



**-REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCRA NO.2 OF 2020**

**EDWARD MUNYUA KITHURE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the Judgment dated 31<sup>st</sup> October,2019 by Hon. L. N. Mesa, Senior Resident Magistrate at Marimanti SRM's Criminal Case No. 282 of 2017)***

**J U D G M E N T**

The appellant Edward Munyua Kithure was tried and convicted of the offence of Manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** (Cap 63 Laws of Kenya) by Senior Resident Magistrate **Marimanti Law Courts Criminal Case No.282/2017**. The particulars were that on 26/2/2017 at Kithoroka village in Turima Location in Tharaka South Sub-County within Tharaka Nithi Count, unlawfully killed Harrison Mworira.

The appellant was sentenced to life imprisonment.

1.The appellant was aggrieved by both the conviction and sentence and lodged this appeal which initially raised six ground but later amended as follows as per the grounds filed in court on 28/10/20.

**(i). That the learned trial magistrate erred in both points of law and facts when he relied on evidence of PW2 being a single eye witness without warning himself of the dangers of relying on such evidence of a single witness at the scene of crime.**

**ii). That the crucial witnesses who caused arrest of the Appellant were not summoned to give evidence in proof of allegations thus provoking section 150 of Criminal Procedure Code Laws of Kenya. (sic)**

**(iii)That the case was not proved beyond the standard required by the law as stipulated under the provision of section 111 of Evidence Act.**

**(iv)That the murder weapon was never recovered in support of appellant having been involved in the alleged crime commissions.**

**v). That the appellant's defence was not at all considered in support of appellant having been involved in the alleged crime commissions.**

**vi). That there was a persisting grudge between the appellant's mother and PW2 based on land lease of which led PW2 to connect the appellant with the present offence.**

Based on these grounds the appellant prays that the appeal be allowed, conviction be quashed, sentence be set aside and be set at liberty.

The brief facts of the case are that on 26/2/2017 at about 4.00 pm the deceased and the appellant were spotted by a witness Justa Kagendo (PW2) while engaged in a fictitious fight. The witness Justa Kagendo enquired from the two as to why they were fighting. Justa tried to separate the two and stood between them with the deceased behind her and the accused in front of her. The deceased informed her that the problem was chips. The two then suddenly started fighting again. They fell down and continued fighting. The accused pulled out a knife and stabbed the deceased. The accused then ran away. The deceased walked towards a house and sat down before he lay on the ground. Other people ran away. The deceased succumbed to the injury which was inflicted under the rib cage. The sub-area and the chief were informed and went to the scene.

2. The father of the deceased John Mwathi M'Ringer PW3 was informed and went to the scene. He found the body of the deceased at the scene and saw the injury on the left side of the rib-cage and cut on the hand between the thumb and the index finger. The police went and removed the body to Chuka mortuary where a postmortem was done by Doctor Justus Kitili. He found that the body was of a male. The body had blood in the mouth and nostrils. There were bruises on the stomach and shoulders. There was a wound on the left side of the chest measuring about 4 cm. On internal examination, there was a cut on the left lung with a lot of blood on the chest cavity. He formed the opinion that the cause of death was penetrative chest injury caused by a sharp object. He filled a death certificate No. 0044247 and a postmortem form which he produced as exhibit 1. Later on 25/5/2017 the appellant was arrested by members of the public who took him to the office of the chief Municipality, Meru Madam Mercy and reported that he ran away from Marimanti after committing murder. The appellant was escorted to Meru Police Station and booked as a murder suspect. A brother of the deceased went to Meru Police Station and identified the appellant. The appellant was then handed over to the OCS Marimanti Police Station. The appellant was then charged with this offence. The appellant gave sworn defence and told the court that he is not the one who committed the offence. He alleged a grudge with PW2. He alleged that when the offence was committed he was in Meru. The trial magistrate held that upon evaluation of all the evidence tendered he was satisfied that the prosecution established beyond any reasonable doubts that the accused is the one who inflicted the wound on the deceased during a fight as a result of which the deceased died, thus committed the offence of manslaughter. He proceeded to find the accused person guilty and convicted him accordingly.

