



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 26 OF 2011 (CONSOLIDATED WITH CR. A. NO. 27 OF 2011)

**PATRICK OMONDI)
COLLINS OSORE).....APPELLANTS.**

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from original conviction and sentence of D.M. Ochenja – PM in Criminal Case No. 1790 of 2007

delivered on 11th March, 2011 at Kitale.)

J U D G M E N T.

1. At the hearing of this appeal, and by consent of all the parties, appeals Nos. 26 of 2011 and 27 of 2011 were consolidated under the holding file Kitale Criminal Appeal No. 26 of 2011. **Patrick Omondi** and **Collins Osore**, the 1st and 2nd appellants respectively were charged with the offence of manslaughter contrary to the provisions of section 202 as read with section 205 of the Penal Code. The particulars of the offence stated that on the 21st May, 2007 at Siyoi AP camp in West Pokot District within Rift Valley province, they jointly and unlawfully killed **Gilbert Serem Ngomonin**. The appellants were tried before the Principal Magistrate, Kitale; they were convicted and sentenced to 4 years imprisonment each.

2. Being aggrieved with the conviction and sentence, the appellants have appealed and raised the following grounds of appeal:-

(1) THAT, the learned magistrate erred in law and in fact when he relied on the uncorroborated and unreliable evidence of the prosecution to find the accused person guilty.

(2) THAT, the learned magistrate erred in law and in fact when he ignored the fact that upon the deceased person's arrest, he had already received injuries and could not talk.

(3) THAT, the learned magistrate erred in law and in fact when he failed to consider the fact that PW1 and the deceased had a quarrel and made a report to the administration police camp and whereby the deceased could have sustained injuries.

(4) THAT, the evidence on record is not sufficient to sustain a conviction.

(5) THAT, the learned magistrate erred in law when he ignored the defence of the accused person.

3. In further arguments to support the above grounds, **Mrs. Arunga**, learned counsel for the appellants submitted that the trial court failed to appreciate the evidence by PW1, the wife of the deceased who had reported to the AP camp that the deceased had tried to set fire on their 4 year old child, this was what prompted PW1 to raise an alarm and ran to the AP camp to report. When the appellants came to the help of PW1, they did not find the deceased. The following day, that was on 20th May, 2007, the deceased returned home armed with a panga and was threatening to kill PW1 who ran to the AP camp to seek for help. The appellants responded and ran to PW1's home and found the deceased who appeared very drunk sitting outside. They placed the deceased on a bicycle because he could not walk and escorted him to the AP Camp.

4. That is how they were seen by the witnesses pushing the deceased on a bicycle which was headed towards the AP camp. If the deceased had sustained any injuries, they were not caused by the appellants because according to counsel, this is confirmed by the evidence of PW1, who stated that she did not know who assaulted the deceased. She also confirmed that she never saw the appellants assault the deceased. The court relied on the evidence of PW2 and PW3 who alleged that they saw the appellant assault the deceased person. The two witnesses said that they were at Siyoi Trading centre when the appellant assaulted the deceased. However during cross examination both PW2 and PW3 disowned the statements that they had recorded at the police station. Finally, counsel submitted that there was doubt regarding the cause of death. Moreover, at the scene of arrest, there were 4 administrative police officers who were not charged with the appellants and no explanation was given.

5. This appeal was opposed by the state; the learned State Counsel, **M/s. Bartoo**, supported both conviction and sentence and urged the court to uphold the decision of the trial court. The State submitted that the charge of manslaughter was proved beyond reasonable doubt. The evidence of PW2 was corroborated by that of PW3 who saw the appellants assault the deceased person. The assault took place at 2.00 p.m. which was in broad day light. There is no question of mistaken identity. There was no evidence to suggest that the deceased had injuries prior to the arrest because he was seen walking normally. The appellant insisted that the deceased was pretending not to walk. Therefore they assaulted him and due to the injuries sustained, the deceased was taken to hospital and he passed away in the cause of treatment the same night.

6. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial court and arrive at its own independent determination on whether to uphold the conviction of the appellants. In so doing, this court should bear in mind that it neither saw nor heard the witnesses as they testified and give due regard to that (See case of; **Njoroge vs. Republic [1987] K.L.R. 19**). The prosecution relied on the evidence of a total of 6 witnesses to support the charge. The learned trial magistrate upon evaluation of the evidence was satisfied that there was direct evidence by PW2 and PW3 who saw the appellant assault the deceased as they tried to effect an arrest.

7. I have re-evaluated the evidence before the trial court, which was led by **Reah Kipchumba, PW1**. She testified that she was married to the deceased as the 2nd wife, on the 19th May 2007; the deceased suddenly became violent and started kicking things around and damaging property while threatening to kill somebody. The deceased removed their 4 year old child who was sleeping and covered him with a blanket, placed a mattress on top of the child and threw burning charcoal in bid to burn the child. PW1 started screaming and some neighbors came and rescued the child while PW1 ran to report the matter at the AP camp. However, when the AP's came they did not find the deceased. On that day PW1 slept in a neighbor's house. The next day PW2 was informed that the deceased was approaching their home while armed with a panga prompting PW1 to return to the AP camp to seek for help. 4 AP's ran to her home ahead of her, she later saw them pushing the deceased in a bicycle.

8. PW1 decided to go home to look for money for transport to go to Kapenguria, as she was heading to the bus stage, she met with the appellants who said they wanted to arrest her on allegations that she had poisoned the deceased person. PW1 was taken to the AP camp and was detained until the evening. PW1 did not witness the appellants beating the deceased. **Kennedy Wamalwa Nyongesa, PW2**, testified that on 20th May, 2007 he was at Siyoi trading centre at about 2.00 p.m. He was at a road behind the shopping centre when 3 AP's passed him. There was a man who he identified as Zaire (deceased) sitting by the side of the road. He saw the AP's handcuff the deceased and they started kicking him on the stomach. PW2 said that one of the AP's handcuffed the deceased while the other two whom PW2 identified as Patrick and Collins kicked the deceased on the head and in the stomach.

9. **Leah Asot Lepit, PW3**, also testified that on 20th May, 2007, while at Siyoi shopping centre at about 2.00 p.m. she heard people shouting that someone had been arrested. She ran behind the shop and saw the deceased handcuffed. There were 3 AP's **Patrick Omondi, Collins Osore** and **Mathew Kiptum**. She testified that she saw **Mathew Kiptum** and the deceased struggling when the deceased fell down, Patrick kicked the deceased on the groin while **Collins** stepped on the deceased on the head. PW3 screamed pleading with the AP's not to kill the deceased and they retorted to her whether she had seen how a dead person looked like as the deceased was pretending. PW1 ran to call **Leah Chepchumba**, the wife of the deceased, but when

they returned, they saw the AP's supporting the deceased on a bicycle while walking away to the AP camp.

10. The other evidence was by **Lilan Kiptum Kipserem, PW4**, who took the deceased to Kapenguria District Hospital. He had rushed to the AP camp at Siyoi when he learnt that the deceased had been arrested. He found the deceased was sick and having difficulties to breathe. Therefore he looked for a motor vehicle and took the deceased to hospital. The deceased was admitted at Kapenguria District Hospital. At midnight they were informed that the deceased passed away. The following day, PW4 together with **Stanley Serem Korir**, identified the body of the deceased for purposes of post mortem examination which was carried out by **Dr. Alfred Wanyonyi** on 21st May, 2007.

11. On examination of the body, the doctor found the deceased had a wound on the front of the head which was about 7 cm long. There was a bruise on the back of the head measuring 2 cm. He found a fracture on the skull and formed the opinion that the deceased died due to cardiopulmonary arrest as a result of subdural hemorrhage manifesting from head injury secondary to blunt trauma. This matter was investigated by **Snr. Spt. Ali Zimbu**, who was then based at West Pokot CID Division. Upon investigations and after recording the witness statements, he recommended the appellants be charged with the offence of manslaughter.

12. The appellants were put on their defence. They gave unsworn statement of defence. They testified that on 20th May, 2007, PW1 reported that the deceased wanted to set their child on fire when they went to rescue the child they did not find the deceased. The following day they found the deceased sitting on a chair. They arrested him and took him to the AP camp. While at the AP camp, the deceased's brothers came and reported to the in charge that the deceased had been assaulted by some people at the shopping centre and they were authorized to take him to the hospital. They later heard that the deceased had passed away. The appellants also called **Jane Nyambura, DW3** who testified that on 20th May, 2007 while at Siyoi Trading Centre, she heard people screaming from the direction of the house of Reah. She went there and was told that the deceased wanted to burn a child.

13. I have subjected the above evidence to a fresh analysis. I find the decision of the trial magistrate was based on the evidence of PW2 and PW3 who saw the appellants assault the deceased. The learned trial magistrate gave the following reasoning on page 5 of the judgment.

“The evidence against the accused is direct and overwhelming. The two were seen in broad light assaulting the deceased. They were seen assaulting the deceased by PW2 and PW3. It was around 2.00 p.m. A few hours later, the deceased succumbed to his injuries. As defined under section 202 (2) of the penal code, the accused persons actions were unlawful. They were negligent in discharging their duties as a result of which life was lost. There is no evidence of bad blood between the accused and the prosecution's witnesses hence they gave their testimonies in good faith. I have no reason to doubt them.”

13. According to **Ms. Arunga**, the evidence of PW2 and PW3 was not corroborated for reasons that PW3 disowned part of the facts stated in the statement that she had recorded with the police. I have gone through the proceedings and the evidence of PW3 in cross examination although the statement was not produced in evidence, I see no material variance in PW3's evidence in cross examination because she maintained that she saw the 2 appellants assault the deceased while trying to effect an arrest. The deceased was assaulted at 2.00 p.m. There was no question of mistaken identity as PW2 and PW3 said they knew both the appellants and gave their names.

14. The evidence of PW2 and PW3 is consistent they both described how the appellants assaulted the deceased after they had handcuffed him. I also find no evidence to support the appellants' defence theory that the deceased was assaulted by members of the public when he had attempted to burn a child. The defence by the appellants did not at all dent the evidence by the prosecution's witnesses. On sentence, I find the learned trial magistrate was extremely lenient because he provides for a death sentence.

15. For the foregoing reasons, I am satisfied that the prosecutions proved their case against the appellants was proved beyond reasonable doubt. The two appellants were properly convicted. I therefore find merit in this appeal which is hereby dismissed.

The conviction and sentence are upheld.

Judgment read and signed on 8th day of July, 2011.

MARTHA KOOME.

JUDGE.