



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 23 OF 2018

ALFRED ODHIAMBO ACHAR.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal against judgment, conviction and sentence in Criminal Case No. 114 of 2016 delivered on 9.06.2017 in the Principal Magistrate's Court at Bondo by Hon. M.O Obiero PM)

JUDGMENT

1. The appellant herein **ALFRED ODHIAMBO ACHAR** was charged together with two other persons with the offense of manslaughter contrary to section 202 as read together with section 205 of the Penal Code and the particulars are that on the 9th day of January 2016 at about 1800hrs at Kaudha East Sub-location in Gem Sub-county within Siaya County jointly with others not before the court unlawfully killed Daniel Ouma Awino. The appellant was initially arraigned before Hon. M. Obiero on 28.01.2016 where he pleaded guilty to the charges. However pursuant to the application by the state to have the case consolidated with Criminal case No. 310 of 2016, and which application the appellant did not oppose, the case was consolidated with the said Criminal Case No. 310 of 2016 and a consolidated charge sheet prepared and when the same was read over to the appellant together with his co-accused, they all pleaded not guilty.

2. The three accused persons were subsequently tried and *vide* the judgment delivered on 9.06.2017 they were all convicted of the offence and each of them was sentenced to seven years imprisonment.

3. Aggrieved by the said conviction and sentence, the Appellant herein instituted this appeal *vide* the petition dated 5.02.2018 setting out the following ground of appeal:

1) The learned trial Magistrate erred in law in fact by placing the Appellant at the scene of crime on the strength of the evidence of PW1 yet the said witness was not at the scene.

2) The learned trial Magistrate erred in law by failing to comply with the provisions of Section 169 of the Criminal Procedure Code.

3) The learned trial magistrate erred in fact by failing to appreciate the fact that the deceased had been found with stolen cow and was attacked by a charged crowd of people who knew him as a thief.

4) The learned trial magistrate erred in fact by ignoring the material contradictions in the evidence of prosecution witnesses as to who assaulted the deceased on the fateful day.

5) The trial magistrate erred in law and in fact by failing to consider the defence raised by the Appellant which was uncontroverted and his mitigation.

6) The sentence of 7 years imprisonment was excessive in the circumstances of the case.

4. The Appellant prayed that the conviction be quashed, the sentence be set aside and that he be acquitted.

5. When the appeal came up for hearing, the appellant relied on his grounds of appeal and further submitted orally stating that he had suffered a lot in prison and that he did not plan to kill the deceased and further that he did not know why he was arrested.

6. The appeal was opposed by Mr. Okachi (Senior Principal Prosecution Counsel who relied on the evidence on record and further submitted that PW1 and PW2 placed the appellant at the scene of crime. He further submitted that the sentence meted was lawful and not harsh or excessive considering the loss of life.

7. In a rejoinder, the appellant submitted that the said PW1 and PW2 were relatives of the deceased and that they lied.
8. In his written submissions (which he relied adopted as fully canvassing the appeal, the appellant submitted that the evidence tendered by the prosecution fell far below the required standard for the safe conviction. He submitted that there was no proper parade identification (Police Identification Parade) carried out. That the trial magistrate erred in law and fact by ignoring the material contradiction of the evidence of prosecution witness, referring to page 9 line 25, 26, and 27 and page 11 line 22 and 23 of the record of appeal.
9. The appellant further submitted that the trial magistrate erred in law and fact by failing to appreciate the fact that the deceased was attacked and assaulted by mob who knew him as a thief especially after being found with a stolen cow (see page 27 line 15 to 18.) and that, that being the case, pointing a finger at one person was not right as the incident occurred in a village area with a Village Elder, a Chief and Assistant Chief who could be called to identify the persons who were carrying runigus or who would be able to identify the culprits as they came from the same area with them but the investigating officer ignore that.
10. The appellant further submitted the OCS (PW7) said that the appellant was **Alfred Odhiambo Achar** but that he arrested Abaya. (that is page 28 line 16 and 17). He thus prayed that the conviction and the sentence be set aside and that he be set free.
11. As earlier stated the Respondent's counsel submitted relying entirely on the evidence adduced before the trial court and urged the court to uphold the conviction and sentence and dismiss the appeal.
12. The duty of this court being the first appellate court was set out as stated by the Court of Appeal in **Okeno v. Republic [1972] E.A. 32** and re-stated in **Kiilu and another vs. R (2005) 1 KLR 174** that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.”