3. The court directed that the appeal be canvassed by way of written submissions. Both parties filed their respective submissions. I have considered the grounds of appeal. The proceedings before the lower court and the submissions.

### **Appellant's Submissions**

It was submitted by the Appellant that the court failed to take cognizance of the fact that he was found guilty and thereafter convicted on PW2 sole witness's evidence.

According to the Appellant the sentence of life imprisonment meted on him by the trial court was harsh, unfair and unjust.

It was further submitted that the trial court failed to recover and present before the court the weapon that was used to perpetrate the offence.

The Appellant relied on the case of **Francis Karioko Muruatetu & Another v Republic Constitutional Petition No.16 of 2015; Mithu v State of Punjab Criminal Appeal No. 745 of 1980.**

He urged the court to allow the appeal, quash conviction and set aside the sentence.

### **Respondent's Submissions**

The Respondent in opposing the appeal submitted that the charge against the Appellant was proved beyond reasonable doubt based on the evidence of the six prosecution witnesses.

According to the Respondent, the Appellant was not only recognized but equally placed at the scene of crime by PW2; further to that, the alleged offence took place in a broad day light at around 4.00 p.m.

According to the Respondent, when all facts and evidence adduced by the prosecution is put into consideration, it is clear that case the against the Appellant was proved and all the elements of the offence of manslaughter proved.

Further, the Respondent submitted that, the alleged grudge between the Appellant and PW2 was nonexistent.

The Respondent relied on the case of **Daniel Okello Rapuch v Republic Criminal Case No. 22 of 2015; Francis Muchiri Joseph v Republic Criminal Appeal No. 56 of 2014** amongst others.

The Respondent urged the court to hold that the prosecution proved it's case beyond any reasonable doubt and that the conviction and sentence ought to be upheld.

### **Issues for Determination:**

The issues for determination which arise from the six grounds of appeal can be collapsed with the following issues.

1. Testimony of a single witness.
2. Whether the defence of the appellant was considered
3. Whether the charge against the appellant was proved beyond any reasonable doubts.
4. Sentence.

This being a 1<sup>st</sup> appeal, this court is enjoined to consider the evidence which was tendered before the trial magistrate, evaluate it and subject it to a fresh analysis then come up with its own independent finding. The court is however supposed to bear in mind that it did not have an opportunity to see the witnesses, assess their demeanor and leave room for that. This was the holding in the case of **Okeno- v- Republic (1972) E.A 32** and has been re-stated in various decisions of this court and Court of Appeal. In **Kiilu & Another -v- Republic (2005) 1 KLR** the court reiterated that the duty of the court is to re-evaluate the evidence and come up with its own independent finding and not just to confirm the finding by the trial court. I will proceed to consider the above issues which are raised by the appellant in his submissions.

### **1) The evidence of a single identifying witness:**

The only witness who identified the appellant was PW2 - Justa Kagendo. The appellant submits that PW2 was the only key witness whose evidence was relied on by the court to convict. The appellant submits that there were other people mentioned by PW2 who were not called to testify. He relies on the case of **Bukenya -v- Uganda (1972) EAC (sic) 549** where it was stated that the prosecution should avail all witnesses even if their evidence is fatal to the prosecution case. He has also relied on the case of **Peter Mutiria Mitambo -v- Republic (2016) eKLR**.

The respondent submits that the trial magistrate appreciated that the PW2 was the only eye witness and went on to state that the identification of the appellant by PW2 was by recognition and hence strong enough to be relied upon in convicting the appellant. It is submitted that the identification was in broad day light and was therefore proper.

