



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

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 61 OF 2019**

**BETWEEN**

**MARTIN MAINA KINYUA.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal against the original conviction and sentence dated 28<sup>th</sup> February 2019 in Criminal Case No. 1386 of 2015 at Thika Magistrates Court before Hon. C. A. Otieno- Omondi, PM)*

**JUDGMENT**

1. The appellant, **MARTIN MAINA KINYUA**, was charged, convicted and sentenced to life imprisonment for the offence of manslaughter contrary to **section 202** as read with **section 205** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that between 16<sup>th</sup> and 17<sup>th</sup> March 2015 at Kiganjo area within Thika West Sub-county of the Central Region, the appellant unlawfully killed **LUCY WANGECHI MAINA** (“the deceased”).
2. In his written submissions before this court the appellant stated that he did not dispute the fact that the deceased was killed, what he was disputing was his involvement; whether he caused the unlawful act or omission that led to her death. He contended that there was no eye witness who saw him assault the deceased or omit to do any act to prevent her death. He pointed out that the prosecution’s case was based on circumstantial evidence which did not establish his culpability.
3. Before I consider the issues raised by the appellant, it is important to outline the evidence that emerged before the trial court because this is a first appeal. I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour [see *Okeno v Republic [1972] EA 32, Kiilu and Another v Republic [2005] 1 KLR 174*].
4. The appellant’s sister, Naomi Wangari Kinyua (PW 1) testified that on 18<sup>th</sup> March 2015, she left the appellant in her house when she went to work in the morning. When she returned at about 11.00am, there was a pungent smell in the house. She called her father, Paul Kinyua (PW 8). When he arrived, they went into the house and found the appellant looking worried. PW 8 asked him what the problem was, the appellant was hesitant at first but he told them that he found his wife taking medicine the previous day. That they had quarreled with her and because he was epileptic, he became sick and fell down. When he regained consciousness, he found that she had also collapsed.
5. PW 8 testified that the appellant told them that the deceased was unwell and that he had tried to call her but she was not responding. PW 8 and the appellant proceeded to Kiganjo AP Post to report what had taken place but the appellant left before reaching there. At the AP post, PW 8 left with police officers to where the appellant and deceased lived. When they opened the door, they found the deceased’s lifeless body. The deceased’s body was taken to Thika Level 5 Hospital Mortuary. PW 8 stated that he saw the appellant 5 days later and informed him of the deceased’s death. He escorted the appellant to Thika Police Station. PW 8 told the court that the appellant appeared unsettled when he saw him on 18<sup>th</sup> March 2015.
6. The deceased’s sister, Nancy Nyambura Mutahi (PW 2), testified that on Friday, 13<sup>th</sup> March 2015 at about 6.00pm, she escorted the deceased who had come to visit her. She did not see the deceased on Saturday or Sunday. She did not call the deceased on Monday but when she called on Tuesday, 17<sup>th</sup> March, the phone rang but was rejected. She kept calling the whole day without success. By Wednesday, 18<sup>th</sup> March, the deceased phone was off. She decided to call the appellant who told him that he and the deceased had broken up. He also told her that the deceased phone was lost then later said that it had run out of charge. On further inquiry, that appellant told her that he had seen her on her way to work that morning. PW 2 further testified that the deceased’s employer (PW 3) called to find out why the deceased was not going to work. At about 6.00pm, she received a call informing her to go the deceased’s house. When she arrived at the house, she was informed that the deceased was dead.

7. The deceased's employer, Carol Nancy Wandia Kiarie (PW 3), testified that she had engaged her in September 2014 as a housemaid. She told the court that the deceased came to work on Monday, 15<sup>th</sup> March 2015 as usual. In the afternoon she assisted her at her workplace to deal with her business supplies. On Tuesday, 16<sup>th</sup> March, she gave her money so that she could do some purchases for her business on the next morning. At around 8.00pm, she remembered something she had forgotten to tell her so she tried to get her on phone but could not. When the deceased did not come to work on the next day, PW 3 then called PW 2 to inquire why the deceased had not come to work since Monday. PW 3 called her on Wednesday and informed her that that the deceased had passed away.

