



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 113 &117 of 2005

SAMUEL MSAGHA KIRIGHA 1ST APPELLANT

HARRISON KALE KIRIGHA 2ND APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

The appellants Samuel Msagha Kirigha (hereinafter “the 1st appellant”) and his brother Harrison Kale Kirigha (hereinafter “the 2nd appellant) together with their father Johnstone Kirigha Kale (hereinafter “the 1st accused”), were jointly charged with the offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code before the Principal Magistrate’s Court at Voi. The particulars of the information filed by the Attorney General were that the trio, on 7.7.2004, at about 7.30 p.m., at Mchanga Village in Taita Taveta District within Coast Province, jointly unlawfully killed Michael Mwangoma (deceased). It seems from the record that Johnstone Kirigha Kale, the father of the appellants has not appealed.

When the appellants first appeared before K. Muneeni, then a Senior Resident Magistrate on 27.7.2004, they pleaded guilty and the prosecution applied that the case be mentioned later. The Learned Magistrate then fixed the case for mention on 29.7.2004. On that date the appellants denied the charge. The prosecution called 12 witnesses to support the charge against the appellants. After a full trial, the appellants were convicted and sentenced to fourteen years imprisonment.

PW1, Juliet Mwake Cherienga, is the daughter of the 1st accused and a sister of the appellants. She testified that on 7.7.2004 at 4.00 p.m., the deceased found her outside their house. He had traditional liquor which he carried in a plastic container. He chased her all over and wanted to rape her. She locked herself in the kitchen and as the incident occurred the second appellant was present. At some stage the deceased poured liquor on her. The 2nd appellant demanded to know, from the deceased, why he wanted to rape PW1. He called a police officer, Mtongolo, PW7, and the two took the deceased away to the police station. At 6.00 p.m. the same day, the deceased went back to PW1’s home and at that time she was in the company of her mother one Priscilla Wakio, PW6 and one Jackline Wali. The deceased once more threatened to rape PW1 and the other women present. She therefore slept in the bushes. She further testified that she left the 1st accused and two of her brothers quarreling the deceased. When she came the following morning she found the appellants at home and the body of the deceased was lying 500 metres away from their home. PW1 was categorical that she did not know what killed the deceased.

Prisca Kirigha, a daughter of the 1st accused and a sister of the appellants testified as PW2. She testified that while at home on 7.7.2004 at 4.00 p.m. with PW1 and the 2nd appellant, the deceased went to their home carrying liquor in a plastic container. He threatened to rape her sister and chased her. Her sister locked herself in a house and the deceased left. He returned later and PW2's mother called the village elder but the deceased could not listen to him. The appellants then tied him with a rope and beat him using their hands. The 2nd appellant slapped him. On seeing the beating, PW2 left the home and slept in the bushes. When she returned home she found the deceased lying down in the kitchen of her father's house. PW2 did not determine whether the deceased was alive or dead. She went to cut grass and when she returned, she did not find the deceased but heard people say the deceased was lying dead on the road near their home.

The doctor who performed a post mortem on the body of the deceased was Dr. Stephen Mutwiwa (PW3). He testified that the deceased had swollen eyes. Blood clots were seen near the ears. He had bruises all over the scalp, the right shoulder and $\frac{2}{3}$ of the back. The right ear was lacerated and the head had blood stains. The doctor opined that the cause of death was cardio pulmonary arrest due to head injury.

PW4 Edward Mwaizangu also visited the home of the accused on the material date. He testified that he found the deceased and the 1st accused and asked the deceased to leave, but the deceased said he wanted to marry one of the daughters of the 1st accused and refused to leave. The appellants then arrived and the 1st accused became agitated. The appellants tied the deceased's hands with a rope but the 1st accused restrained them from beating the deceased. PW4 then left but later heard the 1st accused's wife screaming for help for the deceased. In the morning PW4 went to the home of the accused who told him that the deceased had been untied and had left. On his way back home he saw the body of the deceased lying 500 metres away from the 1st accused's home.

