



**Mutegi & another v Republic (Criminal Appeal E003 & E002 of 2023
(Consolidated)) [2023] KEHC 21036 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E003 & E002 OF 2023 (CONSOLIDATED)**

LW GITARI, J

JULY 21, 2023

BETWEEN

NAHASHON MAUKI MUTEGI 1ST APPELLANT

MOSES MUTHARAKA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellants herein, Nahashon Mauki Mutegi and Moses Mutharaka Iguna, were charged in Chuka Chief Magistrate's Court Criminal Case No. E642 of 2021 with the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.
2. The particulars of the charge are that on September 30, 2021 at Githuguri Village, Karocho Location in Tharaka South Sub-County within Tharaka Nithi County, the Appellants unlawfully killed one Peter Mutiria Njagi.

Brief facts

3. The 1st appellant who is an Assistant Chief in Githunguri village Karocho Location Tharaka South Sub-County and the 2nd appellant were neighbours of the deceased. On 30/9/2021 the deceased had left the house to go and buy alcohol. The deceased returned home carrying three litres of alcohol in a jerrican. The 1st appellant followed the deceased inside his homestead. The 1st appellant went inside the deceased's house and got hold of the jerrican of alcohol that the deceased had put inside the house. The deceased went to the toilet but the 1st appellant followed him there and pulled him out of the toilet. The 1st appellant then tied the deceased with his hands on his back using a rope. The deceased pleaded with 1st appellant to allow him pull up his trousers but he would not hear of it, he hit the deceased on the head with a walking stick and slapped him on the back with the hand. The deceased started nose



bleeding. The 2nd appellant had a motor bike and the two placed the deceased on the motor cycle. They drove off to the chief's office. The 2nd appellant is the one who held the deceased so that 1st appellant could tie his hands. The 2nd appellant was also hitting the deceased with his hands forcing to get on the motorcycle. The appellants took the deceased to the chief's office where he was locked up in the CDF office. His wife Judith Kamene Peter (PW1) had followed the deceased. The deceased told his wife to go and buy some water as he was having a headache. The wife brought him and milk. The deceased tried to plead with the appellant but they told her they would teach the deceased a lesson. The deceased started vomiting. The 1st and 2nd appellant forced the deceased and PW1 to wash the CDF office. The PW1 decided to go home. Later she was called by Marigu (PW2) and informed that the deceased was being assaulted in the home of 2nd appellant. PW1 proceeded to the home of 2nd appellant. While at the home of 2nd respondent the 1st appellant assaulted the deceased using a walking stick. The deceased was bleeding at the top of the head. James Njeru (PW3) in this case saw the 1st appellant hitting the deceased on the head. The 2nd appellant was hitting slapping the deceased using his hands. The deceased was bleeding on the head and was vomiting. The wife of deceased went to Marimanti Police Station. She did not find the deceased there. She proceeded to Marimanti Hospital where she found the appellants. They led her inside the hospital where she found the deceased sleeping on the veranda. The appellants told her that the deceased was pretending. The deceased was then taken for an x-ray of the head which was to be done at Chuka Hospital as he had conclusions and unconscious and increased blood pressure. He was non oxygen. On the way, the ambulance overturned at Chiakariga. At Chuka Hospital, a scan of the head was done. Later at 600pm the deceased died. A postmortem was done by Doctor Nkonge (PW8) at Chuka District Hospital. The cause of death was severe head injury from sever blunt trauma. The matter was reported to the police. Investigation were conducted. It was established that the appellants assaulted the deceased at the time of arrest and while at Marimanti town. The appellants were then charged.

4. The Appellants were tried, convicted of the charge of manslaughter and sentenced to fifteen years' imprisonment.
5. The Appellants, being aggrieved by the conviction and sentences meted against them, filed the instant consolidated appeal setting out the following similar grounds of appeal:
 - a. That the learned trial magistrate erred in law and fact by convicting the Appellants in an offence where the ingredients thereof had not been proved beyond reasonable doubt by the prosecution.
 - b. That the learned trial magistrate erred in law and fact by failing to find that the accident that happened on 2.10.2021 along Meru-Mati road at a place called Mutaranda occasioned the deceased injuries that were ultimately fatal and therefore erred in convicting the appellant.
 - c. That the decision was against the weight of the evidence tendered in the trial.
 - d. That the trial court erred in the manner it analyzed the evidence and therefore arrived at a wrong decision.
 - e. That the sentence was harsh and excessive.
6. Based on the foregoing grounds of appeal, the appellants prayed for this court to quash the conviction, set aside the sentence and set the Appellants at liberty.
7. This being a first appeal, this court is called upon to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See: *Okeno v Republic* (1972) E.A. 32.