8. APC Susan Atamba (PW 4), told the court that on 18<sup>th</sup> March 2015, she was at Kiganjo AP Post when PW 1 came to report what had transpired when the appellant came to visit her. She called other police officers from Makongeni Police Station and they proceeded to the appellant's house which was situated in a plot. The door to the house had been locked from the inside with a latch which they opened through a space in the door. They found the body of the woman on the bed. Since she was dead, they secured the scene, called other officers and took the body to the mortuary. They tried to call the appellant but he was not picking his phone. She was informed that the appellant was arrested a few days later.

9. Chief Inspector Joseph Ngaira (PW 7), testified that on 18<sup>th</sup> March 2015, he received a call from Kiganjo AP Post informing him of a suspected case of murder. Together with other officers, he went to the scene. He found the female body lying on a bed in the house. Items in the house were scattered all over. He recalled that they did not recover any weapon. After the body was taken to the mortuary, they started looking for the appellant who was a suspect. The appellant was brought to the police station by PW 8 on 22<sup>nd</sup> March 2015.

10. The postmortem on the deceased body was conducted by Dr Josephine Muthoni Muthami (PW 9) on 24<sup>th</sup> March 2015 at General Kago Road Funeral Home. Benson Maina, PW 5, and Nicholas Macharia Mwangi, PW 6, identified the body as that of the deceased. PW 3 noted that the body was in state of decomposition. She observed injuries on both sides of the anterior chest wall which she described as bruised. When the body was opened, she noted extensive bruising on the anterior chest wall bilaterally. The right lung had a bruise on the lower part measuring 7 X 8 X 5 cm and there was blood in the chest cavity on both sides. PW 3 concluded that the cause of death was lung contusion and haemothorax due to blunt chest trauma.

11. The appellant gave sworn testimony in his defence. He admitted that the deceased died in her house. He testified that at the time of her death, the deceased was 3 months pregnant. He stated that the deceased told him on 12<sup>th</sup> March 2015 that she wanted an abortion as she did not want to bear an epileptic child. From that day until to 16<sup>th</sup> March 2015 they were quarreling. On 17<sup>th</sup> March 2015, the deceased left and came back with some medicine for abortion. When she took some, they started quarreling. The appellant recalled that he slapped her and they both fell on the bed. He took the medicine away and left. When he returned, he found the door locked. Since it was 10.00pm, the appellant decided to go to his father's timber yard to sleep. When he returned on the next morning, 18<sup>th</sup> March 2015, he opened the door and found the deceased was sleeping on the bed. He could not tell whether she was dead but she was bleeding from the nose and mouth but she was not breathing. He also stated that in the room the deceased had put some pesticide in a soda. He took the bottle and proceeded to report the incident to PW 1. The appellant further testified that PW 1 called PW 2. They wanted to take him to the AP Post but he was afraid so he went to his aunt's place and returned after 3 days. He asked his father to take him to the police station where he was arrested and charged.

12. Based on the evidence I have outlined, the trial magistrate held that it is the appellant who committed the unlawful act that led to the deceased's death. In his amended grounds of appeal and written submissions filed on 12<sup>th</sup> September 2019, the appellant contended that the circumstantial evidence relied on by the trial magistrate was insufficient to support a conviction. He submitted that the trial magistrate failed to consider that a toxicology test was not done considering the presence of poison in his house and PW 1's house and that the prosecution did not tender exhibits that were in the room. The respondent supported the conviction on the grounds that all the evidence pointed to the appellant as the person who caused the unlawful act that led to the deceased's death.

13. The appellant admitted the fact of death. The cause of death was proved by the evidence of PW 9 who produced the post mortem form. The conclusion from the injuries and bruises on the chest were evidence of blunt chest trauma due to battery. I have no reason to doubt these findings. The appellant attempted to cast doubt on PW 9's findings by pointing to the fact that the investigators did not conduct toxicology test as the deceased must have died from taking poisonous substances to induce an abortion. That the deceased wanted to abort her unborn child was ruse created by the appellant to divert attention from the assault. There was no evidence particularly from PW 2 and PW 3 that the deceased had expressed to them that she wanted to procure an abortion or that she was distressed by the pregnancy prior to her death. I reject the contention in his defence that the deceased could have died from poisoning as the cause of death was clear as day and there is no reason for this court to depart from expert findings.