13. Thus it is the duty of this court to submit the evidence which was tendered before the trial court to fresh and exhaustive examination and to come up with its own decision after weighing the conflicting evidence if any, as to whether the prosecution proved the offence of manslaughter beyond any reasonable doubt, and in doing so, consider the other grounds of appeal and whether the issues raised therein indeed ought to have changed the course the trial court took. In doing so, this court must bear in mind the fact that unlike the trial court, I neither heard nor saw the witnesses as they testified; and the established law that the prosecution in any criminal case has the burden of proving every element of the offence an accused is charged with, (as was held in the locus classicus case of **Woolmington -Vs- DPP (1935) AC 462**); and further that the said elements must be proved *beyond any reasonable doubt* (as defined by Lord Denning in **Miller vs. Ministry of Pensions, [1947] 2 All ER 372**).

14. In **Donald Atemia Sipendi v Republic [2019] eKLR** citing with approval the Supreme Court of India decision in **K. Anbazhagan vs. State of Karnataka and Others, Criminal Appeal No. 637 of 2015, Mativo J** stated:

“The appellate Court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate Court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

15. Revisiting the evidence adduced before the trial court, both for the prosecution and the defence, PW1 **Wycliffe Ochieng Ouma** testified that on 9.01.2016, he was from fetching water when he found his father sitting at the verandah. He placed down the water container and sat with his father. After a short while, he entered the house. In the process, he heard people shouting and saying “mwizi! mwizi” (Thief! Thief!) from behind the house. The people were in a maize plantation behind the house and his father went behind the house to find out what was happening. That PW1 saw many people and they surrounded his father and that at that time he (PW1) was standing about 30 metres away. That they wrestled him down and he saw Odhiambo (appellant) hitting his father with a rungu. That his father asked why they were beating him and requested that they take him to the door and when they took his father near the door, they asked him to produce his national identity card and the mobile phone but he could not do so. That in the process, PW1's step-mother by the name **MOURINE** arrived and his father told her to look for the national identity card and the phone and the said step-mother went and brought the said Identity card and the phone. That the people tied his father's hands and legs using a rope and continued beating him and he saw a person by the name Paul kick him.

16. PW1 further testified that he was able to identify some of the people and they included Odhiambo, Paul, Arimba, Madara, Omogi, Oketch, Omondi, Odoyo, Oulo, Dan Ojwang, as they were his neighbours. That after that, the said people frog matched his father and took him away but he did not follow them. That he took a motor cycle and headed to where his mother was doing business and picked his mother and that when they were getting back home, it was dark and as they were approaching home, he heard his father crying and asking Arimba and Odhiambo why they were killing him. That they went home and his mother went to the farm where the people had taken his father. Shortly, the witness heard a sound of a vehicle and when his mother came, she told him that the police had taken his father and gone with him but that his father did not return.

17. PW1 further stated that on the following day, he learnt that his father had passed on. He identified the appellant (the 1st accused in the trial court) and his co-accused persons (2nd accused-Paul and 3rd accused-Arimba). He further testified that he saw the rungu which Odhiambo used to hit his father with and that he saw the rungu again at the police station and that it was broken partly. He identified the rungu in court which was marked as PMFI 1.

18. On being cross examined by the appellant, PW1 stated that he heard the noise from the behind the house and his father went to check out but he did not follow him. Instead, he stood at a place where he was able to see what was happening very well. He testified that he knew the appellant as Odhiambo Ogoko and that they were many people armed with crude weapons but he was able to see the appellant carrying a rungu, although he (PW1) did not move near the crowd, and that he saw the rungu very well. That when they took his father from the home, he (the appellant) was holding him. That he knew only one Odhiambo and that was the appellant. That he did not see the police officers who took his father but his mother told him of the same.