8. Revisiting the evidence before the trial court, PW1 who is the deceased's widow testified that in the morning hours of the material day, the deceased had just bought liquor to take home to drink. The Appellants then raided the deceased's house and took a three litre jericin from his house. That after the appellants raided the deceased's house, the deceased decided to go to the toilet but the appellants did not let him. That appellants pulled the deceased out of the toilet, tied his hands behind his back and the 1st appellant assaulted the deceased on the head using a walking stick while the 2nd appellant used his hand to assault the deceased.
9. PW2 was Samuel Marigu, a neighbour of the deceased. It was PW2's testimony that he was in a hotel at Kithunguri town when he heard noises. He went outside and found the appellants removing the deceased from the toilet. That the appellant was assaulting the deceased using a walking stick and forcing him to get onto a motorcycle. The appellants then took the deceased to the 2nd appellant's home. According to PW3, a neighbour to the 2nd Appellant, he heard noises coming from the 2nd appellant's home on the material day at around 2.30 p.m. He went to find out what was happening and found that the deceased had his hands tied from the back and the appellants were assaulting him. That the 1st appellant was using a walking stick to assault the deceased while the 2nd Appellant was slapping the deceased. According to PW3, the deceased was bleeding from the top of his head. PW3 asked the Appellants why they were assaulting the deceased and he was told that the deceased was pretending.
10. The appellants then decided to move the deceased to the chief's office according to the testimonies of PW1 and PW12. On the way, they met one John Kibaara (PW4) and the Appellants arrested him too and forced him to board the same motorcycle that they were using.. Their motorcycle got into an accident at around Transnation Sacco at Marimanti and the deceased, the 1st Appellant and PE4 fell of the motorcycle. PW4 got an opportunity to escape after a crowd gathered.
11. The health of the deceased started deteriorating and he started convulsing and the Appellants called the police. The police came and the deceased was taken to Marimanti Level 4 Hospital. Upon examination and treatment, the deceased was referred for a head CT scan and for further medical attention at Chuka District Hospital where on the way, the ambulance transporting the deceased had an accident at Mutandara. Another ambulance was provided and the deceased was taken to Chuka District Hospital where the deceased died on October 2, 2021 while undergoing treatment. A postmortem examination was conducted and the medical officer formed the opinion that that the deceased died of severe head injury from a severe blunt trauma.
12. Placed on their defence, the appellants gave sworn statements and called two witnesses. The 2nd appellant (DW1) stated that he is motorcycle rider and the area manager of Kamajee area. He recalled that on the material day at around 8.00 a.m., the 1st appellant asked to take him somewhere with the motorcycle. That they stopped at Kithunguri market and after a few minutes, the 1st appellant came back with the deceased and a black jericin. According to DW1, the 1st appellant told him that he had caught the deceased with illicit brew. They all then boarded the DW1's motorcycle and they went to the sub-chief's office before proceeding to the chief's office. DW1 denied that the deceased's hands were tied and further denied that the deceased was assaulted and that he started vomiting. That the deceased's wife came and gave the deceased milk, water, and a cake before she left. At 4.00 p.m., they went to Marimanti Police Station where John Kibaara (PW4) was arrested with a 20-litre yellow jericin. They proceeded and stopped at Transnation Sacco where they stopped because the deceased was shaking. The police arrived and the deceased was taken to Marimanti Hospital where the doctor stated that he had pressure and convulsions. He was admitted and later on, DW1 found that the deceased was involved in an accident while in an ambulance on the way to Chuka District Hospital.



13. DW3 was Jeremiah Gitonga, the chief at Karoto Location. He recalled that on the material day, the appellants went to his office at 10.00 a.m. after they had arrested the deceased with illicit brew. The deceased was drunk and they took a photograph of him. They waited for the police and when they did not come, the Appellant left with the deceased and proceeded to Marimanti Police Station.
14. DW4 was Charles Mugambi he stated that on the material day, he saw the assistant chief walking with the assistant chief. The deceased was carrying a black jerrican. DW4 heard the assistant chief say that he had arrested the deceased with illicit brew. He stated that he did not see the appellants assault the deceased and that the deceased had no injuries.

The Final Submissions

14. It was submitted by prosecution counsel for the state that it was the conduct and actions or omissions of the appellants that eventually led to the death of the deceased. That the elements of the charge were proved to the required standard and as such their conviction should be upheld. On the sentence meted out against the appellants, the counsel for state submitted that the law provides for a sentence of life imprisonment for a person who commits an offence of manslaughter. It was thus submitted that the sentence should be enhanced from 15 years' imprisonment to life imprisonment.
15. On their part, the appellants submitted that the prosecution did adduce sufficient evidence to prove a case of manslaughter against them beyond reasonable doubt. That the trial court erred in its analysis of the evidence and particularly ignored material evidence adduced both by the prosecution and the defence with regard to the cause of the death of the deceased. Further, that this alleged improper analysis of the evidence led the trial court to wrongfully convict the appellants. On the sentence, it was the appellants' submission that the sentence passed against them was manifestly harsh and excessive under the circumstances. The appellants thus urged this court to find that this appeal is merited and the same be allowed.