PW5 Beatrice Msae is another of the 1st accused's daughters and the appellants' sister. She testified that on the material date at 3.00 p.m. her sister PW2, called her home because the deceased was causing trouble but when she went she did not find the deceased. At 6.00 p.m. the same day the deceased went back to their home and chased PW1. Her mother called the village elder PW4 but the deceased could not be restrained. PW5 and her sisters then ran away to the bushes. The next day in the morning at 7.00 a.m., they returned home and found no one. She later learnt that the deceased had passed away.

Priscilla Wakio, another daughter of the 1st accused, testified as PW6. She testified that on the material date, she returned from college at 6.00 p.m. and found her parents with the deceased. The deceased said that he would kill or rape someone. Her mother went to call the village elder and when she returned she found them in the kitchen and the deceased was at the door. The deceased used abusive words against the 1st accused. The 2nd appellant then arrived and asked the deceased to leave but he refused. PW6 then ran to the bushes leaving the 1st accused and the appellants who were angry. PW6 looked for her mother and the two went to report to the village elder. When they returned, the deceased was not there. Later she learnt that the body of the deceased was lying on the road.

PW7, APC Priscone Mongolo, testified that on 8.7.2004 at 9.00 a.m., while leaving Mwambwirwa D.O.'s office for the shops, he met the Assistant Chief of the area who told him that there had been chaos at the accused's homestead the previous night. Accompanied with the Assistant Chief they visited the home of the accused. On the way they saw the body of the deceased which was 50 metres away from the said homestead. He observed injuries on the face and blood was flowing on the path. He called the first accused who told him that "they had finished the job". According to PW7, the 1st accused implicated the appellants. He also interrogated the appellants who admitted committing the offence. The Assistant Chief further testified that he had heard screams from the direction where the deceased was. He had gone to investigate and found the deceased taking liquor with the 2nd appellant as he listened to the radio. The 2nd appellant and the deceased had fought. The 2nd appellant had used the handle of a hoe and had beaten the deceased on the back on allegations that they deceased had burnt their house. PW7 advised against taking the Law in his hands and went with the deceased and awaited the filing of a formal report by the 2nd appellant which report was not filed and after 2 hours he released the deceased.

The Assistant Chief, Ezekiel Mboya, testified as PW8. He testified that on 8.7.2004, at 7.00 a.m., he received a report from a woman and her daughter that there had been chaos the previous night at their home. Accompanied by a village elder and as they went to the said home they found the body of the deceased on a footpath. Blood flowed from the deceased's mouth. The duo proceeded to the D.O.'s office and on the way met an officer from that office whom they took to the scene. The accuseds were then arrested. In the house of the accused PW8 saw blood stains.

PW9 Danson Kazange Maganga, a first cousin of the deceased, witnessed the postmortem on the body of the deceased and identified the deceased to the doctor who performed the postmortem.

PW10 PC John Wambua, visited the scene of crime in the company of PC. Nanzala and PC. Madaraka. In the house where the deceased was allegedly beaten, he found a piece of wood which was blood stained. He took photographs of the same, the house, the scene where the body was found and the body itself. PW11, PC Nanzala, arrested the appellants, their father and the 1st accused and also visited the scene in the company of PW10. She found a blood stained piece of wood which she recovered. She also took blood-stained sand from where the body of the deceased lay. In her testimony, she stated that the body of the deceased was found 20 metres from the kitchen. PW11 further took possession of blood stained shirts of the appellants. She also had blood samples obtained from the appellants. She took the items to the Government analyst who prepared a report on the same which report was produced by PW12 PC. John Madaraka as the Government analyst's attendance could not be secured at the time of trial.