19. PW2 (Mourine Atieno Ouma) testified that on 9.01.2016 she was at home with the deceased (who was her husband) but she left him to go and fetch water and Enroute she met PW1 going home. That when she was drawing water at the river, she saw a group of about 20 people passing and they were armed with pangas and rungus and were led by the appellant who was armed with a rungu. That on her way back home, she heard some noise and when she reached her home, she saw the people who had passed her in her compound and when she arrived at home, she found the crowd there and when she asked the people what was happening, the appellant and another person (Ojek) told her to give them the phone and the national identity card belonging to the deceased. That she found the deceased tied with a rope. She complied and gave them the items demanded and the people took the two items and led the deceased away towards the appellant home direction but she did not follow them.

20. She further stated that when the people had gone with the deceased, she heard the deceased screaming and telling the appellant and one Arimba that they were killing him yet he had not stolen the cow and that the place was not far from the home. That later her co-wife (Evelyne) came and in the process they heard the sound of a motor vehicle and she saw a police land cruiser. That the following day in the morning, police came and took her away together with one Lillian. That they went to the Appellant's home and took a cow which was black and white and one Nyangonya (appellant's mother). That they went to Akala police station and recorded statements and when she went home, she received information that her husband had died.

21. PW2 testified that she was able to identify some of the people who went to her home and that the appellant was among them and one Ojek and Dan Ojwang. She identified the appellant and one Arimba (3rd accused in the lower court). She stated that the appellant had a rungu when they went to her home and that he went away with it.

22. On being cross examined by the appellant, PW2 stated that when she went to fetch water (at around 6.00pm), she left the deceased at home and that he had returned from herding cows. That when she was fetching the water she saw a group of about 20 people and they were in five groups. That the first group was slightly ahead of the other group and further that she knew the appellant and one Dan Ojwang by name but she only knew the other people by appearance.

23. PW2 further stated that Arimba and Ojek were in the second group. That when she reached home, she found that they had tied her husband with a rope and that she found him lying down near the door but she did not know the people who tied him. That it was the appellant and Ojek who requested her to give them the identity card and the phone of her husband and Dan Ojwang was the one who returned the identity card but he did not talk to her. That she heard her husband crying and calling the appellant's name (Odhiambo) and that of Arimba. She stated that she knew the appellant very well and she saw him very well at the scene.

24. **PW3 (Lilian Achieng Otieno)** testified that on 9.01.2016, she was at her home at around 6.00pm when she heard noise and she rushed towards the direction where the voice was coming from and she realized that it was coming from the home of the deceased and when she reached there, she found when the deceased had been tied with a rope and she saw the appellant at the scene and further she saw Jackstone, Arimba and Omondi. That after that, people took the deceased away then she returned to her home. That later they went to the bush where he had been taken and she was with the deceased' wives. That the deceased was lying down and was saying that the other cow was with one Owuoth. That later the police arrived and took the deceased away. The following day, the police officers came and took her and she went and recorded her statement. That the deceased was taken to a bush which was near his home and that it was about 500 metres away. That at the bush it was dark and she could not see the people well. She stated that when she went to the deceased' home, she saw some people and that the appellant was there.

25. On cross examination by the appellant, PW3 stated that the noise was made around 6.0pm and it was a noise akin to that of people chasing a thief. That there were many people at the home of the deceased and that she saw the appellant, Arito Jackstone and Omondi. That when they took the deceased away, he was walking and that she did not follow them immediately as she went back to her home. That later she followed them to the bush and the deceased said that the other cow was with Owuoth and that she was not present when the police took the deceased.

26. **PW4 (John Owuoth Osore)** testified that on 9.01.2016 at around 9.00pm many people went to his home. Among them were four namely- Odhiambo (appellant), Omondi Odoyo, Madera Okodo and Alex Warinda. That they told him that the area Assistant Chief needed him but when he asked him whether they had summons, they said that they did not have the same and he told them that he would go the following day. That the appellant asked for a rope so that they could tie PW4 but he resisted and the appellant hit PW4 on the arm and when PW4's son told them not to harass his father, they went away. That the people were armed with rungus and pangas. He identified the appellant (as one of the people who went to his house).

27. In cross examination, he stated that he knew the appellant as his cousin and that it was the appellant who killed Ouma (the deceased). That he was not at the scene but that the police informed him that he (the appellant) killed the deceased. He stated that the appellant went to his PW4's home and wanted to kill him as well.

