

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

APPELLATE SIDE
CRIMINAL APPEAL NO.418 OF 2000

(From Original Conviction and Sentence in Criminal Case No.2758 of 1999 of the Chief Magistrate's Court at Mombasa – L. Achode, Mrs. – S.R.M).

MOSES UPEPO SHILENGE.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONDENT

J U D G M E N T O F C O U R T

The Appellant was charged of Manslaughter contrary to Section 202 as read together with Section 205 of the Penal Code. He was convicted and sentenced to serve 6 years imprisonment. He appealed to this court against the conviction and sentence. During the hearing of the appeal the State Counsel Miss Kwena decided to abandon her support of the conviction. I accordingly immediately ordered for the release of the Appellant forthwith, unless he was held in prison on other lawful grounds. I indicated then that I would give my grounds for allowing the appellant's appeal in a judgment to be read on 19.11.2001. I now proceed to justify the position taken by this court.

Did the Prosecution, in the totality of its evidence, prove beyond a reasonable doubt, that the appellant, by his unlawful assault, caused the death of the deceased Maua Syengo? The appellant and the deceased, from the evidence on the record, were either lovers or probably cohabited from time to time. They were apparently heavy drinkers of alcoholic drinks. They fought often and it was the deceased who came off the worse as she was often beaten by the appellant. They both lived in some quarters in Likoni area. PW.1 and PW.2 who were witnesses in this case resided in the same premises but each in separate rooms. They confirmed in their evidence that the deceased and the appellant often fought after taking alcoholic drinks and the deceased was heard screaming due to beatings given to her by the appellant. Despite the fights, the two continued being lovers to the full knowledge of neighbours.

On 8.11.1998 at about 10.00 am the deceased was seated outside her room in the compound where she and PW1, PW2 and the appellant resided. PW2 the main witness in this case claims in her evidence that in the presence of PW1 and Rose Munyao, the appellant was confronted by them to say why he kept assaulting the deceased from time to time. The appellant was already drunk as usual and asked those who questioned him, why they were concerned with his affairs. PW1's evidence however, confirms that she was not present at the spot where this took place and in her evidence claims that she was only called to the spot a little later. PW2 in her evidence states that the appellant stood up and kicked the deceased on the chest. The deceased screamed and staggered into her room. It is on record that she stood up alone. Several minutes later a child reported that the deceased was not feeling well in her room. PW1, PW2 and other witnesses entered her room and found her lying on the floor and she was foaming from her mouth. They poured water on her and this seemed to have improved her condition a little. PW1 left her asleep and went away to sleep. PW2 claims however that the deceased did not improve in her condition. Later the police at Likoni were informed and the latter went and took her to Makadara Hospital where the deceased was admitted. PW1 and PW2 claim that a neighbour was left at the Hospital to watch over the progress of the deceased.

There is no evidence as to who the neighbour was. It is in the record however that the deceased was

not taken to the hospital until after 4.30 pm from 10.00 am when the deceased was allegedly assaulted. Nothing is said as what really happened with the deceased from the time she went to her room until a child came to report that she was not feeling very well. What is clear from the evidence is that nobody stayed with her when she entered her room otherwise the child could not have been the one to report of her condition to the witnesses.

The learned trial Magistrate relied on the lone evidence of PW2, Lilian Wafula to convict. He calls her a star witness and warned himself of the dangers of convicting the accused on the lone evidence of PW2 without corroboration by other relevant and material evidence. PW2 claimed to have seen the appellant kick the deceased on the chest. The medical evidence coming from PW6 Dr. K. N. Mandalya, who performed the post mortem three days later established that the body of the deceased had no physical external injuries. The body was decomposed. He found that the brain was swollen with a large blood clot on the left side. He called the clot or the swelling a subhaematoma. He concluded that the cause of death was due to increased intra cranial pressure due to the left sided haematoma. The haematoma was according to his evidence due to a head injury.

It is the opinion and finding of this court that the learned trial Magistrate erred in his conclusions in respect to some serious material facts and erred in his application of the relevant law. His conclusion that PW2 was a star witness whose evidence was reliable is not supported by other evidence on the record.

PW2 gives the impression that PW1 was present and witnessed the assault by the appellant upon the deceased. The evidence on the record, however does not support this conclusion. PW1 herself states that she came out of her room to find the deceased lying on the ground and foaming. She learned from the deceased that appellant had beaten her before running away. She could not therefore have taken part, as claimed by PW2, in questioning the appellant as to why he kept assaulting the deceased. PW2's evidence does not also clarify whether when the deceased fell as she staggered to her room, she hit herself against any object. She does not state how serious the falling was to support a conclusion that such a fall may have caused a head injury or not. He does not make a finding as whether or not in her consideration, the earlier fights between the appellant and the deceased may have been the origin of the injury as the same cannot in the circumstances of this case be completely ruled out. PW2 also under cross examination admits that in fact she was not present when the brawl between the appellant and the deceased started. She now says she came out of her room after she heard one Rose asking the appellant why he kept assaulting the deceased and only saw the appellant kick the deceased when she had come out. And yet she had earlier claimed that she and PW1 and others had questioned the appellant before the assault.

The impression her evidence creates is that she may not have been at the scene of the incident when the assault took place and she may not therefore have been the star eye-witness the learned trial Magistrate thought she was. The upshot of all this is that PW 2's evidence was quite unreliable and needed serious corroboration before it could be the basis of a conviction. Although the learned Magistrate warned himself of relying upon the evidence of a sole witness unless the evidence of the witness was totally reliable, he went ahead to rely on the evidence of PW2 despite the fact that it was clearly full of holes. He erred in doing so. Had the learned trial Magistrate noticed in good time that PW2's evidence was not that reliable, he could not have grounded the conviction in this case upon her evidence. He could then have found that the prosecution case was weak and the prosecution's evidence was far short of proving their case beyond a reasonable doubt. Or in the alternative, the doubts left or created in the totality of the evidence should have been held in favour of the accused – appellant.

This court also notes that the appellant, if he really kicked the deceased at the material time, kicked her on the chest. The injury found on her body during the post mortem was on the left side of the head. There appears to be no link of the appellant's alleged kick on the deceased's chest and the haematoma on the left side of the head. There is therefore a doubt created as to whether the injury that caused the eventual death of the deceased was inflicted by the appellant. Indeed there is no evidence that appellant caused the death of the appellant at all.

The upshot of all these considerations is that the trial court should not have convicted the appellant. The State Counsel Miss Kwena wisely recognized this fact as she was in the middle of her argument in

support of the conviction. She suddenly changed her position. This court commends her for her honest and brave act.

I therefore allow the appeal, quash the conviction and set aside the sentence of the lower court. The appellant is set at liberty forthwith unless lawfully held in prison.

Dated and delivered at Mombasa on the 19th day of November 2001.

D. A. ONYANCHA

JUDGE