The 1st appellant, Samuel Msagha gave his testimony on oath. He stated that on the material date at 6.00 a.m. he left home and did not return until the next morning at 9.30 a.m. He found the 1st accused and the 2nd appellant who narrated to him the events of the previous day culminating in the handing over of the deceased to a police officer who wanted them at the police station. The 1st appellant accompanied the 1st accused and the 2nd appellant to the police station where they were all placed in cells and later charged with this offence. The 1st appellant denied committing the offence.

The 2nd appellant also gave his testimony under oath. He stated that on the material date when he was at home a police officer went there and informed him that a person who used to burn houses had been found and the officer sought the 2nd appellant's assistance. The person was infact arrested but later went to their home and created disturbance. He was arrested by a police officer who took him to the D.O.'s office. The following day on 7.7.2004 a police officer arrested the appellants and charged the 2nd appellant with an offence he had not committed.

From the above evidence, the Learned Senior Resident Magistrate found that the deceased was lastly seen alive in the homestead of the appellants on 6.7.2004. He created disturbance concerning one of the daughters of the family. He was also suspected to have been behind arson incidents that had visited them. The Learned Magistrate further accepted the evidence that the appellants together with the 1st accused intervened to save the 1st accused's daughter who was the appellant's sister (PW1) from threat of rape from the deceased. The Learned Magistrate further accepted the evidence of the Government analyst that the deceased's blood stains were found on a shirt which belonged to the 2nd appellant. He also accepted the evidence that the appellants tied the deceased with a rope and beat him. Although no one actually witnesses the killing of the deceased, the Learned Senior Resident Magistrate found that the circumstantial evidence pointed at the appellants and the 1st accused only and at no other person. He therefore concluded that the evidence proved that the appellants and the 1st accused killed the deceased and dumped his body where it was found. In the Learned Magistrate's view, the defences put forward by the appellants were not credible.

In this appeal the appellants raise only one substantive ground that they were convicted on insufficient evidence. In the written submissions made by the 1st appellant, he appears to invite the court to consider the circumstances surrounding the death of the deceased with a view to interfering with the sentence. Hence his observations of the deceased's threat to rape his sisters, the deceased's alleged previous arson incidents and the extreme provocation the appellant was subjected to when the deceased returned a

second time to persist in his obnoxious behaviour.

The second appellant Harrison Kale Kirigha on his part in his written submissions has pointed out what he considers as inadequacies in the evidence presented by the prosecution.

The appeal was opposed by Mr. Onserio, the Learned State Counsel for the Republic. Counsel submitted that the appellants were convicted on credible, direct and circumstantial evidence and their appeal has no merit whatsoever.

This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence which was presented before the Learned Senior Resident Magistrate and come to its own independent finding bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify. (see the case of **Okero –v- R [1972] EA 32**).

I have gone through the record of this appeal in detail and find that there is no direct evidence that the appellant actually inflicted the injuries which killed the deceased. In other words there was no direct eye witness account of how the deceased actually died. However, there was acceptable evidence that the deceased was with the appellants on the evening before his body was found dumped on a foot path. There was the evidence of PW1, Juliet Mwake Cherienga. The deceased threatened to rape her twice on the material date. First at 4.00 p.m. and secondly when he returned after being taken away by Mtongolo, PW7 and the 2nd appellant. On the second occasion which was at 6.00 p.m. she ran away into bushes leaving the 1st accused and two of her brothers quarreling the deceased.

PW2 Prisca Kirigha, testified that on the material date at 4.00 p.m. while she was at home with PW1 and the 2nd appellant, the deceased went to their home and threatened to rape her sister PW1. Her mother called the village elder who failed to make the deceased leave. PW2 saw the appellants beat the deceased using their hands. She then left home and slept in the bushes. When she returned, PW2 found the deceased lying down in the kitchen of her father's house but she could not determine whether the deceased was alive or dead. She went to cut grass and when she returned she did not find the deceased but she heard people say that the body of the deceased was lying on a footpath near their home.