28. **PW5 (CPL John Turunya)** testified that he investigated the case and that on 9.01.2016 at around 2.00pm he was at the station with the

OCS when three suspects of stock theft were brought to the station by members of the public including the appellant. They were Mathews Owuor Odera, George Otieno Osodo and George Otieno Otieno and he re-arrested them. They had a bull which was alleged to have been stolen and which was black and white in colour. That he recorded the statement of the appellant and his mother and those of other witnesses and released the bull to the appellant and his mother and they went with the bull and they did not mention any other suspect.

29. PW5 testified that later at around 9.00pm he together with his two colleagues (Sergeant Mitei and PC Menya) were sent by the OCS to Kaudha to go and collect a suspect who was being lynched by the members of the public. He stated that when they reached the scene, they found a crowd of people surrounding the deceased and were armed with pangas and rungu and the bull was tied to a tree at the place. That the appellant was present and when the witness spoke to him, he said that the deceased was one of the witnesses.

30. That he saw the deceased bleeding from the legs and the head and he could not walk but was just crying. That the appellant helped them to carry the deceased to the police vehicle after which they took him to Akala police station and later to Akala Health Centre. He stated that when he interviewed the deceased at Akala Health Centre, the deceased told him that a group of people went to his home and found him and they raised alarm and tied him with ropes and started beating him and took him to the field and he was able to identify the appellant and Arimba Sude as the people who had injured him.

31. PW5 further testified that they left the deceased at the hospital and on the following day, he received information that the deceased had succumbed to the injuries and that they went to the hospital and they confirmed the death and took him to Bondo mortuary. That later they went to the scene where they recovered a broken rungu and a stick. That they went to the house of the appellant but they did not find him. They went and recorded statements from the witnesses and they later arrested the appellant on 20.01.2016 and the other accused persons were arrested later. That he was able to see the appellant at the scene as there was moonlight and he was armed with a rungu. He produced the broken rungu a P Exhibit 1 and the stick as P Exhibit 2. He also identified the postmortem report as MFI 3 and the photographs of the cow as MFI 4(a), (b) and (c).

32. On being cross examined by the appellant, PW5 stated that when they went to the station, they were about 6 people and that Otieno Otieno told them that he had bought the cow from Aloice Okumu but that he did not mention the deceased. That when the appellant went to the Police Station, he was armed with a rungu and was escorting three suspects from the market. That when they arrived at the scene, there were about 15 people and the deceased was alive at that time but in pain. That the appellant was standing near the bull and PW5 requested the appellant to assist in carrying the deceased into the Police vehicle.

33. PW6 Leonard Okoth Oduor testified and recalled that on 9.01.2016, he had gone to clear his farm when he heard some noise within the village and he went towards the direction of the noise and realized that it was coming from near his home. That when he reached at the scene, he saw his brother who had been tied with a rope and that people removed him from his home and they were people from his village and that he followed them while asking them what they were doing and he realized that they were cattle dealers. That the people took the deceased to an open field where they continued assaulting him. That he saw the appellant (who was his uncle), standing next to the deceased. That he then looked for means to reach the police but he realized that they had been informed of the incident. That all that time he was standing behind the crowd. That he heard the (deceased) scream. That the police arrived and took the deceased and the following day he went to the Police Station and was told that the deceased had died at the Police Station.

34. The witness further testified that he did not know the person who assaulted the deceased but that he saw the appellant and Paul both armed with clubs. That he also saw Arimba but that he did not see whether he was armed with any weapon.

35. On being cross examined by the appellant, the witness stated that the appellant was her uncle and that she heard the appellant ask the deceased for his phone number. On being referred to paragraph 5 of her statement recorded with the police, the witness stated that she heard people talking about a cow and even told the deceased to speak the truth. That when she was going to the Assistant Chief's home, she saw somebody driving the cow to the scene and she went to the Assistant Chief's home but she did not find her. That she went to the road to direct the Police Officers to the scene but she did not go to the Police Station.

36. In reexamination, the witness stated that she saw the three accused persons (appellant and the two co-accused in the lower court).

