



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 143 OF 2018

JOSPHAT KIPSANG KURGAT.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. D. A. Alego – SPM Kapsabet dated 17th December 2018 in the original Kapsabet Principal Magistrate’s Court Criminal Case No. 3105 of 2016}

JUDGEMENT

The appellant was sentenced to life imprisonment for the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

The particulars of the charge were that on 19th September 2016 at Kapinderem village in Sauritun Sub-location within Nandi County the appellant unlawfully killed Alexander Kibet Mutai by using blows and kicks.

This appeal is premised on five amended supplementary grounds of appeal filed together with the appellant’s submissions. Those grounds are: -

- “1. THAT, the trial court convicted me by passing a sentence which was manifestly harsh and excessive in the circumstances in any event.**
- 2. THAT, the trial court erred in law and facts in convicting me yet failed to note that the evidence adduced was insufficient to convict.**
- 3. THAT, the trial court failed in law and facts by convicting me to life imprisonment yet there was no proof of MEN’S REA FACTOR, in the offence.**
- 4. THAT, the trial court convicted the appellant on prosecution evidence which was not proved beyond reasonable doubt.**
- 5. THAT, the Medical Inferences were not conclusive and supportive in the circumstances, no exhibits were produced such as Treatment Chart and the weapon used.”**

An appeal is in the nature of a retrial and I have therefore reconsidered and evaluated the evidence in the court below so as to arrive at my own independent conclusion albeit taking into account that I did not see or hear the witnesses who testified – see **Okeno v Republic [1972] EA 32**. I have also carefully considered the rival submissions rendered at the hearing of the appeal.

The appellant’s complaint as against the conviction is that the evidence adduced was inconsistent, uncorroborated and insufficient considering the variance in the time given by the three witnesses as to when they witnessed the event that is alleged to have resulted in the death of the deceased. He submitted that the variance ought to have created doubt in the mind of the court and urged this court to so find and hence disregard the evidence of the prosecution witnesses. Still on the conviction, the appellant submitted that the offence was not proved as mens rea was lacking. He stated that there was no evidence suggesting that the death of the deceased was planned and that there was no record of the existence of a grudge between him and the deceased that could have necessitated him to kill him and therefore the conviction was not safe. He described the evidence as shaky and contended that the investigation was shambolic. He took issue with the prosecution’s conduct in stepping down Pw4 allegedly for being incoherent without giving an explanation for stating why he was incoherent. The appellant submitted that the evidence of that prosecution witness would have assisted the court. On the medical evidence, the appellant queried why no treatment notes were tendered in evidence yet it had been alleged that the deceased had been taken to hospital. He poked holes in the evidence of the deceased’s wife (Pw3) stating that it contradicted that of Pw1. He wondered which of them was speaking the truth. He

submitted that the doctor who performed the post-mortem failed to attend court without reasonable cause and contended that the doctor who testified on his behalf was not competent to do so and his evidence should be disregarded. He also contended that the doctor's statement that the deceased was transferred to hospital on 16th September 2016 contradicted the evidence of the deceased's wife that she spent that night with the deceased and that he was taken to hospital on 19th September 2016. He urged this court to allow his appeal, set aside his sentence and set him at liberty.

It is my finding however that save for a contradiction on the date by Pw2 which is not fatal, the evidence of the prosecution witnesses was credible and consistent and that the charge against the appellant was proved beyond reasonable doubt. Pw1 who knew both the deceased and the appellant very well testified that the three of them were drinking together and that they all left the chang'aa den for their homes at 7pm. He stated that he was walking behind the deceased and the appellant which means he could see them well. When therefore the two of them got into a fight he separated them by pulling the deceased away and took him to his home. He stated that the deceased suffered injuries in the fight and that the appellant trampled on the deceased with gumboots. He further testified that the next day (17th September 2016) he went to see the deceased but found he had been taken to hospital by his wife. This was confirmed by the deceased's wife (Pw3) who also stated that the deceased told her he had been beaten by the appellant thereby corroborating evidence by Pw1 that the appellant beat the deceased. Pw3 testified that the deceased complained he was having difficulty breathing and that it was their Chief who advised her to take him to hospital after she reported the matter to him. Pw2's evidence that the appellant assaulted the deceased on 26th September 2016 could only have been an error given that the post mortem performed on 25th September could not have been conducted before he died. Pw2's evidence largely corroborated that of Pw1 and I find that their evidence together with the dying declaration made by the deceased to his wife proves beyond reasonable doubt that the deceased was killed by the appellant. In his defence, the appellant denied any knowledge of the incident and so did not give any explanation for assaulting the deceased. It is my finding therefore that he did so unlawfully.

To prove the offence of manslaughter the prosecution needed not to prove malice aforethought or intention to kill as the appellant referred to it. It was sufficient to prove beyond reasonable doubt that the appellant caused the death of the deceased by an unlawful act. The appeal against conviction has no merit and is therefore dismissed.

On the sentence the trial Magistrate imposed the maximum sentence - life imprisonment - prescribed by the law without considering that the appellant was a first offender who had an otherwise cordial relationship with the deceased prior to that fateful night. Had she considered the sentencing policy she would have come to the realization that the maximum sentence was excessive in the circumstances of this offence. Accordingly, I allow the appeal on the sentence by setting the sentence of life imprisonment aside and substituting it with a term of imprisonment for ten (10) years and so as to take into account the period spent in custody direct that the sentence shall run from the date of his arrest. It is so ordered.

Signed and dated this 15th day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 21st day of January 2020.

H. A. OMONDI

JUDGE