



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 88 OF 2018

PETER MWANGANGI MBUVI.....1ST APPELLANT

PAUL MUTUKU MBUVI.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellants Peter Mwangangi Mbuvi and Paul Mutuku Mbuvi were jointly charged with the offence of manslaughter contrary to section 202 as read with section 205 of the CPC.
2. The particulars were that on the 20th day of April 2015 at Muthumu village, Kamathitu Sub-Location in Mumoni Sub-County within Kitui County jointly and unlawfully killed Kimanzi Mbuvi.
3. In the second count, Paul Mutuku Mbuvi was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. Particulars being that on the 20th day of April 2015 at Muthumu village, Kamathitu Sub-Location, Katse Location in Mumoni Sub-County within Kitui County unlawfully assaulted Mwendu Kimanzi thereby occasioning her actual bodily harm. The appellants pleaded not guilty and the matter went into full trial.
4. After full trial appellants were found guilty, convicted and sentenced. In Count 1 appellants were sentenced to serve 5 years imprisonment each while in Count 2 appellant No. 2 was sentenced to serve 2 years imprisonment.
5. Being aggrieved by above verdict they appealed complaining that there was no prove of the offence charged.
6. Parties were directed to file submissions.

APPELLANTS' SUBMISSIONS

7. It is appellants' submission that the offence of manslaughter is defined under section 202 of the Penal Code in part as follows:

“202. Manslaughter

(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.”

8. On evidence adduced by the prosecution, PW1 Mwendu Kimanzi stated in her evidence in chief that she was attacked by Paul Mutuku who picked up a fight with her husband. Then Mwangangi came and the three men were throwing stones at each other. That it was Mwangangi who threw the stone that hit her husband and he fell down.
9. Then she called a bodaboda rider on the phone and her husband was taken to Katse Hospital on a motorbike while unconscious. Then at the hospital he was told first to go to the police. Then the police took him back to Katse where he was referred to Mwingi Hospital. Lastly, PW1 stated that she had witnesses who witnessed the whole thing.
10. The appellants submitted categorically that the prosecution's evidence as adduced was not sufficient to convict the appellants. The record

shows that there was no independent witness among those called by the prosecution who witnessed the incident. Yet PW1 said she had witnesses.

11. Further PW1 stated that the deceased fell down unconscious and he was taken to hospital on a motorbike then at the hospital he was referred to the police first before he was attended to. Then back at Katse Hospital where he was referred to Mwingi Hospital.

12. In analysing the case for the prosecution, the appellants submitted that it does not come out clearly what caused the death of the deceased who rode on a bodaboda while unconscious and was first referred to the police before being treated.

13. On **Count 2**, the 2nd appellant submitted that he was also convicted with the offence of manslaughter but when he look at the evidence against him it comes out clearly that he did not throw the stone that allegedly hit the deceased. He submitted that it was not proved that the 2nd appellant caused the death of the deceased.

14. To strengthen this point, the 2nd appellant submitted that he should have not been convicted of manslaughter as it was not even remotely shown that the stone that hit the deceased was thrown by him.

15. On the cause of death, the 2 appellants submitted that they were just told by PW1, the only witness to the incident that the three men were throwing stones at each other and the deceased fell to the ground. It is therefore possible that when he fell he hit his head on the ground. It was not established by the medical evidence and testimony whether the deceased died from the impact of the stone that hit him or from the impact of falling down.

16. It is their submission that this court must consider these points seriously because the stone that allegedly hit the deceased was not part of the evidence before the trial court.

17. The pathologist who performed postmortem on the deceased did not have the benefit of looking at the stone to establish the cause of death. Appellants submitted that the court must not rely on assumptions to convict.

18. On the offence of assault, PW1 stated that she was hit (once) on the head. She did not say which side of the head. She did not state what injuries she sustained. It is surprising to see PW3 the clinical officer who did not even attend to her for treatment saying that she sustained numerous injuries on the head, neck, thorax and abdomen.

19. On the defence of the appellants, they submitted that the defence was not considered at all. For instance, appellant 2 Paul Mutuku said he came out of the house and saw PW1 holding a stone and a huge stick while the deceased was on the ground. Then the two of them were taken away by a motorbike.

20. It is the appellants request that this court to consider the defence as it raises alot of doubts on the case as presented by the prosecution. It is their submissions that the trial court simply ignored the defence and brushed aside the testimony presented.

RESPONDENT'S SUBMISSIONS

21. The respondent submitted that PW1 Mwendu Kimanzi testified that while at her compound on the 20th April 2015 she saw Mutuku Paul a stepbrother to her husband approaching her while asking where her husband was. That before she could answer, he suddenly descended on her beating her and eventually hit her hard with a stick on the head.