It is trite that no particular number of witnesses is required to prove a fact. **Section 143 of the Evidence**

Act provides:-

***“ No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”***

Where the court has to rely on the evidence of a single witness, it has to treat that evidence with caution and only rely on it if it is satisfied that it is safe to rely on it to convict. However in cases of recognition, it is safe to rely on the evidence depending on the circumstances of the case. In the case of Anjanoni -v- Republic (1980) eKLR the Court stated on recognition of an accused by a witness:

***“ This however was a case of recognition not identification of the assailants, recognition of an assailant is more satisfactory, mor assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailants in some form of another.”***

In this case PW2 was the key witness. Evidence of eye witness is important as it forms the starting point, where available for police investigations. PW2 was such witness. The only issue is whether it was safe to rely on her testimony. A close scrutiny of how she recognized the appellant is important in determining whether it was safe to rely on her testimony. PW2 testified that it was at 4.00pm. This means that it was in broad day light and could therefore see and recognize a person she knows. Secondly, she talked with the appellant and the deceased while standing between the two with appellant in front of her. They resumed the fight, fell to the ground and the appellant removed a knife and stabbed the deceased. PW2 had ample time to see the two combatants and there was no possibility of mistake. It is my view that the circumstances were such that they favoured a positive identification by recognition and it was therefore safe to rely on the evidence PW2- to convict.

The evidence of PW2 was corroborated by PW4 who confirmed that there was a fight and the assailants fled from scene while armed with a knife. Secondly the testimony of PW2 was corroborated by the doctor, PW6, who confirmed that the deceased had a stab wound under the rib cage which was caused by a sharp object. I am therefore satisfied that PW2 identified the Appellant by recognition as the person who fatally stabbed the deceased on the material day.

The appellant has argued that critical witnesses were not called. It is trite that the prosecution has discretion to decide who it calls as its witnesses. The prosecution need not call a superfluous number of witnesses to prove a fact.

In the case of Juma Ngodia v Republic (1982-88)1 KAR 454, the Court of Appeal held as follows regarding the role of the prosecutor in respect of witnesses:

**“The prosecutor has, in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution.”** (Emphasis added)

To determine whether the elements for the offence of manslaughter are attributable to the accused, it is incumbent for the prosecution to present evidence on identification.

In Bukenya & Others v Uganda [1972] EA 549 the court addressed itself as follows on the role of the prosecution in endeavoring to ensure a reasonably fully investigated case is presented to court:

**“(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

**(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.**

**(iii) Where the evidence called is barely adequate, the court may infer that the evidence of**

**uncalled witnesses would have tended to be adverse to the prosecution.** (Emphasis added).

The court can fault the prosecution for failing to call witnesses if it can be shown that if the witnesses were called they would have given adverse evidence. It will also be fatal if it is shown that there was some dishonesty in failing to avail the witness. From the judgment of the trial magistrate he lamented that people in the area do not volunteer information to assist the investigators to bring the perpetrators of the offence to book. This is what the magistrate stated in his judgment:

**“ PW2 was the only eye witness to the offence who testified against the accused person despite there being a large crowd of people at the scene. PW2 told the court that the people present at the scene ran away when the accused person stabbed the deceased. This case is an isolated one. This court has received similar testimonies in several cases that have come before this court where a person has been killed. This court has noted a certain consistent behavior within the community around this court that potential witnesses at the scene of a homicide neither arrest the perpetrator nor do they try to assist the victim but instead escape from scene. The witnesses do not volunteer information to assist the investigators to bring the perpetrators of the offences to book.”**

Failure to call other witnesses by the prosecution therefore was not in bad faith. They refused to assist the investigators and could not have been called as witnesses. The prosecution called witnesses who were willing to testify and were sufficient to prove the charge to the required standards.

The appellant faults the court for failing to find that he had a grudge with PW2. The allegation was not put to the witness when she testified and was cross examined. The trial magistrate found that the alleged grudge between accused and PW2 was nonexistent. The allegation of grudge was not raised when PW2 testified, it was raised in his defense and could therefore not be tested as the witness had already testified and concluded her testimony. I find that it was not raised at the earliest opportunity. It can only be treated as an afterthought which as stated by the trial magistrate was nonexistent.

