



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 86 of 2004

DISHON KAMAU KAMANDE APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The Appellant herein was charged before the Lower Court with the offence of *Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code*. After the trial before the Lower Court the Appellant was convicted as charged. The court proceeded to sentence him to five years imprisonment. Being dissatisfied with both the conviction and sentence Appellant has preferred this appeal. The evidence that was adduced before the Lower Court was that the Appellant attacked the deceased with a club by hitting him on the chest. Two days later the deceased died due to a Ruptured Spleen. That injury was caused by blunt trauma. As the first Appellant court, I am expected to submit the whole evidence of the Lower Court to a fresh and exhaustive examination. In so doing I must weigh the conflicting evidence and draw my own conclusion. In so doing I should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. ***See the case of Okeno vs R [1972] EA 32.*** Bearing in mind that responsibility I will proceed to go through the evidence of the Lower Court.

The original handwritten notes of that evidence of the magistrate in respect of PW 1 did show that this witness referred to the year 2001 and not 2000 as indicated in the typed proceedings. PW 1 stated that on 1st January 2001 they were on their way home. It was about 7p.m. It was not dark and there was moonlight. He was in the company of the deceased together with others. When they reached a road junction the Appellant removed a club and used it to hit the deceased on the right side of his chest. Thereafter they proceeded home and reported the matter to the chief the following day. He further stated that on 3rd January 2001 the deceased went to Nairobi and later died. PW 2 said that he knew the Appellant since they were neighbours.

PW 3 stated that on the 1st of January 2001 while on the road in the company of others together with the deceased they stopped the Appellant who seem to want to run away. PW 3 tried to hold him and the Appellant hit him with a fist on the mouth. That was when the deceased chased the Appellant and the Appellant hit the deceased with a club on the left side of the chest. The Appellant ran away and the deceased was left with the club. PW 3 did accept that they were drunk but confirmed that they did see the Appellant. He was able to identify the club before the court.

PW 4 also said that on 1st January 2001 he was on the way home with PW 2, 3 and the deceased. On

the way they met the Appellant and the Appellant hit PW 3 and when the deceased tried to hold him he also did hit him with a club and ran away. This witness did also identify the club before court which he said it had the Appellant's initials. He confirmed that he saw the Appellant because he was near him.

PW 5 was the wife of the deceased. On that material night she said that the deceased on arriving at home said that he had been hit by the Appellant whom they had met on the way home. He said that the Appellant had hit him on the stomach. She gave him some food but he was only able to take a little. That night the deceased complained of experiencing severe pain at the place where he had been hit. On the following day he complained of experiencing heart burn.

PW 6 was a colleague of the deceased. He said that on 3rd January 2001 at about 6p.m. whilst at the Kenya Airways Base the deceased began to complain of pain of the stomach. He later fell down unconscious. He was given First Aid and then he was admitted at Forces Memorial Hospital. He died the following day.

PW 7 was based at Saba Saba Police Station. He said that on 5th January 2001 he arrested the Appellant and charged him with the present offence. He also recovered a club from his possession.

PW 9 was Chief Inspector Robinson Wambu. He produced the Post Mortem Report by consent of the Appellant. The body of the deceased had been identified by PW 8. The Post Mortem Report had been prepared by Dr. Olumbe who by the time the case came up for hearing was no longer in the country. The Appellant did not object to the production of that report by the Police Officer. It ought to be noted that the report indicated that death was due to Ruptured Spleen.

On Appellant being put to his defence chose to give an unsworn statement and called two witnesses. In his statement he denied killing the deceased. He stated that on 3rd January 2001 he was in Nairobi. He travelled to Saba Saba area on 14th January 2001. That he was arrested on 15th January 2001.

His first witness stated that on 1st January 2001 on arriving from his place of duty at about 7p.m. he went to the Appellant's house and stayed there together with another person until 8.30p.m. The second witness stated that on the 1st January 2001 he was with the Appellant at the place of work in Nairobi. At 7.30p.m. that same day he visited the Appellant at his home in Githurai. That he was with the Appellant upto 8.45p.m.

