REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CORAM: F. AZANGALALA J.

CRIMINAL APPEAL NO. 177"A" OF 2009

RAYMOND KIPYEGON BARMAO :::::::::::::::: APPELLANT

=VERSUS=

REPUBLIC :: RESPONDENT

[Being an appeal from the Judgment of the Chief Magistrate- S. N. Riechi dated 6th October, 2009 at Eldoret Chief Magistrate's Court in CRC. No. 1507 of 2005]

JUDGMENT

The appellant, **Raymond Kipyego Barmao**, was charged in the Eldoret Chief Magistrate's Court with manslaughter contrary to section 202 of the Penal Code. The allegation was that on 21st December, 2004 at Tuyoluk in Uasin Gishu District of the Rift Valley Province, the appellant unlawfully killed **David Kipkosgei Kangok** Alias **Ambrose Sawe.**

The appellant pleaded not guilty and after a full trial, was found guilty as charged and convicted accordingly. He was then sentenced to serve twenty (20) years imprisonment. He was not satisfied with both his conviction and sentence and has appealed before this Court on five grounds expressed as follows:-

1). That the learned trial Magistrate erred in law to convict and sentence the appellant on a defective charge;
2). That the learned trial Magistrate erred in law and in fact when he amended the charge sheet without giving the appellant a chance to plead to the same;
3). That the learned trial Magistrate erred in law and fact in imposing a sentence which is manifestly excessive in the circumstances;
4). That the learned trial magistrate erred in both law and fact in failing to appreciate that the appellant was provoked; and
5). That the learned trial Magistrate erred in law and in fact in failing to appreciate that the accused was remorseful.

At the hearing of the appeal, the appellant was represented by counsel who elaborated the above grounds. **Mr. Oluouch**, who represented the state supported the conviction of the appellant and the sentence imposed upon him. On the ground alleging breach of trial rights which counsel for the appellant

had argued in addition to the above grounds, **Mr Oluoch** submitted that there was no such breach as the appellant was arraigned in court when investigations were in progress. In any event, so counsel argued, mere breach was not a basis for the acquittal of the appellant in view of the decision in **Mbugua =vrs= Republic [C.A. Application No. 50 of 2010].**

This is a first appeal. I am therefore duty bound to analyze the evidence afresh, re-evaluate it and arrive at my own independent conclusion bearing in mind that I did not see and hear the witnesses testify and should give allowance for that (See **Okeno =vrs= Republic [1972] EA 32**). The brief facts of the case are as follows:-

On 21st December, 2004, at around 6.30 p.m., **Felix Kipkoech Baramau,** (P.W.1) and **Abrahama Kiprop Baramu**, (P.W.3) were watering vegetables at their home in Tuiloyuk when the deceased went there in pursuit of the accused who was their brother. The deceased was armed with an iron bar while the accused was armed with a stick. The two then started fighting. In the course of the fighting, the accused snatched the metal bar from the deceased and hit the deceased several times on the head and other parts of the body. The deceased fell down while bleeding from the head and legs. P.W.2 and P.W.3 called for help. The call attracted **Wilson Baramau Rotich**, P.W.1 who is the father of P.W.1, P.W.2 and the accused. When P.W.1 approached the scene, the accused left. **Prisca Kangogo,** (P.W.4) also went to the scene. Attempts to take the deceased to hospital that evening bore no fruits. The deceased died before being taken to hospital and the deceased's kin were informed.

The following day, the body of the deceased was taken to Eldoret Mortuary by police officers who included P.C. **Jackson Kemboi**, (P.W.8). The officers also took photographs of the scene. Later, the accused was arrested and placed in custody by the same P.W.8.

Dr. **Joseph Imbenzi,** (P.W.6) produced the post mortem report prepared by **Dr. Koslova** who, at the time of the trial, had gone back to her home country -Russia. The post mortem was witnessed by P.C. **James Biwott,** (P.W.7). The cause of death was body trauma resulting from blunt object.

The appellant was then charged as already stated.

In an unsworn statement, the appellant testified that on the material date at about 5.00 p.m., he met the deceased at Kuyarak Centre. The deceased told him that he had looked for him for long. He then chased the accused while armed with an iron bar. The deceased chased him upto his (the accused's) home and into a fruit farm.

The accused then picked a stick and hit the deceased who fell down. The accused took possession of the iron bar which the deceased had and hit him. He then reported to a nearby A.P. Camp where he was given two A.P. Officers who accompanied him to the scene. Attempts to get transport failed and the A.P. Officers advised him to resume the efforts the next day. The appellant then went to sleep. When he woke up, there were members of the public outside where the deceased was. He confirmed that the deceased had died. He then surrendered himself to the police station at Eldoret.

The above were the facts which were before the learned Chief Magistrate on the basis of which he convicted the appellant. He concluded his judgment as follows:-

The accused in his defence admits inflicting the injuries on the deceased from which the deceased later died. It however emerges that it is the deceased who had threatened to beat or injure him. However, in my view, even if that was so, the injuries he inflicted on the deceased were not meant to enable the accused to flee but to cause grievous harm or death as it did in this case

I have considered the whole evidence. I am satisfied that the prosecution has established its case against he accused beyond reasonable doubt. I find the accused guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and convict him accordingly.

