



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL NO. 50 OF 2009

PASCAL KILIMO KIPLANGAT

DANIEL KIPKOECH APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against Judgment from Eldoret Chief Magistrate's Court Criminal Case No.4144 /2008

delivered by HON. N. SHIUNDU (SRM) on 19th March 2009)

J U D G M E N T

The appellants **PASCAL KIPLIMO KIPLAGAT** and **DANIEL KIPKOECH KIPCHUMBA** were charged, tried and convicted by the learned Senior Resident Magistrate Eldoret (**HON. N. SHIUNDU**) of the offence of manslaughter contrary to the provisions of Section 202 as read with those of section 205 of the Penal Code and were sentenced to serve a term of imprisonment of twenty (20) years.

The particulars of the offence were that on the 20th day of August, 2008, at Kapindani village in Uasin Gishu District of the Rift Valley Province jointly and unlawfully killed **BRIAN KIPCHUMBA CHERUIYOT**.

The facts leading to the conviction were that on 20.08.2008 at about 11.p.m. neighbours of the 1st accused heard screams from his house and **PW1 Edwin Koech Cheruiyot** went to check what was happening. On the way he met a young man called Kiplimo who informed him that the 1st accused's home had been attacked by Kipchumba and his brother Kiprop. He proceeded and was joined by many other neighbours. On arrival at the 1st accused's homestead they found the deceased lying down on the ground and a person called Kiprop was sitting next to the deceased. PW1 gave evidence that the two accused persons were involved in a fight with the deceased and Kiprop.

According to PW1 the 1st accused was unarmed but the 2nd accused had a stick. The deceased was bleeding from the scalp but Kiprop appeared to have no injuries. PW1 and a neighbour called Musa went to report the incident to the village elder called Chepkonga whom they found feeling unwell. They left

him at his home and the duo went back to the scene where they put the deceased in a house due to impending rain and they went to Jennifer's house, a neighbour, where they sheltered themselves from the rain and PW1 went to his home once the rain was over. He was to learn the next day that the deceased had died and his body had been taken away by the police and Kiprop was taken to hospital. PW1 said on cross examination that he did not know who had started the fight among his neighbours.

PW2 was **MUSA KIPLIMO CHEPKONGA** and his evidence was that at about 11.p.m. he heard screams from the homestead of the first accused and he went to find out what was going on. He found the deceased on the ground and next to him was Kiprop. The accused persons were there and so were many neighbours. He found the accused persons assaulting the deceased. When PW2 arrived at the scene he found the 1st accused armed with a stick and the 2nd accused was not armed but both were hitting the deceased. He was one of those who went to report the incident to the village elder but finding him unwell and unable to accompany them back to the scene the witness and another returned to the scene where they put the deceased in a house and left only to learn the next day that the deceased had died. He was categorical in cross examination that he found the two appellants assaulting the deceased and Kiprop and that at the time he arrived at the scene it was the 1st appellant who while armed with a piece of timber which he (PW2) identified in court, was beating the deceased. PW2 did not know why there was that fight.

The village elder to whom PW1 and PW2 reported the incident on the night of 20.08.2008 gave his evidence as the third prosecution witness and his evidence was that he was unwell when the report was made to him and so did not accompany the reporters but that early the next morning he went to the scene, the home of Kiplimo the 1st appellant. He found the door to the house open. The deceased's body was on the floor and Kiprop, whom the witness said was the deceased's brother, was seated next to the deceased crying in pain. Outside people were screaming. The witness called a neighbour called Ben Kandie who helped him put Kiprop in a vehicle. His further evidence was that while at the scene that morning the 1st appellant emerged from the crowd of people and told the witness that it was he, 1st appellant, who had killed the deceased and 1st appellant showed the witness a metal bar, a panga and a belt which the appellant said the deceased and Kiprop had. The witness did not see the 2nd appellant at the scene that morning. All that the 1st appellant asked the witness in cross examination was when the witness had come to the scene and the answer was that the witness only went to the scene the morning following the incident and therefore did not witness what happened.

PW4 was **Patrick Kiptoo Cheruiyot** the elder brother of the deceased who identified the body of the deceased at the Moi Teaching and Referral Hospital Mortuary on 25.8.2008 at about 3 p.m. for purposes of post mortem.

