



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.1259 OF 2000
**(From Original Conviction and Sentence in Criminal Case No.465 of
1999 of the Senior Magistrate's Court at Kiambu)**

JAMES MUNGA NGANGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The appellant herein was the second accused person in the original trial. He filed an appeal against both conviction and sentence in a case of manslaughter contrary to section 2002 as read with S.205 of the Penal Code. The appellant was sentenced to five years after the conviction. In his memorandum of appeal the appellant challenged his conviction arguing that it was based on evidence which was not tangible and was inadmissible. He also took issue with the failure to call a Doctor to testify in the case. The appellant also took issue with the reliance on the evidence of P.W.2 and the arresting officer by the trial magistrate. He has also argued that the trial magistrate shifted the burden of proof from the prosecution to the appellant herein. The appellant has also taken issue with his identification. During the hearing of the appeal the appellant put written submissions which I have carefully studied. Some of the extra issues raised on restated, include the question of the prosecution failing to call some of the witnesses in support of 1st accused, the reliance by the prosecution as hearsay evidence, the failure to call eye witnesses in support of the prosecution case and that the prosecution should not have relied on the evidence of P.W.4. The appellant has also argued that he was convicted because the prosecution relied on the evidence of the 1st accused person.

Mr. Kivihya for the state supported the conviction and the sentence. He argued that the evidence adduced against the appellant was overwhelming.

I have studied the proceedings of the lower court carefully. P.W.1, P.W.2, P.W.3 did not implicate the appellant in their testimony.

P.W.4's evidence as to how the deceased was hit by the appellant in this case is hearsay evidence because she did not see the appellant using a piece of timber to hit the accused person. P.W.6 took a statement inquiry from the 1st accused person in the case which was produced as Exhibit. According to P.W.6 he arrested the appellant as he was said to have been in the group that killed the deceased. He arrested appellant six months down the lane as he was said to have gone into hiding. He did not disclose the name of the person who implicated the accused person with the offence.

P.W.7 did not see the appellant hit anybody during the night in issue. His testimony is that the appellant told him that he heard that somebody with a piece of timber during the fight during the following day. P.W.8 also received a report that it was the appellant who had hit the deceased. He did not witness the

incident.

P.W.9 recovered a piece of timber from the appellant as he tried to hit somebody with it after a quarrel. He did not see the appellant hitting anybody with the piece of timber.

I have noted that the learned trial magistrate observed. "There however occurred a second fight whose cause nobody seems to know. It is in the course of this fight that accused 2 went for a piece of wood and hit the deceased the deceased fell down and the accused ran away". This finding does not seem to be supported from the evidence adduced by the prosecution witnesses as the record clearly shows from my perusal of the available evidence. I am unable to agree with the trial magistrate unless finding that there is no other conclusion to draw from the evidence adduced other than that it is the appellant who took a piece of wood and hit the deceased on his head thus causing his death three days later. The learned trial magistrate finding is not based on any actual evidence which directly implicated the appellant. Although the state counsel supported the conviction of the appellant I do not agree that the conviction was based on sound and cogent evidence.

After a careful perusal of the evidence adduced in the lower court it is my considered view that the prosecution did not prove beyond any reasonable doubt that the appellant is the one who inflicted the fatal blow that led to the death of the deceased. The failure to call the Doctor to give evidence as to the cause of the death of the deceased herein did not also argue too well for the prosecutions case.

It is my considered view that the appellant should have benefited from the benefit of doubt created in the prosecution's case. I therefore find that the appellant's conviction and sentence was not justified. I allow the appellant's appeal against both conviction and sentence. The appellant is acquitted forthwith and set at liberty unless he is otherwise lawfully held.

Order accordingly.

R.M. MUTITU

JUDGE

17/2/2003

Delivered dated and signed in open court in the presence of

Mr. Kivihya for the state and in the presence of the appellant.

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R.M. MUTITU

JUDGE