On my own independent analysis and re-evaluation of the evidence, I concur with the learned Chief Magistrate. The offence took place in broad day light. It was witnessed by the appellant's brothers, P.W.1 & P.W.2. The appellant's own father, P.W.1 also witnessed the assault of the deceased by the appellant. The appellant himself admitted hitting the deceased with the iron bar which the deceased had. The post mortem report indicated that the injuries sustained by the deceased were serious. Some of them were:-

Ø**Four (4) ribs were fractured;**
Ø**The left kidney was ruptured;**
Ø**Lungs were reduced in size;**
Ø**The left Kidney was ruptured;**
Ø**The right kidney was absent;**
Ø **The skull was fractured;**
Ø**The left sided tibia fibula was fractured;**
Ø**There was contusion of the liver.**

Like the Chief Magistrate, the injuries inflicted by the appellant upon the deceased went beyond reasonable force to prevent attack from the deceased. When the deceased fell down, when he was first hit with a stick, the appellant could have walked away. His brothers P.W.2 and P.W.3 attempted to shield the deceased from the appellant's attack without much success.

The appellant has alleged breach of Constitutional Provisions on the basis that he was arraigned in court on 4th March, 2005 which was 71 days after he was arrested. That Prima facie, would suggest that he was held for 57 days beyond the then permitted period. That complaint was however not raised before the learned Chief Magistrate. I can therefore appreciate the difficulty the State would have in obtaining reasons for the delay. The Court has a discretion to determine whether the delay would constitute breach of section 72 (3) of the repealed Constitution. The discretion is however exercised reasonably, judiciously and on known principles and not on whim or idiosyncratically. The Court of Appeal said as much in **Albanus Mwasia Mutua =vrs= Republic [Criminal Appeal No. 120 of 2004] (UR).** In its own words:-

" On the one hand, it is the duty of the Courts to ensure that crime where it is proved is appropriately punished; this is for the protection of society; on the other hand, it is equally the duty of the Courts to uphold the rights of persons charged with criminal offences particularly the human rights guaranteed to them under the Constitution".

A delicate balance must therefore be maintained. In the circumstances of this case, however, having failed to raise breach of his rights under the Constitution before the trial Court, I do not find that the appellant's trial rights under the Constitution were breached.

In any event, I also find that the alleged breach was not trial - related and the appellant has a remedy in civil law (See **Mbugua =vrs= Republic [Cr. Appeal No. 50 of 2010] (UR).**

The appellant has also challenged the charge as laid. In his view, the same was defective because the section which prescribes the punishment was not stated in the charge sheet. However, in my view, the failure to state the said section was not fatal to the charge. The appellant was not prejudiced by that failure. Indeed, he made no such complaint throughout the trial. He obviously appreciated the offence he faced and attempted to answer the same. The defect in my view, was curable under the provisions of section 382 of the Criminal Procedure Code and the learned trial magistrate was entitled to convict the appellant notwithstanding the said failure.

Related to this complaint is the challenge that the names of the deceased given in the charge sheet differed from the names given by witnesses and in particular, P.W.3, P.W.4 and P.W.6. P.W.3 and P.W.4 referred to the deceased as **Ambrose Sawe** and P.W.1 referred to the deceased as **David Kipkosgey Kangogo**. The charge however described the deceased as **David Kipkosgei Kangok** alias **Ambrose Sawe**. I do not find the challenge serious and it does not merit any detailed discussion of the same. In my

view, the mis- spellings and mis-descriptions alleged are not fatal to the charge. All the witnesses and the accused knew about whom they testified and no prejudice was caused to the accused by the mis-spellings and mis-descriptions of the deceased. I therefore find no merit in grounds 1 and 2 of the Appeal as no failure of justice has occurred.

Grounds 3, 4 and 5 are in reality against the severity of the sentence. The appellant has pleaded that he acted under extreme provocation and further that he was remorseful. With regard to provocation, it is clear that the same was considered by the learned Chief Magistrate. In his own words:-

"It however emerges that it is the deceased who had threatened to beat or inure him. However, in my view, even if that were so, the injuries he inflicted on the deceased were not meant to enable the accused to flee but to cause grievous harm, or death as it did in this case".

I have already referred to the same injuries above. The learned Chief Magistrate in my view cannot be faulted. However provoked the appellant may have felt, he used excessive, if not, irresponsible and beastly force which circumstances were considered by the learned Chief Magistrate in imposing the sentence of 20 years imprisonment.

With regard to the plea of remorsefulness alleged, the record disclose none. When the appellant was asked to mitigate, he offered no mitigation whatsoever.

In the premises, there are no grounds upon which I can interfere with the sentence. In my view, the same was deserved – given that the maximum sentence for the offence of manslaughter is Life Imprisonment.

I therefore uphold the sentence of 20 years imposed upon the appellant.

This appeal therefore fails in its entirety as both conviction and sentence are hereby upheld.

DATED AND DELIVERED AT ELDORET
THIS 27TH DAY OF OCTOBER, 2011.

F. AZANGALALA
JUDGE

Read in the presence of:-

1. Mr. **Chemwok** for the appellant,
2. **Raymond Kipyegon Barmao**, the appellant himself, and
3. **Mr. Kabaka** for the State.

F. AZANGALALA
JUDGE
27/10/11.