Dr. Joseph Embenzi gave evidence as **PW5**. He produced the post mortem report on the deceased. It was done by Dr. Nalianya. The date of post mortem was given as 19.08.2008 and showed a body smeared with dry blood and with a laceration on the head, bleeding under the skin on the upper and lower limbs, dislocation of the ribs and bleeding in the spaces between the ribs. The cause of death was given as **multiple injuries due to assault**.

The investigating officer gave evidence that he and other police officers proceeded to the scene on 20.08.2008 where they found the body of the deceased inside a house. The body was naked. There was a lot of blood at the scene. They found a panga a metal bar, a belt and a piece of wood in the house. The scene was photographed. They arrested the 1st appellant at the scene. The body of the deceased was removed to the mortuary. He produced the weapons in evidence saying that his investigations revealed that four people were involved in the incident.

PW7 was **Derrick Kiprop Cheruiyot** who said that on the night of 19.08.2008 at about 9.00 p.m. he was leaving the SEARCH 4 shops with his brother Brian Kipchumba Cheruiyot. On their way they came along the home of the 1st appellant. The 1st appellant then went and hit the witness on his legs with a stick. The 1st appellant was in the company of the 2nd appellant. The appellants then dragged the witness

and the deceased to the homestead of 1st appellant. That homestead was about 10 yards from the path the witness and the deceased were walking on when first attacked. At the homestead the 2nd appellant pulled out a panga. The witness and the deceased were then beaten by the appellant. The first appellant was armed with a piece of wood with which he beat the duo and he later collected an iron rod. The 1st appellant said that he had looked for the deceased for a long time and now he had got him. The witness told court that he was beaten on his legs, month, stomach and the back. They were locked inside the 1st appellant's house. Witness lost consciousness and when he came to the next day he found his brother the deceased herein lying next to him naked. He screamed and neighbours came and he saw one Chepsengeny who took the witness to Moi Teaching and Referral Hospital where he was admitted for six days. In cross examination the witness maintained that they (he and deceased) were attacked on the path as they walked home and that they never attacked the 1st appellant as he alleged.

PW8 was one of the investigating officers. He visited the scene and they recovered a belt, a panga and iron bar and a piece of wood which he identified in court. They arrested 1st appellant and took him into cells. His investigations showed that the 2nd appellant had taken poison earlier in the day on learning that the police were looking for him. He was admitted at Moi Teaching and Referral Hospital from where he was arrested upon his release.

PW9 was the scenes of crime officer who photographed the scene and the naked body of the deceased and produced the photographs in evidence.

In his defence the 1st appellant in an unsworn statement in evidence stated that he was in his house at about 10.00 p.m. on 19.08.2008 when he heard a knock on his door. The door was soon broken and he was attacked by the people who were knocking the door. He said his attackers were two naked people. In the ensuing struggle he was able to grab one of the attackers and then he screamed attracting many people who came and attacked the attackers. He said that they sent for the village elder who was found unwell. They tied the deceased inside his house and 1st appellant participated in calling the chief who then called the police who came, took the body of the deceased to the mortuary and arrested the 1st appellant.

The 2nd appellant's defence was that he was at work when at 4 p.m. on 19.08.2008 he was called by a neighbour who told him that the 1st appellant had been attacked and so he decided to go and find out what happened. On arrival he found that the deceased was injured and he told the people gathered at the scene to report to the village elder and he saw the attackers were locked in a house. He went away back to work until 6.30 p.m. the next day. He drank some changaa and he collapsed and when he came to he found himself at Moi Teaching and Referral Hospital from where he was charged and arrested.

The learned trial magistrate did not believe the appellants but found them guilty and convicted them then sentenced them to twenty (20) years in prison, provoking this appeal wherein both appellants raised almost identical grounds of appeal that there was suspicious, insufficient, fabricated evidence which could not sustain a conviction, that the evidence was contradictory and the post mortem report was irregular.

I have, as is required of me, fully assessed the evidence at trial and subjected the same to thorough scrutiny and evaluation and having done so I come to the following findings.

