REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 175 OF 2009

CHRISTOPHER KIPROTICH CHEBOI ………… APPELLANT

VERSUS

REPUBLIC …………………………………………. RESPONDENT

(Appeal against Conviction and Sentence from Eldoret Chief Magistrate Court Criminal Case No. 3664 of 2006 read on 6th October 2009 by Hon. Nathan Shiundu – Senior Resident Magistrate).

J U D G M E N T

This appeal arises from the appellant's conviction and sentence by the learned Senior Resident Magistrate in Eldoret CMCCR. No. 3664 of 2006 in which the appellant, **Christopher Kiprotich Cheboi,** was charged with manslaughter contrary to section 202 read with section 205 of the penal code.

It was alleged that on the 3rd April 2005 at Kimamet village in Keiyo District, the appellant unlawfully killed Joseph Kimaiyo Cheboi. After pleading not guilty, the appellant was tried and convicted. He was then sentenced to fifteen (15) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds contained in the petition of appeal dated 16th October, 2009.

The grounds are that;-

(1) The trial magistrate erred in fact and in law by convicting and sentencing the appellant while the proceedings and charges preferred against the appellant were anullity since the appellant's fundamental right to liberty was violated since the appellant was detained in police custody for more than 14 days hence contravening the provisions of law as stated in the constitution.

(2) The trial magistrate erred in fact and in law by convicting and sentencing the appellant where the prosecution did not proof their case to the standards required of beyond reasonable doubt.

(3) The trial magistrate erred in fact and law by convicting and sentencing the appellant where there were no evidence on record implicating the appellant.

(4) The trial magistrate erred in fact and in law in relying on contradictory evidence on record to convict and sentence the appellant.

(5) The trial magistrate erred in law in convicting and sentencing the appellant without analyzing properly the evidence on record.

(6) The trial magistrate erred in fact and law in convicting and sentencing the appellant by disregarding the appellant's defence evidence on record.

(7) The trial magistrate erred in fact and law by meting sentence which was too harsh excessive in all circumstances.

At the hearing of the appeal, learned counsel **Mr. Tarus,** appeared for the appellant while the learned, Senior State Counsel, **Mr. Chirchir**, appeared for the respondent.
The learned State Counsel conceded the appeal for the main reason that there was no eye witness who saw the appellant killing the deceased.

The learned state counsel submitted that the witnesses testified that they saw a drunken deceased chasing the appellant and that it was only Dr. Joseph Imbenzi (PW6) who connected the appellant to the offence by finding that the cause of death was severe injuries not consistent with falling down.

The learned state counsel submitted that it was that evidence of the doctor that led to the conviction of the appellant by the trial court. Further, the doctor (PW6) confirmed that the deceased was intoxicated. Therefore, it was possible that the deceased may have fallen down.

The learned state counsel submitted that if indeed the death of the deceased was caused by the appellant then the sentence meted out by the trial court was excessive in the circumstances.

The appellant's, learned counsel concurred with the learned state counsel and submitted that the learned trial magistrate relied on circumstantial evidence which did not show that the appellant caused the death of the deceased. Further, the scene where the body of the deceased was found was interfered with and that those who removed the body from the scene and took it to the deceased's house were not called to testify.

The learned counsel went on to submit that the learned trial magistrate failed to notice that only the relatives of the deceased testified against the appellant. Further, the learned trial magistrate accepted exhibits which were not identified by any of the prosecution witnesses and link them to the appellant.

Learned counsel contended that the appellant's defence showed that PW5 and an Officer Commanding Police Station (OCS) implicated the appellant since he was an assistant Chief of the area yet none of the witnesses saw the appellant using the alleged weapon against the deceased. Learned counsel further contended that the investigations carried out were shoddy and that although PW5 said that the weapons were handed over to him by members of the public, none of those were called to testify.

Learned counsel concluded by contending that both the appellant and the deceased were drunk while the deceased was chasing the appellant and in the process, the deceased fell down.