37. **PW7, Chief Inspector Jared Nyaosi** who was the then OCS Akala Police Station testified on oath and stated that on 9.01.2016 at about 8.30pm, he received information from the Assistant chief of Kaudha that a suspect had been arrested on allegations that he had stolen a cow. He sent police officers who went and collected the suspect and took the suspect to Akala Health Centre. He stated that the person had been beaten and they took him to Akala Health Centre where he was admitted in critical condition. That the following day, he received information that the deceased succumbed to the injuries which he had sustained. The witness then went to the hospital and confirmed the position.

38. It was his further testimony that he later went to the scene and to the home of the deceased where he found the witnesses and he interviewed them on what had transpired and they explained to him what had happened. In the course of investigations, they were given the names of the people who had assaulted the deceased who were about 12 but they managed to arrest only three of them as the others escaped from their homes. They managed to recover a rungu (club) and a stick at the scene. Later he handed over the matter to CPL Turunya who proceeded with the investigations.

39. **PW8 HARUN CHEBON** testified and produced a postmortem report carried out on the body of the deceased by Dr. Daniel Awino of Bondo District Hospital Mortuary on the 21st day of January, 2016. He produced the postmortem report as exhibit 3.

40. At the close of the prosecution case, the appellant and his co accused were found to have a case to answer and placed on their defense.

41. The appellant herein who was the 1st accused in the trial court gave sworn evidence and testified that on 9.01.2016 at 6.00pm he was from Akala Police heading to his home in the company of some people-Vincent Onyango, George Otieno Osodo, George Otieno Otieno as

they had gone to report a case of stock theft. That enroute, he found a crowd of people and they said they were going to look for some of the thieves who had been mentioned at the police station. That when he reached the market Centre near his home, he found another group of people and the said people accompanied him. That after a short distance they heard some noise and when they reached the place where the noise was coming from, he saw the deceased who had been mentioned by George Otieno to have given him the stolen cow. That he tried to move near him so as to ask him about the other cow and the deceased told him that one John Owuoth and Alice Olum knew where the cow was and at that time, his brother Leonard Okoth Augo was there and Leonard told him to go and look for the said Owuoth. That they left with Leonard and went to the home of Owuoth and when they reached there, they found Owuoth and talked to him but Owuoth denied knowing anything about the cow. That they then left and went back to the place where they had left the deceased and when they reached there, they found people beating him. That he called the Assistant Chief by phone and explained to him what was happening and the Assistant Chief told the appellant that he would inform the Police. That after a short while, Police Officers from Akala Police Station arrived and the people who were at the scene ran away but he (appellant) did not run away.

42. He further stated that he assisted CPL Turunya in carrying the deceased and placing him in the Police Vehicle. He stated that the following day he went to the shamba but when he returned home, he received information that police officers had arrested his mother and taken away the cow to the Police Station. Shortly, his mother came and told him that the deceased Daniel had died. That he was then arrested on 20.01.2016 and charged. He denied beating the deceased.

43. In cross examination by the prosecutor, the appellant stated that two of his cows had been stolen and that they had recovered one and suspects were in custody and that one of the suspects told them that it was the deceased and one Aloice who gave him the cows and that he was concerned because the cows belonged to them. That the police officers went to look for Aloice. He conceded going to the deceased' home to look for him but stated that they found when other people had removed him from his home and that he did not go to the deceased' compound and that it was dark. That he was able to see Leonard Okoth because he talked to him. That the people were asking the deceased the whereabouts of the cow. He denied sending those people whose names he did not know. He denied being among the people who assaulted the deceased and further denied having been armed with a rungu.

DETERMINATION

44. I have carefully considered the evidence adduced before the trial court, both for the prosecution and the defence. I have also considered the appellant's grounds of appeal, oral and written submissions tendered by both parties. This being a first appeal, this court is expected to comply with the duty as espoused in the **Okeno v. Republic (supra)** case as re-stated in **Kiilu and another vs. R (supra)**.

