



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL NO. 9 OF 2011

DAVID KARIUKI.....APPELLANT/ APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The Applicant was convicted by the Chief Magistrate at Embu of manslaughter contrary to Sections 202 and 205 of the Penal Code and sentenced to life imprisonment. The particulars of the offence were that on the 25th May 2008 at 10 p.m. at Njukiri village in Embu District within Eastern Province, he jointly with another not before the court unlawfully killed Emilio Muchangi. He was aggrieved by both the conviction and the sentence and has filed an appeal before this court. Pending the resolution of this appeal, he seeks to be released on bail.

The prosecution evidence on which the Applicant was convicted was briefly that the deceased came to Facing Brothers Bar at Njukiri at about 9 p.m. and found the Applicant and one Mwaniki both of whom were his uncles. After a short discussion in the bar the deceased began to leave but was attacked by the two until he fell down. They took him back to the bar and drunk for a while. They then took him out and continued to beat him. The Applicant was using a plastic pipe which he used to hit him severally on the head, body and legs. He was lying down helplessly. They dragged him for about 50 meters from the bar and threw him at the Kibugu-Embu Road junction. His wife Judith Mugure Muchangi was informed about the incident and went to the road where she found the deceased lying with his under pants stashed in his mouth, a belt was tied around his tummy and a T-shirt tied around his neck. She dressed him up and took him to the house. The only thing that the deceased was able to say was that he had been beaten by the Applicant and Charles Ileri. The deceased was taken to Embu Provincial Hospital where he died the same night while undergoing treatment. Salesio Mbogo Nyaga and Alfred Kinyua Nthambiri each testified that he witnessed the Applicant and Mwaniki beating the deceased person that night. They also testified that they witnessed the two dragging the deceased to the Road.

The Applicant gave an unsworn statement and called Robert Nyaga Munyi and Peter Ndungu Kariuki. The defence case was that the deceased came into the bar and found them drinking, his clothes were dirty and he appeared to have fallen on the ground. He had a bruise, he was drunk and was staggering. He was also incomprehensible. He tried to order for a drink but the waiters refused to sell him one. He poured down drinks of the patrons. This is when the bar man and watchman pushed him out of the bar and up to the road. The Applicant denied assaulting the deceased.

The trial court believed the prosecution. Part of the prosecution evidence was a postmortem report produced by a doctor who was not the one who had made the report, but had worked with the doctor who had made it. It is also notable that the trial was partly conducted by Mr. Kathoka Ngomo (Principal

Magistrate) before it was taken over and completed by Mrs. Wachira (Chief Magistrate). In effort to show that the appeal has overwhelming chances of success, it was pointed out that the postmortem report was improperly admitted in evidence because there was no evidence tendered to show that the maker could not be available or that his availability was going to delay the case or occasion expense. The result, according to the Applicant, was that there was no evidence as to the cause of death. The other ground of appeal was that the new magistrate, in taking over the case under Section 200(3) of the Criminal Procedure Code, did not inform the Applicant of his right to have the witnesses, or any of them, re-summoned and reheard. Further the Applicant was represented throughout the trial by Mr. Mogusu who, however, was not present during the delivery of the judgment and during sentence. The record does not show that there was any inquiry by the trial court regarding the absence of the counsel. It was the submission of Mr. Morris Njage, who appeared for the Applicant during this application, that the constitutional right of his client to be represented was compromised by the absence of his counsel during that part of the trial. I also note that this was a first offender who had a dependent family who was jailed for life.

Mr. Wohoro for the State did not oppose the application and pointed out that the matters above had put him through a lot of agony.

The Applicant is a convicted and sentenced person. There is against him the presumption that he has been properly convicted and sentenced. It is therefore upon him to show why he should be released on bail pending the determination of his appeal. (**RAGHBIR SINGH LAMBA VS REPUBLIC [1958] EA 337**). He has to show that, among other things, the appeal has overwhelming chances of success and that his application presents an exceptional occasion (**DOMINIC KARANJA VS REPUBLIC [1986] KLR 612**).

When the appeal will be heard all the complaints by the Applicant will be heard and decision made thereon, and therefore nothing should be said at this stage that would prejudice any party or embarrass the court that will deal with the matter. All that I want to say is that, having considered the arguments of the learned counsel during the application and having considered the evidence upon which the Applicant was convicted, I am of the view that this appeal has overwhelming chances of success. I consequently admit the Applicant to bail. He will be released on bond of KShs.500,000/= and shall provide a surety in similar amount. The surety shall be approved by the Deputy Registrar who shall also set the mention dates.

DATED, DELIVERED AND SIGNED AT EMBU THIS 12TH DAY OF JULY 2011.

A. O. MUCHELULE
JUDGE