PW 2 and 4 were in the company of the deceased on the 1st January 2001 when they saw the Appellant hit the deceased with a club. Their evidence on that attack is clear and consistent. PW 2 said that the Appellant hit the deceased on the right hand of the chest. PW 3 said that the deceased was attacked on the left side of the chest. That inconsistency does not in any way affect the quality of the prosecution's evidence against the Appellant. What is clear is that they saw the Appellant hit the deceased on the chest.

PW 5 was the wife of the deceased. She stated that the deceased made a dying declaration to her and identified the person who attacked him. The deceased named the Appellant as his attacker. That night the deceased suffered with pain in the area he had been hit. He continued to suffer until the following day when he travelled to Nairobi. *Section 33 of the Evidence Act provides that a dying declaration is admissible in evidence when it relates to the cause of death.* The cause of death was stated to be a Ruptured Spleen by the doctor who carried out the post Mortem. Such a cause is consistent with the being hit by a club.

The law as regard dying declarations is now well settled. As was held by the Court of Appeal in **Okethi Okale & others –vs- Republic [1965] EA 555** at page 555 Para E;

“In this respect we would quote the following passage from the judgment of the court in Jasunga Akumu vs R. (1954) 21EACA at Page 334: ‘the question of the caution to be exercised in the reception of dying declarations and the necessity for the corroboration has been considered by this court in numerous

cases, and a passage from FIELD ON EVIDENCE (7th Edn.) has repeatedly been cited with approval:

‘the caution with which this kind of testimony should be received has often been commented upon. The test of cross examination maybe wholly wanting; and ... the particulars of the violence may have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed ... the deceased may have stated his inferences from facts concerning which he may have omitted important particulars, from not having his attention called to them.’ (Ramzani bin Mirandu (3); R-vs-Okulu Eloku (4) R. –vs Munyovya bin Musuma (5)). Particular caution must be exercised when an attack takes place in darkness when identification of the assailant is, usually, more difficult than in daylight (Ramzani bin Mirandu (3); Munyovya bin Musuma(5). The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case; it is no guarantee of accuracy (ibid). It is not a rule of law that, in order to support a conviction, there must be corroboration of a dying declaration (R vs Eligu Odel (6) Re Guruswami(7), and there may be circumstances which go to show that the deceased could have been mistaken in his identification of the accused. (See, for instance the case of the second accused in R. vs Eligu Odel (6) and R.vs Epongu Ewunyru (8)). But it is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration.”

It is pertinent to note that the Appellant did not cross examine the prosecution witnesses on their evidence that he attacked the deceased. He did not deny that the club that was detained by the deceased and which was produced by the court was his. He also did not deny that that club had his initials. Further the arresting officer stated in chief that he arrested the Appellant in Saba Saba on 5th January 2001 yet in his defence the Appellant said that he did not go to Saba Saba until 14th January 2001. He did not cross examine that officer in respect of the date of his arrest. The Appellant’s witnesses’ evidence is rejected by this court just as it was rejected by the trial magistrate. I am of the view just like the learned magistrate that those witnesses were not telling the truth. Their evidence lacked specifics and detail. The witnesses talked about being at the same place of work with the Appellant but failed to state where that was. With that in mind and in view of the fact that the Appellant did not contradict the prosecution evidence in chief the defence offered by the Appellant is rejected. The prosecution witnesses at the scene of the attack stated that they were drunk. The fact that they were drunk does not in mind detract the weight of their evidence. Each of those witnesses at the scene gave evidence consistent with each other on how the Appellant attacked the deceased. I do find that the prosecution met the required standard of proof that is beyond reasonable doubt. I confirm that I have perused the Grounds of Appeal. I find that some raise new grounds that were not raised at the trial and others raise issues which cannot be considered at this appeal. In considering the sentence passed against the Appellant I cannot find any reason why I should interfere with that sentence. The end result is that the Appellant’s appeal is hereby dismissed.

Dated and delivered at Nyeri this 20th day of February 2008.

MARY KASANGO

JUDGE