Upon due consideration of the foregoing submissions, this court must embark on its primary duty of reviewing the evidence and arriving at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

In that regard, the prosecution case was that on the material date, at about 5.00 p.m. both the deceased and the appellant who are brothers were at the deceased's homestead when they disagreed over talks they were engaged in. In the process, the deceased threw down a tea cup and held a stool. He then hurled abuses at the appellant. The deceased's wife **Christine Chepkemboi Maiyo (PW1)** who was present at the scene felt

that the abuses were getting out of hand. She went outside the house from where she spotted the appellant come out of the house and being chased away by the deceased. She did not notice any weapon. The two (appellant and deceased) ran towards the appellant's homestead. Thereafter, she (PW1) heard screams from that direction. She went there and found the deceased lying down but did not notice any injuries on him. People were gathered at the scene. She also noticed that the appellant was

present. She ran to the Chief but did not find him. She returned to the scene with the Chief's wife and found that the deceased had been carried to his home. Later, the police arrived and arrested the appellant. She noticed that the deceased had died when she found him having been carried to their home.

Kimeli Chebor (PW2) was in his farm on the material date when he heard screams from the direction of his home. He ran there and found the appellant bleeding while the deceased lying down dead. The appellant asked to be taken to hospital. Police later arrived at the scene and took away the body of the deceased which had been on his (PW2's) land. The deceased and the appellant were his neighbours.

Esther Jebet Rono(PW3) also heard screams and was advised to go home by her mother in-law. She went there and found many people. She saw the deceased lying down outside the house and observed that he did not have any injuries on him. She asked the appellant to call the police and noticed that the deceased was breathing but could not talk. She and the appellant's wife took the deceased to the home but he appeared to have died. Police later arrived at the scene.

Amon Maiyo (PW4) is a son of the deceased. He was herding cattle when he was attracted by screams and went to the home of a brother to the accused where he found the deceased lying down unconscious.
There were people at the scene including relatives. The appellant was also there trying to make a phone call. The deceased died before being taken to hospital. He (PW4) did not see any injuries on the deceased.

P.C. Patrick Macharia (PW5) of Tambach Police Station was on the material date at Kaptagat Police Station when he was informed that a person had been killed at Kimamet Village. He proceeded there with his colleagues and found that the appellant had already been arrested. They went to the scene of the killing with the appellant and found that the body of the deceased had been removed to another place. He (PW5) observed the body and noticed some scratches on the neck. He was shown a jembe and an iron-bar and said that they were the murder weapons. He removed the deceased's body to the Moi Teaching and Referral Mortuary.

P.C. Macharia (PW5)investigated the case and gathered that the deceased and the appellant had quarreled over money. He found that other than the scratches on the neck, the deceased had no other injuries. He said that the body of the deceased was outside his house but he died 200 meters away at a spot which had blood stains. He (PW5) said that the alleged murder weapons were handed over to him by members of the public who were at the scene. He charged the appellant on completion of his investigations.

Dr. Joseph Imbenzi (PW6) of the Moi Teaching and Referral Hospital did not perform the postmortem examination on the body of the deceased but he produced the necessary post mortem form which was compiled by his colleague Professor Koslova after she performed the postmortem on 11th August 2005. He (PW6) however examined the appellant and found him capable of pleading to the charge. The postmortem report by Professor Koslova showed that the cause of death was blunt head injury which bilateral subdural haemora and haemorrhage into the 4th ventride of the brain, fracture of cervical verteoral column with damage of spinal cord, signs of asphixia, emphysema of both lungs, fluid blood.

The appellant was placed on his defence on the basis of the foregoing evidential facts. His defence was that the deceased was his brother and had been sickly since 1996 when he was assaulted by his son. He received seventy stitches at the Nakuru Pine Breeze hospital and was advised not to drink alcohol. He complied for about five years and thereafter started drinking again. He would always be assisted and taken home when drunk.

On the material date, the appellant found the deceased drunk while attempting to climb a hill.

Consequently, the deceased fell down and died. The appellant contended that the fall was the cause of death and because he was not in good terms with the investigating officer (PW5) and the local Officer Commanding Station (OCS) he was linked to the death of the deceased. He was therefore arrested and taken to Kaptagat Police Station. A jembe and iron bar were alleged to be the murder weapons yet the deceased had no injury on his body nor did the weapons have blood stains on them. The appellant did not

call any witnesses to support his case.

