



FELIX NDWIGA SIMON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with manslaughter contrary to section 202 of the penal code. He was tried convicted and sentenced to 7 years imprisonment. He appeals against the conviction and sentence.

Ground one of his petition is that the trial Magistrate relied only on evidence of 3 witnesses neglecting other evidence of those who were at the scene.

Ground 2 is that the trial magistrate forced him to participate in the trial while sick and could not produce P3 form.

Ground 3 is that the trial magistrate left the writing of judgment to another magistrate who was not conversant with the trial/proceedings.

The record shows that on 31/10/98 at 9.30 p.m. Isaiaha Kingo Njue (PW1) was with Anthony Kivuti deceased and others traveling in a Nissan vehicle. They stopped for drink at Kivue stage bar. They had left the Nissan outside the bar with engine running. They heard hooting while inside bar and Anthony Kivuti dashed out to check. He was making noise with the bar owner called Mwikalia and a watchman of the bar premises. The watchman was being asked why he entered the vehicle. At that time, another vehicle came and stopped there and inquired if there was anyone traveling to Nairobi. There was nobody. One Kinyua who was there and was fighting with another person. The Deceased ran to them asking what was happening. One of those fighting was appellant. Appellant stabbed the witness PW1 on the left shoulder with a knife. The deceased was on the ground. PW1 checked on the deceased and found him bleeding from the head. Deceased was cut with a knife.

Kennedy Kinyua was also punched and fell down. Accused then ran away and escaped through the coffee plantation Kivuti Kariuki took the deceased to Kyeni Mission Hospital. The following night PW1 was requested by police to make statement. PW1 said it was appellant who killed the deceased. He was able to see him because there were security lights and PW1 knew the appellant. The story was repeated by PW2 Kennedy Kinyua Kango who says that he was punched by the appellant on the face and he fell down. He added that he knew appellant and that he had a knife. Deceased was standing near him when he was stabbed and fell on the ground bleeding. In cross-examination by appellant he said **“I saw you stabbing the deceased.”** PW3 Emilio Muchangi Njeru was traveling with accused in vehicle KAJ to Runyenjes. A feud ensued which led into a fight. Then there was another fight between appellant, PW1, and the deceased. Emilio said that he heard a female voice calling him saying the deceased had been stabbed. They tied the deceased who had injury in the head and took deceased to the hospital at Kyeni. Emilio confirmed that he had known the appellant for very many years and that he was involved in a fight.

In cross-examination he said he did not see appellant with any weapon that night. PW IV Cecilia Njoki Mugo was near the scene but heard noise and saw the deceased lying down bleeding. She saw the other

witnesses there at the scene. She said there was light at the scene.

PW VII was police officer who went to the scene and found it was by a bustop. He confirmed that appellant reported himself to police and was arrested.

PW8 was the watchman at Universal bar who hooted. He said he waited the deceased to give him the job of cleaning the vehicle but when deceased came out he made noise. This witness places all other witnesses at the scene. He heard the female voice of Cecilia Njoki say “**you have left Kavuti to be killed.**” He saw at the scene someone lying on the ground. He saw Kavuti falling down. He saw somebody running away to Ndwiga’s place deceased was bleeding from the head. He was told Ndwiga had stabbed deceased with a knife. He did not witness the stabbing.

On 15/3/2001 the Trial Magistrate said he was transferred to another place and that the trial would be conducted by another Magistrate. This is permitted under section 200 CPC. Accused was informed of his right to have witnesses recalled. The accused then applied for the case to be heard De Novo. However trial Magistrate ***Mr. S. Ombaye Senior Resident Magistrate*** was awaited and proceeding with trial. Last witness a doctor his evidence was produced by prosecutor by way of postmortem report.

Upon being put on his defence the Appellant made unsworn statement and called witnesses. He said that he was at the scene in the vehicle. That some people were demanding money and a scuffle arose. He was later requested to attend Manyatta Police Station and he was there charged. First Defence witness on cross examination said he was present at the scene but he did not see appellant stab the deceased. There was no light at the scene but there was electric light in the bar. Second defence witness was the sister to appellant. She was in the vehicle and at Kivue stage there were many touts who demanded money. She and the appellant entered the vehicle and went away only the vehicle was hit. She said there was no fight but a small commotion. Nobody was injured she testified in cross examination.

The record shows that the Trial Magistrate wrote the judgment and left it to be read by another Magistrate. This was because on the date judgment was to be delivered the appellant did not turn up in court. Warrant for his arrest was issued. The trial Magistrate found the prosecution evidence well corroborated by 4 witnesses for prosecution and he believed their evidence. The trial Magistrate also considered the defence case and found it to be untrue. The appellant placed himself at the scene and also his witnesses who said there was no fighting and that the appellant did not stab anyone. This was not true as there was sufficient evidence that he participated in the fight and had a knife with which he cut 2 witnesses and the deceased.

The postmortem shows that the deceased sustained severe head injury and open fracture of the skull. The prosecution witnesses saw the appellant ran away and he did not give himself up to police until on 5th October several days after the incident. Answering the grounds of Appeal it is clear the Trial Magistrate not only considered all prosecution witnesses but he also considered the defence evidence and that of his witnesses. It is that he did not believe the same. On ground 2 there is no evidence to support that ground. Infact the appellant was released on the bond at some stage of trial.

On ground 3 the record shows that the trial Magistrate wrote judgment and left it to be read by another just because the accused failed to turn up on the date appointed for delivery of judgment. As is evident the Trial Magistrate had already been transferred to another place.

I find no merit in the grounds of appeal and the same are dismissed.

On the sentence the offence of manslaughter carries maximum sentence of imprisonment for life. I find 7 years to be appropriate sentence in the circumstances of this case.

I therefore find no reason to interfere in the conviction and sentence. The prosecution case was proved beyond reasonable doubt.

I dismiss the appeal.

Dated this 21st September, 2006.

J. N. KHAMINWA

JUDGE