45. In my humble view, the following issues flow for determination:

1. ***Whether the elements of the offence of manslaughter were proved to the required standard?***
2. ***Whether the sentence imposed was proper?***
3. ***Whether the appeal ought to succeed/ what orders should this court make in the circumstances?***

46. ***On whether the elements of the offence of manslaughter were proved to the required standard***, the appellant was charged with the offence of manslaughter contrary to section 202 as read together with section 205 of the Penal Code. Section 202(1) of the Penal Code provides that:

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

47. This definition can be broken down into the following elements:-

- a. ***There must be an act or omission***
- b. ***The act or omission must be unlawful***
- c. ***The unlawful act or omission must cause death (of a person)***
- d. ***The act or omission causing death of the deceased must be by the accused person***

48. ***On the question of whether there was an act or omission and which act and omission was unlawful and which caused death***, it is not in dispute that the deceased herein was attacked by a group of people and assaulted on suspicion of being a cattle thief and he sustained injuries from which he died. The evidence of PW 1 was that he was at home when people came shouting “mwizi mwizi” (thief! thief!) and the said people took his father (the deceased) and started assaulting him, after which they frog- matched him away but the witness did not follow them. He instead took a motor cycle to go and get his mother from the market and when they were returning home, he heard the deceased wail and asking why the appellant was killing him.

49. The following day the police came and relayed information that the deceased had died. This testimony was corroborated by that of PW2, PW3 and PW6. According to PW5, a police officer, they were tasked by the OCS to go and rescue a member of the public who was being lynched by the public and that when they got to the scene, they found people armed with rungu and sticks and the deceased was on the ground and was bleeding from the legs and the head and he could not walk but was just crying. They took him to Akala dispensary and the following day PW5 received information that the deceased had succumbed to the injuries and that they went to the hospital and confirmed the death and took him to Bondo mortuary.

50. It is further not in dispute that the deceased died from the injuries occasioned by the assault inflicted on him by those who suspected him to be a cattle thief. PW8 (the clinical officer) produced a postmortem report which had been filled by Dr. Awino of Bondo District Hospital but who was on strike at the time of hearing of the case. There was no objection to the witness producing the Postmortem report on behalf of the maker and the circumstances under which such production was allowed is legally recognized under section 33 of the Evidence Act.

51. According to PW8, the deceased's body had multiple bruises both on the lower and upper limbs and there were deep cuts on the face and jaw and further that he had injuries on the ribs and fracture on the left leg. It was the doctor's opinion that the cause of the death was excessive hemorrhage from crushed fracture right tibio-fibula due to assault.

52. Article 26 (1) of the Constitution provides that every person has the right to life. Sub-article 3 provides that a person shall not be deprived of life intentionally except to the extent authorized by the Constitution or other written law. The aspect of when an act causing death can be said to be lawful has been recognized from the time immemorial. In the case of *Gusambizi Wesanga v Republic [1948] 15 EACA 65* the court stated that:

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable it must have been caused under justifiable circumstances, for example in self-defense or in defence of property.”

53. From the testimony of the above stated witnesses, it is clear that there were unlawful acts meted against the deceased. The deceased was attacked as a result of being suspected to have stolen some cattle. No law permits killing of suspected criminals who are not even armed as was the deceased who was found relaxing at his home. Suspected criminals must be handed over to law enforcement agencies as no one is permitted to take the law into their own hands and administer mob injustice on a suspect.

54. Further, from the evidence of the doctor as contained in the postmortem report, indeed the deceased sustained very serious injuries as a result of the unlawful beatings administered to him. From the findings of the Doctor, the deceased did not die of natural causes nor an accident therefore his demise cannot be brought within the exceptional circumstances under the Constitution or other written law. The nature of injuries and the cause of death as a result of excessive hemorrhage from crushed fracture right tibio-fibula due to assault is crystal clear that whoever carried out the unlawful act was not acting within the law. Accordingly, I find and hold that the deceased died as a result of unlawful acts.

55. ***On whether the act or omission causing death of the deceased was caused by the appellant (the accused person)***, the appellant denied killing the deceased. In his grounds of appeal and submissions, he argues that he was not the one who killed the deceased. He blames the trial magistrate for placing the Appellant at the scene of crime on the strength of the evidence of PW1 yet the said witness was not at the scene; that the learned trial magistrate erred in fact by failing to appreciate the fact that the deceased had been found with stolen cow and was attacked by a charged crowd of people who knew him as a thief; the learned trial magistrate erred in fact by ignoring the material contradictions in the evidence of prosecution witnesses as to who assaulted the deceased on the fateful day; and that the trial magistrate erred in law and in fact by failing to consider the defence raised by the Appellant which was uncontroverted and his mitigation.