Issues for Determination

16. I have considered the grounds of appeal and the submissions by the parties. The main issues that arise for determination for this Court are:
 - a. Whether the charge of manslaughter against the appellants was proved beyond the required standard of beyond any reasonable doubt; and
 - b. Whether the sentences meted out against the appellants were harsh and excessive in the circumstances.

Analysis

On proof of the charge against the Appellants

17. In a case of manslaughter, the prosecution is supposed to prove the primary ingredients of the offence namely:-
 - (i) The death of the deceased and the cause of death.
 - (ii) That the accused committed the unlawful act which caused the death of the deceased.
18. The death of the deceased has been proved by the evidence of PW1 who identified the deceased's body before a postmortem examination was conducted by PW8. The postmortem report produced by PW8



as P. Exhibit 1 also confirmed that the death deceased and further, it confirmed that the cause of the deceased's death was severe head injury from severe blunt trauma.

19. The next question for determination then is whether the cause of the deceased's death was a result of the unlawful actions or omissions of the Appellants. It was the testimonies of PW1, PW2, PW3, PW4, and PW11 that they witnessed the Appellants assaulting the deceased on the material day at different times and in different locations. PW1, PW2, and PW11 saw the Appellants assaulting the deceased at the deceased's home. PW3 saw the Appellants assaulting the deceased at the home of the 2nd Appellant while PW4 saw the Appellant assaulting the deceased after they got into an accident at around Transnation Sacco on the material day. The deceased was then rushed to Marimanti Level 4 Hospital where he was later referred to Chuka District Hospital.
20. According to PW10, the deceased was referred to Chuka District Hospital with a history of trauma to the head. While being ferried to the said Chuka District Hospital, the ambulance that was ferrying the deceased got into an accident. PW5 was the driver of the said ambulance. According to him, he swerved the ambulance in order to avoid a head-on collision with an oncoming motorcycle and the ambulance knocked the side of the road and overturned. PW9, who is a nurse at Marimanti Level 4 Hospital and who was travelling in the same ambulance stated that after the accident, the deceased had a swollen forehead which he did not have when they were leaving Marimanti Level 4 Hospital. The testimony of PW6, the police constable who visited the scene of the accident also confirmed that the deceased had a swelling on the forehead and was oozing some blood.
21. From the radiology report dated October 2, 2021 that was produced by PW10 as P. Exhibit 5, there was extensive bleeding on the left side of the brain tissue which led to compression of brain on the same side and a shift of the brain tissue to the opposite side. The cause of the deceased's injuries was however not indicated in the radiologist report. On cross examination, PW10 stated that it was possible that the cause of the deceased's injury was from the accident.
22. It was the PW9's testimony that after the accident, the deceased was assisted out of the accident by members of the public. The nagging question then becomes whether the cause of the death of the deceased was directly linked to the injuries he sustained following the accident of the ambulance that the deceased was being ferried/travelling in or whether the deceased had sustained those injuries before the accident. This argument relates to the law of causation.
23. Having considered the evidence on record afresh, it is my view that the prosecution established that the deceased sustained the injuries before the accident that the occurred on October 2, 2021 and that is why he was referred to Chuka District Hospital for a CT scan. The evidence adduced by the nurse who was accompanying the deceased to Chuka Hospital told the court that when they left Marimanti Hospital the deceased was unconscious, he had convulsions and the pressure was going up. The deceased was on oxygen. This was corroborated by the evidence of (PW5) the ambulance driver who confirmed that the deceased on oxygen. There can be no doubt that the severe injuries on the head were caused by the appellant, long before the accident occurred.

There is overwhelming evidence that the appellants beat the deceased and in particular the 1st appellant was using a stick. The testimony of PW1 – was that when the 1st appellant hit the deceased on the head the 1st time, he immediately started nose bleeding. This was a clear sign a head injury. The trial magistrate found that the accident was not a serious one because other passengers accompanying the deceased in the ambulance did not sustain sever injuries. The injury which the deceased sustained was a swelling on the forehead. The CT scan produced by PW10 states that the deceased had an extensive bleed on the left side of the brain tissue. The internal injuries were not on the forehead. The deceased was ordered to have a CT scan at Chuka Hospital. This is itself shows that the doctor at Marimanti



Hospital noted that he had internal injuries which need to be established through a C.T. Scan. I find that it is the actions of the appellants beating the deceased that led to his death. These actions by the appellants were unlawful.