14. I now turn to consider whether the prosecution proved the case against the appellant beyond reasonable doubt. The prosecution's case was based on circumstantial evidence and in this respect, the well-settled principle that a court should consider in relying on circumstantial evidence as a basis for a conviction was summarized in **Sawe v Republic Criminal Appeal No 2 of 2002 [2003] eKLR**, where the Court of Appeal restated the principles which ought to be applied when dealing with circumstantial evidence in the following terms:

*In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.*

15. The prosecution relied on several facts to complete the chain of circumstantial evidence. The appellant did not dispute the fact that he lived together with the deceased and that he was the last person to be with her. He stated that between 12<sup>th</sup> and 17<sup>th</sup> March 2015 they had been quarrelling and on 17<sup>th</sup> March 2015 they fought. The nature of the fight was corroborated by the evidence from the postmortem which revealed bruises on the chest and blood in the chest cavity. This evidence also disposes of any suggestion that the deceased's death could have been accidental since the appellant testified that on the day they fought, the deceased fell on the bed.

16. Those who expected to see the deceased on the days the appellant stated that he had quarreled with her were her sister, PW 2, and her employer, PW 3. All this evidence points to the appellant as the only person who could have caused the unlawful act and only he could explain what transpired in their house. The appellant's behavior and statements to third parties after the death of his wife was inconsistent with his innocence. By the time he went to see PW 1 on 18<sup>th</sup> November 2015, he knew she was already dead as a result of assault. He tried to suggest that they quarreled and she fell. He also tried to suggest that she had taken poison contrary to the clear evidence of the physical injury on the deceased's body.

17. The appellant stated that he feared going to the police station. When he went to see PW 1 and PW 8, no one knew about her death and if he was innocent, there would have been no difficulty reporting to the police. The appellant ran away instead. It is also telling that when the appellant spoke to PW 2 on 17<sup>th</sup> March 2015, he told her that they had separated, a fact he knew was false.

18. Looking at the entire evidence, there is no doubt that the appellant fought with the deceased, inflicted injuries on her chest whereupon she collapsed and died. The appellant decided to plant poison in the room to suggest that the deceased had committed suicide. He feigned the quarrel about abortion in order to inoculate himself against any suspicion and planted stories to third parties suggesting that she had left him. All this evidence is watertight and hence I find that the appellant was properly convicted.

19. Before I conclude this decision, I wish to deal with one issue the appellant raised about the nature of the typewritten proceedings. There are some gaps in the record which when compared to the original handwritten proceedings refer to the parts where the proceedings are torn. I doubt that this is deliberate and it appears to be a result of the quality of paper and the manner the file was kept. I find that the gaps in the proceedings were not substantial and do not affect the substance of the proceedings.

20. I now turn to the sentence. The maximum sentence for the offence of manslaughter under **section 205** of the **Penal Code** is life imprisonment. The general principles upon which the appellate may interfere with a sentence imposed by the trial court are well settled. It has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see **Wanjema v Republic [1971] EA 493**).

21. The trial magistrate considered the probation report and the mitigation in coming to the sentence. Although a custodial sentence was warranted, it was held in **Josephine Arissol v R [1957] EA 447** that, "*The general rule is that a maximum sentence should not be imposed on a first offender*". In addition, and in the interest of fairness and certainty, the court ought to consider sentencing decisions of superior courts. Taking into account the fact that the appellant was a first offender, the views of the victims and the circumstances of the cases, I find the sentence of life imprisonment was harsh and excessive. I find that a sentence of 9 years' imprisonment would be appropriate. Since the appellant was in pre-trial custody since his arraignment, the sentence shall run from 22<sup>nd</sup> April 2015.

22. I allow the appeal only to the extent that I quash the sentence of life imprisonment and substitute the same with a sentence of **nine (9) years imprisonment** which shall run from 22<sup>nd</sup> April 2015.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KIAMBU this 16<sup>th</sup> day of JANUARY 2020.**

**R. N. SITATI**

**JUDGE**

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.