminating evidence came from PW1 as she was with the deceased on the material date and that the she said that the deceased was with her when she left to go and see his wife (The first appellant) so that they may resolve domestic problems. Thereafter, PW1 heard screams emanating from the house of the first appellant. She went there and on opening the door was threatened with an iron bar by the second appellant. She said that the iron bar was later recovered by the police and had blood stains. The respondent also submitted that the deceased was assaulted by the appellants. His body was recovered on the following day. They (appellants) were the last persons to see him alive. Their evidence was considered by the learned trial magistrate and was disbelieved. It was irrelevant where the body was found and significally, the appellants after having killed the deceased reported that the deceased had assaulted the first appellant.

The respondent further submitted that motive is not relevant in cases of manslaughter and that under Section 125 of the Evidence Act, PW1 was a competent witness even if she was related to the deceased. The respondents submitted that the deceased was savagely attacked by the appellants such that

he succumbed to the injuries inflicted. His body was found later. The respondent contended that the appellants used an iron-bar in assaulting the deceased. On the alleged violation of the appellant's constitutional rights, the respondent contended that the remedy lay in damages. In any event, the prosecution explained the reasons for the delay. Again, the complaint was an afterthought as it was not raised at the earliest opportunity. On sentence, the respondent asked for enhancement saying that the appellants were given ten (10) years for an offence carrying a sentence of life imprisonment.

The foregoing submissions having been considered by this court in the light of the grounds of appeal, it now falls upon the court to reconsider the evidence adduced at trial and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Okeno Vs. Republic (1972)EA 32 & Achira Vs. Republic (2003) KLR 707).** Briefly, the case for the prosecution was that on the material date at about 9.00 p.m., **Evaline Alusa (PW1),** a resident of Langas Estate Eldoret Town and cousins with the deceased Edwin Sakwa were together at Langas when she was informed by the deceased that he had differences with his wife Susan Ngina (the first appellant) and that she (wife) had called him so that they could discuss the issue. She (PW1) decided to go to her house even as the deceased went to his house, about twenty (20) feet away. Her house was separated by a fence from that of the house of the deceased where he lived with his wife, the first appellant. After a while, Everline (PW1) heard the deceased screaming. She jumped over the fence and proceeded to the house of the deceased and found the door shut. She forced opened the door. Inside the house, there was a lamp. She enquired as to what the problem was. She saw the second appellant (Njuguna) armed with an iron-bar which he threatened her with. She ran back into her house. It started raining heavily and she went to sleep feeling afraid. She woke up at 6.00 a.m. and went to see her step mother Pamela whom she informed what she (PW1) had seen. She learnt from the step-mother that the deceased had died and that his body had been dumped at a place called Corner Mbaya. She, Everline (PW1) proceeded to that scene and saw the body of the deceased in a ditch. She later in court saw and identified the iron-bar seen in the possession of the second appellant. She said that inside the deceased's house, she spotted the first appellant seated on a chair while the deceased was down on the floor screaming. She said that the deceased and the first appellant lived as husband and wife and that when she saw him (deceased) in the house, he lay down on the floor holding his abdomen. She (PW1) recorded her statement after the burial of the deceased at Kaimosi Tiriki.

IP Isaiah Ngetich (PW2) of the scenes of crime Eldoret proceeded to Kisumu Ndogo area of Langas Estate on the material date and was shown the dead body of the deceased lying besides a rood and took photographs of the same. The mother of the deceased, **Ann Khasinga (PW3),** learnt of the death of her son on the material date at 6.00 a.m. She found the dead body of the deceased lying in a trench at an area referred to as Kinyago, thereafter, she made a report to the police at Langas. The body was removed to the mortuary before it was released for burial after five days. She confirmed that the deceased lived with the first appellant as husband and wife.

P.C. Yusuf Kibet (PW4), of Langas Police Station was on duty on 23rd November, 2006 at 7.00 a.m. when he received information about a dead body of a male person lying at Kinyago area of Langas Corner Mbaya. He proceeded there with his colleagues and saw the dead body of the deceased. He noted that the body had cut wounds all over. It was photographed and removed to the Moi Referral Hospital. Acting on a tip off, P.C. Yusuf proceeded to the house of the first appellant at Kambi Nguruwe Estate, she (first appellant) had reported an assault case with the deceased. He (PW4) found her at Tawfiq Hotel in Eldoret town and took her to her house where a blood stained knife and iron-bar were recovered.

Dr. Joseph Ewei (PW5) of the Moi Teaching and Referral Hospital confirmed that the post mortem on the body of the deceased was conducted on 27th November 2006 by his colleague Professor Koslova who had since left the country. He produced the necessary post mortem report on her behalf. The post mortem form showed that the deceased died as a result of severe extensive injuries inflicted on his body by a blunt object.

The evidence by Dr. Ewei (PW5) concluded the case for the prosecution. On being placed on her defence, both appellants made unsworn statements and called no witnesses. Both denied the charge with the first appellant stating that she was employed as a waiter at Tawfiq hotel Eldoret and that on the 6th November 2006 borrowed Kshs.500/- from her neighbour Everline (PW1) which was to be repaid on 30th November 2006.

On the material date (22/11/2006) the (first appellant) went to work as usual and returned home at 8.00 p.m. Thereafter, she saw Everline outside her house. Everline was armed with a club. She (Everline) entered her (first appellant's) room and threatened her. A man was in the company of Everline and standing behind her. Everline hit the first appellant with the club. She (first appellant) hid behind the man who was also hit by Everline. She (first appellant) ran away and into her landlord's house. She later went back to her house and found nobody. She slept and went to work on the following day. While there, she was confronted by four police officers and arrested. She remained in police custody upto 1st January 2007 when she was charged in court. The second appellant said that he was an employee of Eldoret Municipal Council Engineering department and that the first appellant was his sister. On the 23rd November 2006 he was on duty upto 5.30 p.m. he was called later and informed that the first appellant had been arrested. He went to the police station on the following day and was arrested. He was in police custody upto 11th January 2007 when he was charged with the present offence.