Manslaughter is defined under section 202(1) of the Penal Code as killing of another person by an unlawful act or omission.

It states that-

“ Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed Manslaughter”

An unlawful act or omission is defined as “an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

The prosecution adduced sufficient evidence to prove that the fact and cause of death were proved beyond any reasonable doubts on the question of regarding time of death section 215(1) of the Penal Code provides:

“ A person is not deemed to have killed another if the death of that person does not take place within a year and a day after the cause of death.”

In this case the death occurred within a period of 48 hours from the time of assault. Section 213(e) of the Penal Code provides as follows:-

“(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.”

In this case the appellants assaulted the deceased and inflicted injuries which rendered him unconscious. The deceased was then unfortunately involved in an accident while being taken to Chuka Hospital for a C.T. Scan.

I find that although the deceased was involved in accident, the injuries inflicted on him by the appellant contributed to the death of the deceased and the appellants are deemed to have caused the death of the deceased.

24. On the complaint by the appellants about the discrepancies and inconsistencies in the testimonies of PW1, PW2, and PW11 on what happened at the time of the arrest, it is my considered view that the same are of no consequence to the conviction of the appellants. The prosecution witnesses need not have mentioned the presence of each other at the time and place of arrest. The testimonies of PW1, PW2, PW3, PW4, and PW11 consisted in the greater chain of events that happened on the material day point to the culpability of the Appellants. It is trite that not all discrepancies and inconsistencies will vitiate a conviction. Minor inconsistencies are ignored but grave and deliberate contradictions which may tend to show that the witnesses were not truthful may cast doubts in the prosecution’s case. In *Twehangane Alfred v Uganda* Criminal Appeal No.139/2002 [2003] UGCA

It was stated that “with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case. Inconsistencies unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected. See *Victor Owish Mbogo v Republic* [2020] eKLR C.A. The appellant has alleged that there were contradictions in the prosecution’s case in timelines and the



differences in evidence tendered on where and when the deceased was assaulted. I find that there are no material contradictions by the witnesses which suggest that they were telling deliberate untruths. The testified on approximate time and the happenings at various places from the time the deceased was arrested. I find that the evidence was devoid of material contradiction. The court can safely rely on the evidence.

On allegation that the decision was against the weight of the evidence, this is far from the truth. There was overwhelming evidence to support the charge. I find that the evidence proved the charge to the required standard. In *Miller v OMinister of Pensions* [1947] 2 All E.R, 372, 373 Lord Denning. It was held:-

“That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The Law would fail to protect the community, if it admitted fanciful possibilities to deflect the course of justice.

If the evidence is so strong against a man as to leave only a remote possibility in favour which can be dismissed by a sentence of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short will suffice.”

On the Sentences meted against the Appellants

25. The next question for our determination is whether this Court ought to interfere with the sentence meted out to the appellant on grounds that it is manifestly excessive. Before this Court can interfere with a sentence passed by the trial court, it must be satisfied that the trial court erred in the exercise of its discretion. This principle was enunciated in *Ogolla s/o Owuor v Republic*, [1954] EACA 270, as follows:

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R v Shershowsky [1912] CCA 28TLR 263).”

26. The offence of manslaughter is punishable by the maximum penalty of life imprisonment under section 205 of the [Penal Code](#). The said Section provides that:

“Any person who commits the felony of manslaughter is liable to imprisonment for life.”

27. The sentence of life imprisonment represents the maximum sentence which is usually reserved for the worst of such cases. It was indicated by the state that the appellants were first offenders. For that reason, it is my considered view that this case does not fall in the category of the most extreme cases of manslaughter. I am alive to the fact that the circumstances herein appear to have turned tragic for the deceased and his family which was rather unfortunate. The trial court did consider the mitigation by the counsel for the appellants as well as the sentiments made by the deceased’s wife. I agree with the learned trial magistrate that the death of the deceased could have been prevented had the appellants made the arrest in accordance with the law. In the circumstances, the sentence meted against the appellants was lawful and not harsh.

Though the State had warned the appellant that they would apply to enhance the sentence which they have done, such notice is of no consequence. It is issued where the sentence meted is unlawful and on appeal they may ask the court to pass the lawful sentence. In this case, life imprisonment is not a mandatory sentence. The section say the offender is ‘Liable’ the court can therefore exercise



discretion and pass any sentence upto a maximum of life imprisonment. The trial magistrate exercised her discretion fairly and judiciously.

Conclusion:

For the reasons stated in this Judgment, I find that this appeal is without merits. The Judgment of the trial magistrate was proper.

Order:

1. The appeal is dismissed

DATED, SIGNED AND DELIVERED AT CHUKA THIS 21ST DAY OF JULY 2023.

L.W. GITARI

JUDGE

