



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CRIMINAL APPEAL NO. 67 OF 2010.**

***(From original conviction and sentence in Criminal Case No. 2076 of 2003 before the Chief Magistrate – W.A. Juma at Kitale)***

**JOSEPH NYONGESA NAMUKANA.....APPELLANT.**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

**J U D G M E N T.**

1. The appellant was charged with the offence of Manslaughter contrary to section 202 as read with the section 205 of the Penal code. The particulars of the offence stated that on 21<sup>st</sup> day of March, 2003 in Matunda Township, Mtunda sub location Nzoia location in Lugari District within Western Province, jointly and unlawfully killed JESKA NALIKA MASINDE. The appellant pleaded not guilty to the charge and after a full trial he was found guilty upon conviction he was sentenced to 5 years imprisonment.
2. Being dissatisfied with the conviction and sentence, the appellant has appealed. He relied on several grounds of appeal as contained in the petition of appeal filed on 23<sup>rd</sup> April, 2008. The appellant also relied on his written submissions which contained further amended grounds of appeal. The appellant faulted the prosecution's evidence regarding the investigations of this case. There was doubt whether the offence was committed by the appellant. The evidence by the prosecution was also challenged for failing to take into account material discrepancies and contradictions in the prosecution's case. Finally the defence by the appellant was not taken into consideration despite the fact that it was plausible and the fact that the appellant was kept in police custody longer than the period that is provided for under the constitution.
3. This appeal was opposed by the state. Ms. Bartoo, the learned state counsel submitted that there was overwhelming evidence that led to the conviction of the appellant and sentence of five years is lenience considering the offence carries a life sentence. The deceased complained of sickness and was taken to the hospital by her sister Elizabeth Nekesa Masinde who testified as PW1. The deceased requested to be taken at Matunda West View Medical clinic where she said she had been assisted the previous day to procure an abortion. According to PW1, the appellant told her that the deceased was suffering from Malaria and he proceeded to inject her and while she was on the bed the appellant revealed to PW1 that he had helped the deceased to procure an abortion. PW1 asked her sister Dorris Nakhumicha Masinde

(PW2) who had come to see what was happening to inform people at home that they were at that clinic. While at the clinic PW2 testified that the appellant had told her he had pretended to put drip on the deceased so as to look like he was treating her for malaria and to conceal that the deceased had procured an abortion. She further testified that she witnessed the appellant cutting pieces of flesh from the deceased's private parts while the deceased was groaning in pain. Shadrack Simiyu Murefu (PW3) also a brother of the deceased passed by the clinic and spoke with the appellant who said that the deceased had a lot of malaria for which he was treating her and needed to be paid a further sum of Ksh. 800/=. The condition of the deceased deteriorated and it was compounded by the fact that the appellant abruptly left the clinic at about 6.00 p.m. saying that he had lost his father. The deceased was removed from that clinic by her mother, Alice Nanjala (PW6) on the same night but when her condition deteriorated she was taken to Kitale District Hospital where she was admitted but passed away on 21<sup>st</sup> March, 2003. A post mortem examination was performed by Dr. Meshack Liru (PW7) He produced a post mortem report that showed the deceased had an enlarged uterus with anterior perforation with purulent fluid present in peritoneal cavity. On dissection of uterus he found remnants of septic placenta and membranes present in the cavity. He formed the opinion that the cause of death was septicaemia due to septic abortion. The investigating officer did not give evidence and after the close of the prosecution case, the appellant was put on his defence. He gave a sworn statement of defence and denied having committed the offence. He also relied on the evidence of Josephine Midecha (DW1) who was at the time working as a nurse at West View Medical Centre. She testified that the deceased visited the clinic on 10<sup>th</sup> March, 2003. She was vomiting and nose bleeding with high temperature. She was found to have malaria and admitted for one day the following day her mother discharged her from the hospital and the police came on 26<sup>th</sup> March, 2003 and took the treatment card. The appellant was convicted based on the above evidence. According to the state counsel the court should dismiss this appeal and enhance the sentence to life imprisonment while taking into account that an innocent life was lost due to the appellant negligence. Moreover, the contention that the appellant was held in police custody longer than provided in the constitution should be disregarded as he should have raised it before the trial court.

4. This appeal turns on two issues whether failure by the investigating officer to give evidence in this case was fatal and whether the evidence by the prosecution proved beyond reasonable doubt the charge against the appellant. The state urged the court to enhance the sentence from five years to life sentence but hearing in mind the notice of enhancement of sentence was not duly served upon the appellant I will not enhance the sentence. I have evaluated the evidence by the prosecution witnesses and also the defence. It is not in dispute that the deceased was treated at the appellant's clinic on the 10<sup>th</sup> March, 2003. According to the appellant he treated the deceased for malaria and admitted her for one day but she was discharged the following day when he had gone to attend the funeral of his father. Since there is no denial that the appellant treated the deceased on 10<sup>th</sup> March, 2003, I do not see any possible prejudice that was caused by failure of the investigating officer to give evidence.

5. There is evidence from the deceased's family especially PW1 and PW2 who claimed that the appellant told them the deceased had procured an abortion the previous day. PW1 saw the appellant inserting some kind of instruments on the deceased and removing some human matter. It is also confirmed that the deceased had undergone a botched up abortion which turned septic and was the cause of her death. It is the trial court that heard this evidence and believed the prosecution witnesses. I have also considered the defence evidence and in my view it does not dent the otherwise strong prosecution's evidence especially the evidence of PW1, PW2 and PW7. Accordingly I find no merit in this appeal which is dismissed and the conviction and sentence are upheld.

Judgment read and signed on 16<sup>th</sup> December, 2010.

**MARTHA KOOME.**

**JUDGE.**