All the foregoing evidence was considered by the learned trial magistrate who concluded that the death of the deceased was confirmed by the findings of the doctor indicated in the post mortem form produced by PW5. The said report indicated that the body of the deceased had multiple injuries on the head, deep cut wound on the face, fracture of six ribs on the right side of the chest, rapture of the lungs, spike wounds on the face and lacerations on the head. The learned trial magistrate also concluded that the two appellants were responsible for the injuries inflicted on the deceased which ultimately caused his death. From the evidence, this court sees that the cause of death was not disputed. It was proved that the deceased succumbed to injuries inflicted upon him on the material date. The injuries were so gruesome and savage such that it would not be farfetched to opine that the assailants may have intended the death of the deceased. The crucial point that fell for determination was whether the two appellants were responsible for the fatal injuries inflicted on the deceased. The most incriminating evidence against them was that of Everline (PW1). This evidence was believed by the learned trial magistrate. He found that it was credible and that it was corroborated by the evidence of P.C. Yusuf (PW4) who recovered the iron-bar suspected to have been used in assaulting the deceased. At the time of the recovery inside the house of the first appellant, the iron-bar was blood stained.

The evidence by Everline (PW1) showed that the two appellants were the last persons seen with the deceased prior to his death. They were also seen inside their house with the deceased. At that time, the deceased was lying on the ground screaming while the first appellant sat on a chair and the second appellant held an iron-bar. Everline (PW1) was attracted to that house on hearing of screams emanating from there moments after she had parted with the deceased. She found the two appellants and the deceased in the house in a manner strongly suggesting that the deceased was in the process of being assaulted by the appellant.

By finding that the two appellants were responsible for the death of the deceased the learned trial magistrate relied heavily on the credibility of Everline (PW1) as opposed to that of the appellant. The learned trial magistrate was entitled to do as much. After all, he had the advantage of seeing and hearing the witnesses. He was better placed than this court to make findings on credibility. He found that Everline (PW1) was a clear, candid and truthful witness. He disbelieved the defence raised by the two appellants respectively and observed that they killed the deceased on the material night and dumped his body at Kinyago within Langas area. Thereafter, in an attempt to cover up for what they had done, they reported to the police that the first appellant had been assaulted by the deceased.

This court finds no good reason to interfere with the findings of the learned trial magistrate in as much as they were based on credibility. Indeed, the evidence by Everline (PW1) was believable considering that there was nothing suggesting cogently that she malicious incriminated the two appellants. The suggestion by the first appellant that she may have been maliciously implicated by Everline (PW1) because she (first appellant) was indebted to her (Everline) in the sum of Kshs.500/- was far fetched and most likely, an after thought.

The first appellant talked of a man who was in the company of Everline (PW1) on the material date. She also talked of running into her landlord's house on the material date. Yet, she made no attempt to identify the said man and landlord and add credence to her story of the events which occurred on the material date.

Significantly, there was no denial from the first appellant as well as the second appellant that they were with the deceased before he met his death on the material date. There was also no denial from the first appellant that the suspect iron-bar was recovered in her house and had blood stains at the time. The stains were not analyzed by a forensic expert to link them to the offence. However, the omission was not fatal to the prosecution case in view of the direct and credible evidence against the two appellants by Everline (PW1) who saw the second appellant holding the iron-bar as the deceased lay down on the ground. She (PW1) was threatened with the same iron-bar by the second appellant. If anything, forensic evidence would have been necessary for purposes of enhancing any circumstantial evidence against the two appellants if that were the only evidence available.

On the issue of credibility, this court must take guidance from the decision of the Court of Appeal in **Republic Vs. Oyier (1985)KLR 353,** where it was held that a first appellate court could not interfere with those findings by the lower court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings or it was shown that there existed errors of law. A similar holding was made in a later decision of the Court of Appeal in **Buru Vs. Republic (2005)2KLR 533.** As indicated herein above, this court finds no compelling reason to interfere with the findings of the learned trial magistrate with regard to the appellant's culpability in the death of the deceased.

With regard to the alleged violation of the appellants' constitutional rights, it is not disputed that they were held in police custody longer than the period prescribed under section 72(3) of the former constitution of Kenya. However, a satisfactory explanation for the delay was given by the respondent vide an affidavit dated 11th October 2010 deponed by one of the officers who investigated this case. It is only an unexplained delay which amounted to a violation of a constitutional right. In that event, the remedy was in damages as per section 72(6) of the former constitution. All in all, the conviction of the two appellants by the learned trial magistrate was proper and is hereby sustained.

The sentence meted out against the appellants though lawful was rather on the lower side considering the cruel manner in which the deceased met his death. After agonizing on whether to enhance the sentence, this court considers it reasonable to uphold the ten years imprisonment sentence for the main reason that the deceased was regarded as the husband of the first appellant and therefore a brother in-law of the second appellant. His death at the hands of the appellants relatives will definitely haunt them for the rest of their lives if they have human hearts.

Otherwise this appeal is dismissed in its entirety.

J. R. KARANJA

JUDGE

(Delivered and signed this 15th day of March, 2011)

In the presence of Mr. Kabaka for State Counsel and Mr. Kipnyekwei for both appellants)