



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 257 of 2005

LENAYAKENI MUGO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The appellant was charged in the Lower Court with manslaughter contrary to Section 202 as read with 205 of the Penal Code. After trial before the Senior Resident Magistrate at Nanyuki the appellant was convicted as charged and sentenced to 8 (eight) years imprisonment. The appellant was aggrieved by the conviction and sentence and has therefore preferred this appeal. 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*.

PW 1 from the evidence adduced in the Lower Court stated that he is a resident of Dol-dol and on the 10th October 2004 a person came to his residence asking for a place to sleep. PW 1 showed him a house where he could spend the night. In a short while PW 1 heard noise coming from the house. He heard someone saying, “*You won’t sleep here.*” PW 1 did not witness any fight but he was called to the scene where he found the appellant according to him had killed the deceased. He saw the injured person was bleeding from the chest. He also observed that the appellant had a rungu. The appellant was bound by PW 1 and the following day when the police came they were able to recover a knife from the scene which this witness identified it before court.

PW 2 is a son of PW 1. He confirmed that the appellant and someone else came to their residence and asked his father for a place to sleep. Thereafter on being shown this witness heard them make a lot of noise from that house. This caused him to go outside and found the two persons outside the ‘boma’. He saw one person lying down on the ground and was bleeding from the chest. He noticed that the appellant was staggering. This witness called his father PW 1 where upon his father apprehended the appellant. He confirmed that the following day the police recovered a blood stained knife in the fence.

PW 3 was the Sub chief of Dol-dol area. He recalled that on 10th October 2004 at about 10p.m. PW 1 and others came to him and reported what occurred. He saw the deceased at PW 1's residence and also noticed that the appellant was bleeding from the head. The matter was reported to the police.

PW 5 performed the post mortem after the body was identified by the brother of the deceased PW 4. That post mortem was performed on 19th October 2004. The doctor formed an opinion that the cause of death was a Cardial Pulmonary Arrest due to external and internal bleeding. He confirmed that the deceased had penetrating wound on the chest, some injuries on the back and a cut on the head.

PW 6 is a police officer. He recovered a blood stained knife which was 10 metres away from where the deceased lay.

The court on finding that the appellant had a case to answer put him on his defence. The appellant gave sworn evidence. He said that he was herdsman and on that night he went looking for a place to spend the night and as he did so he said that he was all alone and not in company with any one else. He was then beaten up and cut on the head by a person he named as Lemugo Lesuari. The learned magistrate noted that the appellant had a scar on his head. Thereafter the appellant said that PW 1 took him to a house where he was to spend the night and as he slept five men came and bound him with a rope. The police came later and arrested him. He was taken to Nanyuki District Hospital for treatment and thereafter he was charged with the present offence. He denied the charge before court and stated that the deceased was killed then he was bound as stated herein before. He stated that he did not know what happened to the deceased and that he simply saw him lying down.

As can be seen from the evidence above none of the prosecution witnesses saw the appellant kill the deceased. The evidence adduced by these witnesses amounted to circumstantial evidence. That as it may be there was clear evidence that the appellant arrived at the home of PW 1 in the company of the deceased. PW 1 showed them where to sleep. A while later noise was heard to come from where the two were sleeping. Later the deceased was found lying down bleeding from the chest. Confronted with that circumstantial evidence the court is guided by the case of;-

R V. Kipkering arap Koske & another 16 EACA 135 where it was inter alia held that: ***“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”***

The evidence tendered by the prosecution in my view irresistibly point to the court finding appellant being the person who injured the deceased. He certainly was the last person seen with the deceased according to the evidence of PW 1 and 2. He therefore has a legal duty to explain how the deceased met his death. That is, he had to rebut the assumption that he was implicated in the unlawful killing of the deceased. Section 119 of the Evidence Act provides as follows:-

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

Again faced with the evidence adduced by the prosecution the appellant ought to have offered a reasonable explanation on the matter bearing in mind the provisions of Section 111 of Evidence Act. That Section provides as follows;-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.”

The appellant's explanation was not reasonable and just like the learned magistrate found the appellant's defence was doubtful. To comprehend the doubt it creates one needs to look at the cross examination by the appellant of the prosecution witnesses. The appellant did not raise the issue that he was all alone

when he arrived at the residence of PW 1. He also did not raise the issue of being bound by five men nor of being injured as he arrived at PW 1's homestead. Such an issue should have been raised in respect of cross examination of PW 1 and 2. They were the two first people who went to the scene after the unlawful killing of the deceased. The defence raised by the appellant is rejected by this court. What is clear from the evidence is that the appellant was in the company of the deceased as they went looking for somewhere to spend the night. After they were shown a house where they could sleep it seems that a disagreement occurred between them and the disagreement was such that it disturbed PW 1 and 2. As a consequence PW 2 had to go and check and on checking found the deceased lying down and bleedings. As the deceased was lying down the appellant was standing nearby. Bearing in mind that evidence I do find that the prosecution sufficiently met the criminal standard of proof. Accordingly I do hereby dismiss the appellant's appeal in respect of conviction. Considering the sentence I find there is no reason to interfere with it. The appellant's appeal is dismissed.

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

MARY KASANGO

JUDGE