



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL APPEAL NO. 110 OF 2003**

ERNEST NJERU BENJAMINAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of Manslaughter, Contrary to Section 202 of the Penal Code. The facts were that on 7.5.2000 at Ndamungi village, Kanja Sub-location, Kagaari North Location he unlawfully killed Paul Murimi. The evidence as tendered before the lower court was this;
2. PW1, Njiru Mwaniki testified that on 7.5.2000 at about 8.00 p.m. he was at his home when he heard noises form the road. He went out to investigate and found more than ten (10) people who included the Appellant, and his Co-accused in the lower court (Mbogo and Muriithi). ***“They were beating somebody”***, he testified. When he enquired why the person was being beaten, the Appellant told him that the person had stolen his chicken. They all had sticks and his further evidence was that ***“accused and Mbogo were the most active.”*** He saw the Appellant hit the person whom he identified as Murimi. His attempts at stopping the beating failed but the area chief came, ordered the Appellant and his confederates to take the alleged thief to his camp and he rode off. Later the witness was told by the chief that the Appellant and others had killed Murimi and thrown his body into tea bushes. Of further relevance is his testimony that the Appellant and the deceased were escorted to the Chief’s Camp by the Sub-area (I believe the Sub-Chief) and the Chief followed them on his Motor Cycle. This was evidence in cross-examination.
3. PW2, Zephaniao Stefano Njiru confirmed that he walked with the deceased to the Chief’s Camp together with the Appellant. The Appellant as the Complainant against the deceased was told by one Sgt. Manyara to go and look for a vehicle to take the deceased to hospital as he had serious head injuries. The Appellant went and came back with no vehicle. Asked by unknown person how the deceased would be taken to hospital, the Appellant offered to take him there. He left and the witness testified that only on the next day was he told by the chief that the suspect was found in some tea bushes owned by the Chief. In cross-examination, the witness said that he was accompanied to the Chief’s Camp by a “large crowd” which was chased away by Sgt.Manyara.
4. PW3 A PC Ndwiga Kinyua gave evidence quite in tandem with that of PW2 but added that the ***“suspect said that he had been beaten by the accused and others.”***
5. PW4, PW5 and PW6 discovered the deceased’s body, identified it at the hospital and took the body for burial respectively. PW7 was the doctor who performed the post-mortem.
6. PW8, Sgt. John Manyara confirmed that the Chief had come to the A.P Camp and told him that he had met a suspect being brought to the Camp; that shortly thereafter, the suspect was brought by the Appellant and three (3) other persons. He found that the deceased was bleeding so he told the Appellant to take him

to hospital. Under cross-examination, he said, "I can't tell how many people assaulted the deceased. None of you had weapons."

7. In his defence, the Appellant stated that he found the deceased stealing his chicken so he raised an alarm, many people came and seriously beat up the deceased. They took him to the Chief's Camp and the crowd was chased away. They were told to take him to Runyenjes Police Station and thence to hospital. On the way, the suspect ran away and the Appellant went home. He denied killing the deceased.

8. In his judgment, the learned trial magistrate in one paragraph of findings said;

9. *"After considering the evidence adduced before this court. I find that it is not in dispute that the accused was part of the crowd that beat up the deceased. The injuries which the deceased sustained are the ones that led to his death the same night. The accused cannot in any way exonerate himself from the charge that he caused the death of the deceased, I find that the evidence against him is overwhelming.*

10. *I find the accused guilty as charged and I convict him."*

11. I have no hesitation in finding that the learned trial Magistrate misdirected himself. In a case of manslaughter, it is imperative that there should not be any doubt at all that the person charge actually caused the death of the deceased. Only PW1 said that he saw the Appellant hitting the deceased with a stick. He said that the deceased could not walk while PW2 said that he actually walked. It is agreed by all witnesses that there was a big crowd escorting the deceased to the Chief's Camp and the evidence of PW3 and PW8 was consistent on this point. The trial Magistrate also found that the Appellant was part of the crowd. If indeed the crowd beat up the deceased, the charge sheet would have said that the Appellant and others killed him. The charge sheet did not. It pointed fingers at the Appellant and no one else. Where is the evidence that he and only he killed the deceased? I found no such evidence.

Further, it was the evidence before the lower court that the Appellant and others escorted the deceased to hospital and that on the next day he was found dead. Who are these others? The Chief was also one of the first people to arrive at the roadside where the deceased was being beaten. Why was he not called to testify. What of the Sub-Chief who escorted the deceased?. In my view all these flaws in evidence must favour the Appellant.

12. I have attempted to evaluate the evidence in a bid to show that had the learned trial Magistrate point his mind to these unclear matters, the doubt raised would tilt towards a non-conviction.

13. In my view therefore, to sustain the conviction would not be right and I hereby quash it, set aside the sentence and order that the Appellant be released (if he is in custody) unless he is otherwise lawfully held.

Orders accordingly.

Dated and delivered in open court on this 25th day of November 2004.

I.LENAOLA

AG. JUDGE

Miss Ndegwa for Appellant

Mr. Omwega for Republic

I.LENAOLA

AG.JUDGE