When the appellants say that there were contradictions I find that indeed that may appear to be so. **PW1** said in his evidence that when he arrived at the scene of the crime he found appellant number two armed with a piece of wood with which he was assaulting the deceased. Then **PW2** says that when he arrived it was the 1st appellant who was armed with a stick or piece of wood assaulting the deceased. What appears to be a contradictory is dislodged by the fact that no where in evidence was it said that both PW1 and PW2 got to the scene at the same time. What came out in evidence was that many people answered to the screams emanating from the appellant's home. It may be the scenario that when PW1 arrived at the scene it was the 2nd accused who had the piece of wood and when PW2 arrived at his time it was the 1st appellant who had the stick. What is quite clear is that the evidence of PW2 and that of PW7 corroborate each other sufficiently that PW7 and the deceased were beaten by 1st appellant with a piece of wood and

the 2nd appellant was present with a panga both of them assaulting the deceased and PW7 and it was the execution of that common action and purpose as envisaged by section **21 of the Penal Code Cap. 63 Laws of Kenya** that led to the death of the deceased and hospitalization of the witness (PW7) as the post mortem on the body of the deceased showed. The date of the postmortem was taken by the appellants as a main ground. It is true that the postmortem report indicates that postmortem was done on 19/08/2008 at 3.00 p.m. whereas PW4 who identified the body said that it was performed on 25.08.2008 at 3 p.m. after he had identified the body. I find that inconsistency minor when I look at the postmortem report itself. It was dated 25/08/2008, the very day PW4 said post mortem t was done. It is not the normal practice of medical personnel conducting a postmortem to give the report a future date from that on which it is performed. I would find that the indication of 19/082008 as the date of performing the postmortem report to be an inconsistency as would not affect the validity of the entire report. I say so considering the rest of the report which agrees in all material factors that the body upon which that postmortem was performed was that of Benjamin Kipchumba and it had injuries consistent with the assault of it as described by PW1, PW2, and PW7. To fault the report on the date alone and to accept all the other details is to my mind an attempt at finding an escape from a completely and tightly sealed dungeon.

When PW3 said in his evidence that the 1st appellant emerged at the scene and showed him the weapons with which the deceased and PW7 allegedly attacked him and then the 1st appellant said he had killed the deceased, the 1st appellant did not ask the witness (PW3) a single question in cross examination on this very important aspect of his admission of the offence. I find that if the 1st appellant had never told the witness that then the 1st appellant would have grilled PW3 thoroughly on it. That he did not must be held against the 1st appellant and the necessary inference drawn, and I am satisfied that it was not a matter the 1st appellant would have missed to take up with the witness had he never said it at the scene.

The account of what happened on the night of 19.08.2008 was vividly given by PW7 and the court believed that version as opposed to that given by the appellants. I agree with the trial court. The version of PW7 was materially corroborated by the evidence of PW1 and PW2 and it is believable. The 1st appellant's tale about "many people" (not neighbours) having answered his screams upon being attacked by the deceased and PW7 is rightly that, a tale. Not a single witness agreed with him. And if the attackers were naked then when did PW7 dress himself as he simply went into unconsciousness and never said a word about dressing himself when he came, to and found his brother lying next to him dead and naked. I do not find that sort of defence believable and it is inconsistent with PW7's testimony. Clearly none of the appellants participated in calling and or reporting the incident to the village elder, the chief and later the police as all the evidence availed gives that task to other persons. The appellants' detail on that aspect is a feeble lie. The 2nd appellant did not contradict PW8 on why he (2nd appellant) was admitted in hospital and his whole evidence as to his alibi at the material time on 19.08.2008 was successfully dislodged by the evidence of PW1, 2, and 7 who stated that indeed at about 11.00 p.m. He and the 1st appellant assaulted the deceased and PW7.

The appellants did not attack the term of the sentenced meted out to them and similarly I do not. For having killed the young deceased herein who was only 18 years old and having assaulted the PW7 causing him to be admitted in hospital for six (6) days although they were not charged with the assault, a term of twenty years (20) imprisonment was light, although a correct sentence in law.

In the result I find no merit whatsoever in this appeal and accordingly hereby dismiss it. Right of appeal 14 days.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF DECEMBER, 2010.

P.M. MWILU

JUDGE

In the presence of;

Mr. Kabaka – State Counsel

Both appellants

Andrew Omwenga – Court Clerk

P.M. MWILU

JUDGE