## **2. Failure to consider the defense of the accused**

I have considered this issue. This court relies on the record of the lower court which is an important document as it informs the court as to how the proceedings were conducted. The appellate court will be guided by the record and nothing else. The record shows that the trial magistrate considered the defense of the appellant at Page 66 of the record where the court stated that the defense of alibi was raised for the first time in his defense. He concluded that:-

*“The court thus found that the accused person's evidence of alibi deficient in many aspects to justify this court to uphold it”*

The defense was considered and properly analysed. The defense was a turn around with the line of defense he had adopted from the inception of the case. This ground is without merits.

## **3. Whether the charge proved to the required standards**

The appellant faults the court for convicting him and yet no matter weapon was produced in court. The prosecution with the evidence of PW2 and PW6 proved that the deceased was stabbed with a knife and the injury resulted in his death. The prosecution witnesses PW2 & PW 4 testified that the assailant who has been identified to be the appellant in this case fled from the scene with the murder weapon. As submitted by the state, failure to produce the murder weapon does not water down the strong prosecution case. It was proved that the injury was caused with a knife which the appellant used.

On whether the charge was proved, the accused was charged with manslaughter contrary to **section 202 of the Penal Code**. The section provides:

***“202. (1) Any person who by an unlawful act or omission causes the death of another person is***

*guilty of the felony termed manslaughter.*

***(2) An unlawful omission is 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 ingredients of the charge which the prosecution must prove are:-

- i) Unlawful act
- ii) The unlawful act must be a dangerous one
- iii) Death must result from the unlawful act

The prosecution proved that it is the accused who committed the unlawful act of stabbing the deceased with a knife and the act was dangerous as it resulted in the death of the deceased. I find that the charge was proved to the required standards, that of beyond any reasonable doubts.

#### **4. Sentence**

The appellant submits that the sentence of life imprisonment was a mandatory sentence and failed to conform to the tenet of fair trial under **Article 25(c) of the Constitution (sic)**. He has cited the Supreme Court decision in **Muruatetu & Another -v- Republic**. He submits that the sentence was harsh and excessive.

The decision in Muruatetu’s case is not applicable as the sentence under Section 205 of the Penal Code is not mandatory. The sentence of life imprisonment is the maximum. The fact that **Section 205** provides that the person is “liable” leaves room for the exercise of discretion in sentencing. **Section 205 of the Penal Code** provides:

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

Furthermore, the Supreme Court has issued directions in Muruatetu’s case and stated that the decision of Muruatetu’s case and these guidelines apply only in respect to sentences of murder under **Section 203 as read with Section 204 of the Penal Code**. The decision does not therefore apply in these proceedings. I will therefore consider the appeal on sentence on the other aspects that it was harsh and excessive.

In the case of **SIMON KIPKURUI KAMORI V REPUBLIC [2019] eKLR** thus:

“Since the appellant is only appealing against sentence, it is important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it.

To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court.

It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

In the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue 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, I 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) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -

**“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)”**

In this case, the trial magistrate passed the maximum sentence. The appellant was a first offender and he pleaded for leniency. Although the trial magistrate found that the appellant was not remorseful, it is my view that for a first offender, the maximum sentence of life imprisonment was manifestly excessive. A maximum sentence should not be imposed on a first offender unless there are aggravating circumstances. See Court of Appeal decision in Charo Ngumbao Gugudu v Republic [2011] eKLR; James Nganga Njau v Republic [2014] eKLR. The court stated that it is only in exceptional cases that a maximum sentence will be imposed on a first offender. This, the court noted, is the principle of sentencing as opposed to the severity of the sentence.

I find that the trial magistrate ignored the principle that a maximum sentence could not be imposed on a first offender. I therefore have reason to interfere with the decision of the trial magistrate in sentencing.

### **In conclusion**

I find that the prosecution tendered sufficient evidence which proved the charge against the appellant beyond any reasonable doubts. I therefore find that the appeal against conviction is without merits and is dismissed. I allow the appeal on the sentence and order that the sentence of life imprisonment is set aside. It is substituted with a sentence of imprisonment for twenty-five (25) years which will run from 14-06-17 when the appellant was remanded in custody and remained in custody until the time he was sentenced to imprisonment.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 21ST DAY OF JULY 2021.

**L.W. GITARI**

**JUDGE**

**21/7/2021**

The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

**21/7/2021**