



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 312 OF 2008

*(From Original Conviction and Sentence in Criminal Case No.20 of 2007 of the Senior Resident Magistrate's Court at Voi: **J. Gandani – S.R.M.**)*

1. **JOSPHAT MWANYAMBA MWASIO**
2. **GRANTON WANGOZI MWAVULA** **APPELLANTS**
3. **VALID MBOGHO PUSARU**
VERSUS
REPUBLIC **RESPONDENT**

JUDGEMENT

The three Appellants **JOSPHAT MWANYAMBA MWASIO** (hereinafter referred to as the 1st Appellant), **GRANTON WANGOZI MWAVULA** (hereinafter referred to as the 2nd Appellant) and **VALID MBOGHO PUSARU** (hereinafter referred to as the 3rd Appellant) have filed this appeal challenging their conviction and sentence before the lower court on a charge of **MANSLAUGHTER CONTRARY TO SECTION 202 AS READ WITH SECTION 205 OF THE PENAL CODE**. The particulars of the offence read as follows

“On the 10th and 11th day of December 2006 at unknown time, at Chakareli village, Kishamba location in Taita-Taveta district of the Coast Province, jointly with others not before court, unlawfully killed JAMES MAKELELE KINONA.”

The three appellants were jointly arraigned before the Senior Resident Magistrate sitting at Voi Law Courts on 16th March 2007 where each entered a plea of **‘not guilty’** to the charge. Their trial commenced on 25th April 2007 at which trial the prosecution led by **INSPECTOR GITHOGE**, called a total of twelve (12) witnesses in support of their case. The prosecution revolves around an unfortunate young lady known as **‘SAMBA’** a daughter to one **MWAVULA**, all residents of Chakareli village in Mwatate. This girl **‘Samba’** was believed to have been possessed by evil spirits commonly known as **‘Jinis’**. It was further believed that the deceased **JAMES MAKELELE** was the culprit who had **‘sent’** these evil spirits to possess the girl. **PW3 ELINA KIRIGHA**, who runs a food kiosk in the village told the court that on 10th December 2006, the deceased was at her kiosk eating a chapati which he had purchased from her. **‘Mzee Mwavula’** the father to **‘Samba’** came and dragged the deceased away to his daughter’s house. At that house friends and relatives had gathered to pray for the girl. The girl herself was shouting claiming that it was the deceased who had sent the evil spirits to possess her. This session of prayers and accusations continued for about five (5) hours from 4.00 p.m. to 9.00 p.m. After the girl appeared to calm down everybody left the home. The 3 appellants were seen **‘escorting’** the deceased home. The next day at about 8.00 A.M. the body of the deceased was found lying dead and unclothed near a railway line. The matter was reported to police who upon completion of their investigations charged all the three appellants with this offence of Manslaughter.

At the close of the prosecution case all the three (3) appellants were ruled to have a case to answer. They each gave their defences denying any involvement in the death of the deceased. On 27th October 2008, the learned trial magistrate delivered her judgement in which she convicted all 3 appellants

of Manslaughter and sentenced each to serve a prison term of fifteen (15) years imprisonment. Being dissatisfied with both their conviction and sentence, the appellants filed this appeal. **MR. MAGOLO** Advocate appeared and argued the appeal on behalf of the three appellants whilst **MR. ONSERIO**, State Counsel who represented the Respondent State conceded the appeal. Being a court of first appeal I am guided by the decision of the Court of Appeal in the case of **OKENO –VS- REPUBLIC [1972] E.A.L.R.** as follows

“it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgement of the trial court should be upheld.”

I have carefully perused the record from the trial court. I have also given careful consideration to the submissions made by both counsel. Mr. Magolo argued that the proceedings before the lower court were rendered invalid by the fact that the charges were based on an **‘information’** as opposed to a **‘charge sheet’**. Counsel submits that S. 274 of the Criminal Procedure Code allows the institution of a charge by way of an Information but **only** in the High Court. Trials before the lower court, submits Mr. Magolo cannot be instituted by way of an Information. I have looked at S. 274 of the Criminal Procedure Code. I am satisfied that it falls within the provisions dealing with **“Procedure in trials before the High Court”**. However in my view this is a mere technicality which would not invalidate the subsequent trial. There was no prejudice caused to the accused persons by the institution of the charge in this way. I can see no miscarriage of justice which was occasioned by the use of an information as opposed to a charge sheet. The charge of Manslaughter contrary to S. 202 of the Penal Code was clear and the facts also supported an offence of Manslaughter. More importantly as has been conceded by Mr. Magolo the court prosecutor applied to consolidate the case with Cr. 296/2007. That application was duly allowed by the court and a new charge sheet was filed. This was in fact a charge sheet in the terms of S. 89 of the Criminal Procedure Code. The same charge and particulars were included in this second charge sheet which was signed by the magistrate on 16th March 2007. The charge was read out afresh to the appellants who again each entered a plea of not guilty. This action of filing the latter charge did in my view cure any defect in having initially instituted the proceedings by way of an information. I find that no miscarriage of justice was occasioned by the initial filing of an information as opposed to a charge sheet. I therefore dismiss this ground of the Appeal.