22. That she screamed loud which screams attracted the husband and upon responding was met with his two stepbrothers Paul Mutuku and Peter Mwangangi who after exchanging bitter words started throwing stones at each other after which he was overwhelmed by the two when Peter Mwangangi hit him hard with a stone that sent him falling and was unconscious, bleeding on the head and died while undergoing treatment the same day at Katse Hospital.

23. PW2 Esther Mwikali in her testimony stated that she was indeed informed that the deceased had died on the 20/4/2015 after the quarrel between him and his stepbrothers.

24. PW3 Francis Saku confirmed that he treated Mwendu Kimanzi (PW1) at Kyuso Sub-County Hospital on the 20/4/2015 and that she had a cut wound on her head. He produced the P3 form as exhibit 1 and treatment notes as exhibit 2.

25. PW4 Dr. Kiema Mwangi testified that being a medical officer at Mwingi Level 4 Hospital, he was familiar with the handwriting of Dr. Onyinzor Sam whom he worked with and who performed the postmortem on the deceased and found the body had a cut wound on the left region of the skull bone. That there was blood clot on the face and nose. He had a depressed skull fracture and he formed opinion that the deceased died of brain damage.

26. PW5 No. 58583 PC Bernard Kaguru testified that he was the investigating officer after the matter was assigned to him. That his investigations revealed that on the 8/4/2015, the deceased's wife and the appellants' mother fought and the appellants' mother informed them of the assault.

27. That on 19/4/2015, the appellants left Mwingi purposely to come and avenge the assault and on the morning of 20/4/2015 while looking for the deceased and his wife confronted the deceased's wife before the deceased intervened. That a quarrel ensued and the deceased was hit by a stone thrown by the appellants.

28. The respondent submits that the prosecution proved its case beyond reasonable doubt.

EVIDENCE TENDERED

29. The prosecution called 5 witnesses. They all testified under oath. Briefly stated the prosecution's case against the appellants was that on the material date and time, the appellants went to the house of the deceased and confronted deceased's wife and asked her why she assaulted their mother on 8/4/2015.

30. That a quarrel ensued and the 2nd appellant took a stick and hit the deceased's wife on the head. She screamed. That the deceased who had gone to tether his goats heard his wife screaming and rushed home. That he found his wife bleeding. That the deceased went inside the house and came out armed with a panga ready to attack the appellants but was disarmed by members of the public who had gathered.

31. That he picked some stones and the appellants also picked stones and they started throwing the stones at each other and in the process the deceased was hit on the head and lost consciousness. That he was taken to Mwingi Level 4 Hospital for treatment but died the same day at 6pm.

32. PW1 was present and confirmed occurrence of the incident. PW3 treated Mwendu Kimanzi (PW1) and complainant in Count 2 on 20/4/2015. He testified that the complainant had cut wound on the head which was approximately 2hrs old. He stated that he also filled P3 form for the complainant which he produced as an exhibit.

33. PW4 Dr. Kiema Mwangi of Mwingi Level 4 Hospital produced a postmortem report on behalf of Dr. Onyanzo Sam who left the hospital. The report is dated 30/4/2015. He testified that Dr. Onyanzo conducted an autopsy on the body of the deceased Kimanzi Mbuvi on 30/4/2015 and reported that the body had a cut wound on the left parietal (left skull bone) region about 8cm long and had four stitches.

34. That there was blood on the face and nose. That there was also a depressed skull fracture, blood clot below the skull bone, an epidural hematoma (near the brain) and that brain tissue were protruding through a dural tear. He testified that the cause of death was brain damage secondary to head injury. He produced the report as an exhibit.

35. The investigating officer testified as PW5 and stated that he went to the scene of crime on 21/4/2015 and interrogated some witnesses. That the deceased's wife PW1 produced a stick and that was used to hit her and a stone which was used to hit the deceased. He produced them as exhibits. He testified that the appellants surrendered themselves to the OCS Mwingi on 24/4/2015.

36. That accompanied by PC Nyasoki they collected the appellants from Mwingi Police Station and escorted them to Kyuso Police Station where the charges before trial court were preferred against them. He also testified that he was present during the postmortem and stated that the body of the deceased was identified by deceased's father.

37. Both appellants were placed on their defence. Each gave unsworn evidence and did not call any witness. The first appellant (DW1) testified that on the material date he saw the deceased and his wife (PW1), arrived and started throwing stones at him. That he rushed back to her house because he did not want his child to be burnt.

38. He stated that after putting the child on the bed, he went outside and saw the deceased on the ground. He stated that someone came with a motorbike and took the deceased to the hospital.