The learned trial magistrate considered the defence together with the prosecution's evidence against the appellant and arrived at the following conclusion;-

"There is evidence that the deceased was chasing the accused out of the compound. The accused was at the scene where the deceased was lying down with injuries on the head. The accused explanation is that the deceased fell down and died as he was trying to climb a hill. The post mortem showed that deceased had blunt injuries on head, injuries on neck and fracture of the spinal column. These injuries Dr. Imbenzi testified were inconsistent with falling down.

While there is no witness who saw the accused assaulting the deceased and inflicting the injuries that caused his death. I do find that the circumstantial evidence is so strong that it leaves no other explanation than the accused is the one who inflicted the injuries from which the deceased died. I do not accept accused defence that the deceased fell down and sustained the injuries from which he died."

It was that conclusion which led to the conviction of the appellant by the learned trial magistrate.

It was therefore apparent that the conviction was based solely on circumstantial evidence. The incriminating factors being that the appellant was chased away by the deceased. A few minutes thereafter the deceased was found lying down dead. The witnesses who first saw him in that condition did not see any visible injury on the body. However, they found the appellant at the scene. It was only the investigating officer (PW5) who said that he saw scratch marks on the neck of the deceased. Dr. Imbenzi (PW6) was of the view that the injuries found in the body of the deceased were inconsistent with a fall.

The post mortem form indicated that the deceased sustained a blunt head injury and fracture of the cervical column with damage of the spinal cord. These were indeed severe injuries which ultimately proved fatal.

On re-assessment of the evidence, this court confirms that there was no direct evidence against the appellant. None of the witnesses saw him in the act of assaulting and injuring the deceased. The alleged murder weapons were not found in his possession, neither were they linked to the injuries on the body of the deceased. It is acceptable that the deceased died from injuries inflicted upon him. However, the big question is by whom and how were the injuries inflicted.

Suspicion was cast upon the appellant because he had quarreled with the deceased and was chased away by the deceased prior to the deceased being found lying down either in a state of grevious injury or already dead. It was not made clear at what juncture the deceased actually died. There was evidence that he was found lying down already dead. There was also evidence that he was found unconscious and taken to his house where he died before being rushed to hospital. It was also indicated that the deceased died 200 meters away from his house.

Be that as it may, the suspicion cast b upon the appellant no matter how strong was not sufficient evidence to prove that he was responsible for inflicting fatal injuries on the deceased.

The appellant vehemently denied responsibility and said that the deceased's fatal injuries were as a result of falling down while climbing a hill in a state of intoxication.

The post mortem report showed that the deceased sustained fatal blunt head injuries and fracture of the cervical column.

A blunt injury denotes an injury occasioned by an object which is not sharp. This meant that the injuries on the deceased would have been inflicted by any blunt object such as a hard surface.

Since it was not the appellant's obligation to prove his innocence, the prosecution was required to prove

beyond any reasonable doubt that the deceased’s death was not as a result of injuries inflicted by a fall but by the appellant.

It is the view of the court that the prosecution did not discharge its burden of proof by way of direct evidence or even circumstantial evidence.
Herein, the fact of the deceased falling down on a hard surface provided additional circumstances which weakened or destroyed the inference of the appellant’s guilt.

It is well established that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatable with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt (see, **Simoni Musoke Vs. Republic (1958)EA 715)**.

This court does not think, as the learned trial magistrate did, that the inculpatory facts were incapable of explanation upon any other hypothesis than that of the appellant guilt.

Consequently, this court finds that the conviction of the appellant by the learned trial magistrate was unsafe in so far as it was not based on cogent and credible circumstantial evidence.

The learned state counsel was therefore right in conceding the appeal.

In the end result, the appeal is allowed. The conviction is quashed and the sentence set aside.

The appellant is set at liberty unless otherwise lawfully held.

J. R. KARANJA
JUDGE

(Delivered and signed this 7th day of July, 2011)