REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 60 OF 2009

DIMA HUKA DIBA…………….................................……..……….APPELLANT

V E R S U S

REPUBLIC…………………..................................………………RESPONDENT

JUDGEMENT

The appellant was convicted of manslaughter contrary to section 202 as read with section 205 of the Penal Code. He was sentenced to life imprisonment. Being aggrieved by the conviction and sentence he filed this appeal.

Mr. Isaboke advocate filed a Petition of Appeal against the whole of the decision of the learned trial magistrate. He cites eleven grounds of appeal as follows:

1. The learned trial magistrate erred in law and fact in determining the matter against the weight of evidence.

2. The learned trial magistrate erred in law and fact in convicting the appellant notwithstanding the fact that the prosecutor failed to discharge the burden of proof fully and satisfactorily.

3. The learned magistrate erred in law and fact by failing to give due cognizance and recognition of the appellant's defence.

4. The learned magistrate erred in law and fact in wrongfully applying the law of sentencing in a most unusual manner hence the sentence is excessive in the circumstances.

5. The learned magistrate failed to find that the charge against the accused was orchestrated to frame the appellant by the family members of the deceased.

6. The trial court failed to consider the mitigating factors of the appellant.

7. The learned magistrate erred in law and fact in failing to consider the inconsistence and contradictions of the prosecution witnesses.

8. The learned magistrate failed to find that the appellant's constitutional rights under section 72(3) of the Constitution of Kenya were violated.

9. The learned magistrate erred in law and fact in not finding that the risk and decision to treat the deceased was corrective and *mens rea* in the individual mind of the appellant was absent.

10. The learned magistrate failed to find that the cause of death was not proved.

11. The learned magistrate erred in law in not finding that the charge against the accused was defective and was not proven.

The State has opposed this appeal. Mr. Kimathi learned State Counsel supported both the conviction and sentence.

The facts of the prosecution case were that the appellant is a traditional healer. He introduced himself to PW2 the mother of the deceased and told her that if the deceased was her son, he had the ability to exorcise the demons that had given him mental illness and to heal him. PW1 and 2 the brother and the mother of the deceased allowed the appellant to come to their home in order to administer medicine to the deceased, their brother and son respectively. According to the testimony of these two witnesses, the administration of the medicine involved tying the deceased on his hands to an object in order to force him to take the medicine, because he was resisting. It was the evidence of the two witnesses that the appellant whipped the deceased and also used glowing hot firewood to burn the deceased, as part of forcing him to take the medicine. It was also part of exorcising the demons. The appellant also kept the deceased under lock and key between 27th November, 2008 and 15th December, 2008. On the 15th the accused succumbed to his injuries and he died.

The post mortem examination revealed wounds all over the body, burns all over the body and lacerations which were on the back and on the chest. The doctor testified that he was shown a whip and confirmed that the whip could have caused the lacerations which were on the back and on the chest of the deceased. The doctor also said that the whipping was capable of causing death. He formed the opinion that the cause of death was bleeding internally and in the heart caused by a blunt object.

The accused gave unsworn statement in which he described himself as a traditional healer. He said that PW2, the mother of the deceased asked him to go and heal her son who had mental illness. He said that he went to their home and administered treatment on the deceased which included praying for him and touching him on the back with a whip. The appellant stated that the deceased was possessed of demons and that he had given instructions that the deceased should be held in a house for 40 days, and that should not under any circumstances be allowed out of the house. He said that he later learned that contrary to his instruction the deceased had been allowed to leave the house. The appellant stated that the deceased had no injuries on him and so he was to blame.

This is the first appellate court and it is duty bound to re-evaluate and re-analyze the evidence of the lower court and make its own conclusion. In this regard the case of **Okeno Vrs. Republic** 1972 EA 32 is relevant. The court of appeal in the above case stated as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

I have carefully analyzed and evaluated the entire evidence adduced before the lower court by both sides. The appellant was represented in this appeal by Mr. Isaboke while the state was represented by Mr. Kimathi. Mr. Isaboke in his submissions urged that the post mortem report indicated that the deceased was not a healthy person counsel because the respiratory system and the lungs had a problem due to the fact the deceased was a heavy smoker. Counsel urged that the deceased also had a problem with his cardio vascular system. Mr. Isaboke submitted that the body had no fresh wounds noted but had only burns and lacerations. Counsel urged that the prosecution failed to adduce any evidence to establish *acteus reus* against the accused connecting any action on the appellants part to the death.

Mr. Kimathi for the state urged that the prosecution proved its case against the appellant beyond any reasonable doubt. Counsel urged that the appeal had no merit and should be dismissed. Mr. Kimathi submitted that the appellant purported to be a traditional healer and that he was hired by the family of the deceased to exorcise demons from him. Mr. Kimathi urged that the appellant severely whipped the deceased and burnt him causing him serious injuries. Mr. Kimathi submitted that the appellant also declined to have the deceased moved from where he was or be taken to any hospital. Mr. Kimathi urged that the post mortem form revealed that the body of the deceased was full of burns and injuries.

Before considering the issue of the injuries found on the body of the deceased and the cause of death I wish to revisit Mr. Isaboke's submission. Counsel urged that the post mortem report revealed that the deceased was not a healthy person and concluded that it was because he was a heavy smoker. That submission was informed by conjecture and accepting it could amount to allowing evidence from the bar, as there was no evidence to support that submission. I disregard that submission as unacceptable.

Mr. Isaboke urged that PW1 and 2 had contradicted each other. Mr. Isaboke urged that while PW 1 testified that the appellant had asked them to move out of where the deceased was kept, to avoid spirits infestation, PW1 said that he ran away. He urged that PW2 contradicted him by saying that herself and PW1 walked together to the house.

I carefully considered the evidence of PW 1 and 2. These were the eye witnesses and the key witnesses to the prosecution case. Their accounts of the events were consistent and their testimony was also consistent with each other's testimony. The learned trial magistrate relied heavily on their evidence and found that the appellant had whipped the deceased several times on the back and the chest on the 26th and 27th November 2008. On the 27th November the learned trial magistrate found that the appellant had spent the night in the room where the deceased was kept for treatment and that at 4 am, he called PW1 and 2 to tell them that the treatment was over. The learned trial magistrate found that the evidence of PW 1 and 2 was consistent with the evidence of PW3 a neighbor who heard the deceased screaming for help as another person said "Shetani toka" (devil come out).

I find that the evidence of PW1 and 2 was corroborated by PW3 who was an independent witness. From the evidence of these 3 witnesses, I have no doubt that the appellant confined the deceased in a room; and on the 26th and 27th of November both day and night, the appellant whipped the deceased on the back and on the chest, and also burnt him with fire all over his body. The prosecution has established *acteus reus* as against the appellant.

The doctor's findings were that the deceased had lacerations on the back and chest, which were consistent with having been caused by a whip; that the whipping led to internal bleeding, including the bleeding of the heart, which was the cause of the death of the deceased.

The learned trial magistrate arrived at the following conclusion:

"**Having considered the evidence as a whole including the defense of the accused the court finds the prosecution evidence credible and consistent that the accused used a whip to beat the deceased repeatedly burnt him with a burning wood causing him external and internal bodily injuries that led to internal bleeding causing death.**
The prosecution has proved the case beyond reasonable doubt. The accused by his unlawful act of whipping the deceased while purporting to treat him caused this death of Lama Ababa".

I concur with the learned trial magistrate and find that he arrived at the correct conclusion after analyzing and evaluating the evidence before him. The learned trial magistrate cannot be faulted for the conclusion he made in his findings. I find that the appellant's action to severely whip the deceased contending that it was part of the treatment to exorcise demons from the deceased was the direct cause of the death of the deceased.

Turning now to the sentence the learned trial magistrate sentenced the appellant to life imprisonment. In his remarks before sentence, the learned trial magistrate found correctly that the accused was a traditional healer but was not registered or certified by the government. He also found correctly that the appellant in his attempt to treat the deceased resorted to bizarre practices of whipping and burning the accused, which was torturous. I also agree that the offence was aggravated when the appellant forbid the family of the deceased to take him to hospital even when he started spitting blood.

I have taken into consideration that the mother of the deceased is the one who called the appellant to treat the deceased. She was there from the beginning of the treatment and saw the whipping and burning of the deceased by the accused person, yet she chose to take no action despite the cries by the deceased for help. Even when the deceased started spitting and vomiting blood, she still kept him for another week without taking him to hospital or for any medical care.   I agree with Mr. Isaboke the family of the deceased, especially the mother of the deceased, had a responsibility to care for the deceased, who was her own son and who had mental illness. The appellant, even though his action was the substantive cause of death, cannot be the only one to blame. PW2 played a small role in her passiveness in the matter. For that reason I find the sentence of life imprisonment harsh.   In the result I will set aside the sentence of life imprisonment and in substitution thereof impose a sentence of 15 years imprisonment.

Mr. Isaboke raised the issue of confinement of the appellant for a period of 15 days, which was 14 days in excess of the period allowed under the old Constitution.   That issue was raised for the very first time in the appeal. It is trite that a violation of constitutional right under section 72(3) of the old constitution has a remedy provided under section 72(6) of the same constitution. That remedy gives the appellant the right to sue the state for damages as a redress for prolonged confinement. That avenue is still open to the appellant. I say no more.

Having carefully considered this appeal I find no merit in the appeal against conviction. Consequently I uphold the conviction and dismiss the appeal against the conviction.   In regard to the appeal against sentence I find merit in the appeal against sentence. Consequently I set aside the sentence of life imprisonment and in substitution thereof impose a sentence of 15 years imprisonment.   The appellants appeal succeeds to that extent.

Those are my orders.

Dated, signed and delivered this 7th day of July 2011

J. LESIIT
JUDGE