39. DW2 testified that he heard noises that day while he was sleeping. That he went outside and saw the deceased's wife (PW1) holding a stone. He stated that he saw the deceased on the ground. That the deceased was bleeding. He saw PW1 holding a big stick which was broken.

40. That he also saw neighbours jumping the fence. He stated further that his cousin Makau took the deceased to the hospital on his motorbike. He stated that he asked his brother Peter what had happened but the brother told him he did not know what happened.

ISSUES, ANALYSIS AND DETERMINATION

41. After going through the evidence on record and parties submissions, I find the issues are; **whether the prosecution proved its case beyond doubt? whether the appellants defence was considered?**

42. The offence of manslaughter is defined under **section 202 of the Penal Code** in part as follows:

"S. 202. Manslaughter

Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter."

43. In the case of *Roba Galma Wario vs Republic [2015] eKLR* the court held that;

"For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional."

44. Section 251 of the Penal Code which states:

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”

45. The fundamental ingredients of the offence of assault causing actual bodily harm were spelt out in the case of *Ndaa vs Republic [1984] KLR* which are:

(i) Assaulting the complainant or victim,

(ii) Occasioning actual bodily harm. Thus it was the duty of the prosecution to prove beyond reasonable doubt the offences charged.

46. In the case of *Alex Kinyua Murakaru vs Republic [2015] eKLR John M. Mativo J* held that :

“Thus, actual bodily injury is any physical injury to a person (which is not permanent), or psychiatric injury that is not merely emotions, fear or panic. To make out the offence, the prosecution must show that there has been an assault, and that the assault has resulted in actual bodily harm. There must be an intention to assault (mens rea) and the assault must have taken place (actus reus).”

47. The evidence tendered was to the effect that PW1 Mwendu Kimanzi testified that while at her compound on the 20th April 2015 she saw Mutuku Paul a stepbrother to her husband approaching her while asking where her husband was. That before she could answer, he suddenly descended on her beating her and eventually hit her hard with a stick on the head.

48. That she screamed loud which screams attracted the husband and upon responding was met with his two stepbrothers Paul Mutuku and Peter Mwangangi who after exchanging bitter words started throwing stones at each other after which he was overwhelmed by the two when Peter Mwangangi hit him hard with a stone that sent him falling and was unconscious, bleeding on the head and died while undergoing treatment the same day at Katse Hospital.

49. PW2 Esther Mwikali in her testimony stated that she was indeed informed that the deceased had died on the 20/4/2015 after the quarrel between him and his stepbrothers.

50. PW3 Francis Saku confirmed that he treated Mwendu Kimanzi (PW1) at Kyuso Sub-County Hospital on the 20/4/2015 and that she had a cut wound on her head. He produced the P3 form as exhibit 1 and treatment notes as exhibit 2.

51. PW4 Dr. Kiema Mwangi testified that being a medical officer at Mwingi Level 4 Hospital, he was familiar with the handwriting of Dr. Onyinzor Sam whom he worked with and who performed the postmortem on the deceased and found the body had a cut wound on the left region of the skull bone. That there was blood clot on the face and nose. He had a depressed skull fracture and he formed opinion that the deceased died of brain damage.

52. PW5 No. 58583 PC Bernard Kaguru testified that he was the investigating officer after the matter was assigned to him. That his investigations revealed that on the 8/4/2015, the deceased's wife and the appellants' mother fought and the appellants' mother informed them of the assault.

53. That on 19/4/2015, the appellants left Mwingi purposely to come and avenge the assault and on the morning of 20/4/2015 while looking for the deceased and his wife confronted the deceased's wife before the deceased intervened. That a quarrel ensued and the deceased was hit by a stone thrown by the appellants.

54. PW1 was categorical that the 2nd appellant descended on her beating her and eventually hit her hard with a stick on the head whereas the first appellant Peter Mwangangi hit deceased hard with a stone that sent him falling and was unconscious, bleeding on the head. The two appellants' defences amounted to mere denial which was for rejection on the face of the overwhelming prosecution's evidence.

55. The prosecution proved its case beyond reasonable doubt, however on conviction, it was wrong to convict 2nd appellant with offence of manslaughter as it was clear that appellant 1 is the one who hit deceased with the stone that caused his death.

56. Thus the appeal succeeds to that extent with court making the following orders.

i) Appellant 1: conviction on offence of manslaughter is upheld together with the sentence of 5 years.

ii) Appellant 2: conviction on manslaughter is quashed and sentence of 5 years is set aside. However, his conviction on assault causing actual bodily harm is upheld and sentence of 2 years is confirmed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE