

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL APPEAL NO.1106 OF 2001

(from Original Conviction and Sentence in Criminal Case No. 294
of 2001 of the Senior Principal Magistrate's Court at Kibera)

DAVID KOMU MWANZIA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The appellant herein filed this appeal against both conviction and sentence for a charge of manslaughter contrary to section 2020 as read with S.205 of the Penal Code. After the trial the appellant was convicted and sentenced to 7 years imprisonment on the 15th day of October 2001.

I have addressed my mind to the written submissions that were given to me by the appellant at the time of arguing this appeal. I have also considered Mr. Kivihya's sentiments in opposing the appeal. I have considered the procedures of the lower court as compiled by the learned trial magistrate (Mrs. W. Kara Esquire) while compiling this considered judgement.

The evidence of the prosecution is to the effect that it is the appellant who burnt the deceased with a stone. The appellant's defence is that it is the deceased who threw a burning stove on him and also burnt herself with the same stove. The defence of the appellant though given on oath would appear to be an afterthought because he did not cross-examine the two eye witnesses who came to the rescue of his wife about this important issue. He did not cross-examine P.W.1 about this issue either. The trial magistrate considered his defence carefully but rightly rejected it in my own considered view.

The trial magistrate regarded the deceased's confession as to the person who caused her death as a dying declaration. She went ahead to consider the law on dying declaration as stated in Sakar on evidence 1st Edition 1999 at page 635. Against the law on dying declarations the trial magistrate considered the evidence of P.W.3 and P.W.4 who testified about the nature of injuries which the deceased had sustained as she told P.W.4 in particular about the appellant and how he had inflicted the same on her. P.W.1 also testified that the deceased implicated the appellant with having caused the burns. The appellant did not attempt to cross-examine P.W.1 nor P.W.4 on the important piece of evidence. He chose to ignore this evidence which the trial magistrate correctly regarded as amounting to a dying declaration since the deceased gave the same evidence when she had lost hope of living.

A clear perusal of the trial magistrate's record indicates that she is quite knowledgeable on the law relating to dying declarations. I am satisfied that she came to the right findings after addressing herself to the evidence on record adduced by the witness who heard the deceased name her assailant just before the death, i.e. P.W.1 and P.W.4.

I am in agreement with Mr. Kivihya's submissions that the appellant was properly convicted and

that such conviction was safely arrived at. I am equally satisfied that the sentence imposed on the appellant was sufficient and not excessive.

I therefore dismiss the appellant's appeal against conviction and sentence accordingly.

Dated and dated at Nairobi this 12th Day of March 2003.

R.M. MUTITU

JUDGE