PW4 Edward Mwaizangu also witnessed the appellants tie the deceased with a rope. He left and later heard screams from the 1st accused's wife calling for help for the deceased. The following morning PW4 saw the body of the deceased lying 500 metres away from the 1st accused's home. PW6 Priscilla Wakio returned from college at 6.00 p.m. and found her parents with the deceased. He threatened to kill or rape someone prompting her mother to call the Assistant Chief. But the Assistant failed to restrain the deceased. The 2nd appellant arrived and also asked the deceased to leave. At that juncture, PW6 ran to the bushes. She observed that the 1st accused and the appellants were angry. She looked for her mother and they both reported the matter to the village elder. When they returned they did not find the deceased. Later she learnt that the body of the deceased had been found lying on the road.

The Learned Senior Resident Magistrate believed the evidence of the above witnesses. He had the discretion to do so. In his own words:-

“This case appears to touch on both direct and circumstantial evidence. Principally it was on circumstantial evidence since by the time the deceased was killed no other witness was there. I say there is direct evidence because the accused were seen tying the deceased with a rope on the hands. They were also seen beating him.....

In the present case there was no evidence that by the time the deceased was left in the hands of the accused he had other pre existing injuries on his body that he could have succumbed to Accused were seriously beating this man.

One draws no other conclusion than that the deceased was killed by the accused. They dumped his body outside their house where it was found.”

For a conviction to be based exclusively upon circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. (see the case of **Simon Musoke –v- R [1958] EA 715**)

I have considered the conclusions made by the Learned Senior Resident Magistrate on the evidence presented before the Learned Senior Resident Magistrate and concur that there were no other co-existing circumstances which would weaken or destroy the inference that the appellants were guilty. In addition to the evidence of PW1, PW2, PW4 and PW6 highlighted above there was the evidence of the Government Chemist whose report was produced by PW12, PC John Madaraka since the witness who prepared the same was at the time of the trial attending a course in Nairobi. The report was tendered in evidence by PW12 under Section 77(1) of the Evidence Act. The appellants, in any event, had no objection to its production by PW12. The report indicated that a shirt belonging to the 2nd appellant had bloodstains of blood group AB which was the deceased's blood group. PW12 surmised that the bloodstain could have originated from the deceased. I concur, especially as the 2nd appellant preferred no other explanation.

The deceased's death according to PW3, Dr. Stephen Mutwiwa was due to cardio pulmonary arrest due to head injury which was consistent in my view with severe beating.

There was therefore acceptable evidence that the deceased met his death at the hands of the appellants and the 1st accused. That evidence completely displaced the defence given by the appellants. In the result I have come to the conclusion that the appellants' convictions for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code was based on sound and credible evidence. The appellants' appeals against conviction therefore fail and are dismissed.

With regard to the sentences of 14 years imposed upon the appellants, it is my view that the same is manifestly harsh and excessive in the circumstances. The 1st appellant at the time of being sentenced was married and had two children who depended on him. The 2nd appellant was also married and had three children. His wife had recently given birth and they all depended on the appellant. The sentences of 14 years although lawful were harsh. The Learned Senior Resident Magistrate does not appear to have considered the appellants mitigation. Infact the Learned Resident Magistrate's observations before sentencing the appellants flew in the face of the circumstances presented before him. He stated that that offence bordered on murder. Yet, the deceased had acted in an obnoxious manner. He threatened the appellants' sister with rape and chased her around not once but twice. He was taken away after the first threat and went back to repeat the same threats. In my view those circumstances cried for a more lenient sentence than that meted out by the Learned Senior Resident Magistrate. There is therefore, in my view, justification to interfere with the sentences. The appeals against the sentences are allowed. The sentence imposed upon each of the appellants is set aside. Each appellant shall now serve 7 years imprisonment from the time they were convicted and sentenced.

Order accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF APRIL 2009.

F. AZANGALALA

JUDGE

Delivered in the presence of:-

The Appellants and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

27TH APRIL 2009