Counsel for the appellants has also argued that the evidence adduced against his clients was not sufficient to warrant a conviction. At the outset it is important to state that the fact of the death of the deceased is not in any doubt whatsoever. **PW1 HAMMERTON MDAWIDA MAKELELE**, who was a son to the deceased told the court that he did see the body of his dead father, which was naked with a stick inserted into the anus. **PW4 WINNIE MKAWAJOMBA**, also testified that she saw the dead body which she identified as James Makelele a fellow villager. **PW10 DR. CHARO WILSON** gave evidence on the autopsy conducted on the body of the deceased by his colleague Dr. Mwero. The body had fractures to the ribs and bruises all over. The cause of death was found to be **“cardio pulmonary arrest due to chest injury with multiple rib fractures and strangulation”**. This provides conclusive evidence that the deceased met his death due to the illegal act of another person or persons.

From the evidence on record, it is clear that there was no eyewitness to the killing of the deceased. Nobody saw the person or persons who strangled and beat the deceased to death. The evidence relied upon by the trial court to convict the appellants was largely circumstantial. Such evidence was defined in the case of **JAMES MWAGI –VS-REPUBLIC 1983 KLR 327** as follows:-

“In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

PW3 told the court that on the material date one Mzee Mwavula came and dragged the deceased from her kiosk to his daughter’s house. This was where some sort of inquisition was being conducted over the sending of evil spirits to **‘confuse’** the daughter of Mzee Mwavula known as Samba. Several prosecution witnesses testify that they were present at that **‘inquisition’** where Samba herself named the deceased as the one who had bewitched her. **PW5 MARY WAKIO**, told the court that she too was inside that house, and that she being a witchdoctor collected some herbs with which to treat the girl. **PW3** confirms that the deceased was also inside that house. After the girl Samba calmed down everybody left the home. The

persons in whose company the deceased was last seen were the three appellants. **PW7 WILLIAM MWANDOE JANELIZA** states in his evidence at page 35 line 27

“Makelele [the deceased] went out and was ordered to go to his home. I saw Granton accused 2 hold Makelele’s hand and he said he was escorting Makelele home. It was how 9.00 p.m. Granton and other people escorted Makelele away. I saw Granton pull Makelele away. I also saw Mwanyamuba accused 1 pull away Makelele. I followed them behind. I heard Makelele screaming. I saw he was being beaten by the people who were pulling him. [my emphasis]. They took him down the road. On reaching the railway line they diverted to follow the railway”

It is of importance to note that the deceased met his death that night and his body was recovered the following morning near the railway line. **PW3** positively identified the three appellants whom he knew well as fellow villagers. The question that immediately comes to mind is why the appellants felt that they needed to escort the deceased to his home. There is no evidence to suggest that he was not able to proceed home on his own. Further even if the appellants were being cordial enough to escort the deceased home why did they feel the need to drag him away? Why not walk calmly by his side? I have it in mind that the incident occurred at night when it was dark. However under cross-examination by the 2nd Appellant **PW7** states that there was a lantern outside the house and he was able to see and identify the appellants well. It must be remembered that all these people were inside the house together at the same time providing ample opportunity for a positive identification. I do not find there to have been any possibility of a mistaken identity. I am also mindful of the fact that there was only one witness **PW7** who saw the 3 appellants leading the deceased away. In her judgement at page 67 the learned trial magistrate did warn herself sufficiently before relying on this evidence of a single witness. Further at page 67 line 20 she states

“The evidence of the 7th prosecution witness sounds truthful. He was an honest witness.”

This is a finding from the trial magistrate who had the advantage of hearing the witness testify and was best qualified to comment on his demeanour. I have no reason to doubt or controvert this finding.

In my view the circumstantial evidence against the three appellants is indeed weighty. They lead the deceased away from a charged meeting where he has been identified as a witch. Ostensibly escorting the deceased home they pull and drag him away all the while beating him causing the deceased to cry out for help. They lead the deceased towards the railway line where his naked body is recovered a few hours later. The only logical conclusion from this set of facts is that the three appellants were the ones who inflicted the injuries which led to the death of the deceased. Taken in its totality this set of facts can lead to only the conclusion of guilt against the appellants. In my own view no other hypothesis other than the guilt of the three appellants is reasonable. In this case I find that the circumstantial evidence pointed directly at the 3 appellants, who were last seen with the deceased as the persons who killed him. The conviction rendered by the trial court was sound and proper. I do not agree with the learned State Counsels concession of this appeal. I do hereby confirm the conviction of each appellant on the charge of Manslaughter.

After conviction each appellant was accorded an opportunity to mitigate. Thereafter the court sentenced them to serve 15 years imprisonment each. I note that their actions did cause the loss of a human life. The deceased met a cruel, brutal and unnecessary death. This killing of suspected witches must be discouraged and perpetrators dealt with accordingly. I find the sentences imposed to have been merited and appropriate given the circumstances and I do uphold the same. The upshot is that this appeal fails in its entirety. The convictions and sentences imposed by the lower court are hereby confirmed and upheld.

Dated and Delivered at Mombasa this 2nd day of November 2010.

**M. ODERO
JUDGE**

Read in open court in the presence of:-
Mr. Magolo for 3 appellants

Mr. Onserio for State

M. ODERO
JUDGE
2/11/2010