56. In his written submissions, the appellant expounded some of the above grounds and submitted that the trial magistrate erred in law and fact by failing to appreciate the fact that the deceased was attacked and assaulted by mob knew him as a thief especially after being found with a stolen cow and that that being the case, that pointing a finger at one person was not right as the incident occurred in a village area with a village elder, a chief and Assistant Chief and who could be called to identify the person who were carrying runbus or identify the culprits as they came from the same area with them but who were never called by the investigating officer.

57. The appellant submitted that the evidence tendered by the prosecution fell far below the required standard for the safe conviction as there was no proper identification parade carried out and that the trial court erred in law and fact by ignoring the material contradiction of the evidence of prosecution witness. As such, the question which in my opinion begs for an answer is ***“whether the appellant was the one who caused the death of the deceased?”***

58. PW1 testified that he saw many people who came to their home and surrounded his father and that at that time he (PW1) was standing about 30 metres away. That they wrestled him down and he saw Odhiambo (appellant) hitting his father with a runbus. He further testified that the said people tied his father's hands and legs using a rope and continued beating him and he saw a person by the name Paul kick him and he was able to identify some of the people who included Odhiambo (appellant), Paul, Arimba, Madara, Omogi, Oketch, Omondi, Odoyo, Oulo, Dan Ojwang and that the said persons were their neighbours

59. PW1 further testified that he took a motor cycle and headed to where his mother was doing business and picked his mother and that when they were getting back home, it was dark and as they were approaching home, he heard his father crying and asking Arimba and Odhiambo why they were killing him. That they went home and his mother went to the farm where the people had taken his father and that the following day, he came to learn that his father had passed on. In cross examination, he testified that during the attack, there were many people armed with crude weapons but he was able to see the appellant carrying a runbus and when they took his father from the home, he (appellant) was holding him. That he knew only one Odhiambo who was the appellant.

60. PW2 on her part testified that on her way back from the river, she heard some noises and when she arrived at home, she found the crowd there and when she asked the people what was happening, the appellant and another person (Ojek) told her to give them the phone and the national identity card belonging to the deceased and she complied and the people led the deceased away towards the appellant home's direction but she did not follow them. She further stated that when the people had gone with the deceased, she heard the deceased screaming and telling the appellant and one Arimba that they were killing him yet he had not stolen the cow and that the place was not far from the home. The next day she received information that her husband had died. She testified that she was able to identify some of the people who were with the deceased as the appellant, Ojek and Dan Ojwang.

61. When she was cross examined by the appellant, she reiterated that she heard her husband crying and calling the appellant's name

(Odhiambo) and that of Arimba. That she knew the appellant very well and she saw him very well at the scene.

62. PW5 on the other hand testified that on the material night, at 9.00pm he together with his two colleagues (Sergeant Mitei and PC Menya) were sent by the OCS to Kaudha to go and bring a suspect who was being lynched by members of the public. He stated that when they reached there they found a crowd of people surrounding the deceased and were armed with pangas and rungas and the bull was tied to a tree at the place. That the appellant was present and when the witness spoke to him, he said that the deceased was one of the witnesses and the appellant helped them to carry the deceased to the police vehicle after which they took him to Akala Police Station and later to Akala Health Centre. He stated that, when he interviewed the deceased at Akala health Centre, the deceased told him that a group of people went to his home and found him and they raised alarm and tied him with ropes and started beating him and took him to the field and he was able to identify the appellant and Arimba Sude and they were the ones who injured him and that they left the deceased at the hospital and on the following day, he received information that the deceased had succumbed to the injuries and that they went to the hospital and they confirmed the death and took him to Bondo mortuary.

63. On being cross examined by the appellant, he stated that when they arrived at the scene, there were about 15 people and the deceased was alive at that time but in pain. That the appellant was standing near the bull and he requested the appellant to assist carrying the deceased to the vehicle.

64. PW6 testified that he heard noise while on his farm and went towards the direction of the noise and realized that it was coming from near his home and when he reached at the scene, he saw his brother who had been tied with a rope and that people removed him from his home and they were people from her village and that he followed them. They took him to an open field where they continued assaulting him. That he saw the appellant (who was his uncle) and he was standing next to the deceased. That the police came and took the deceased but the following day she went to the police station and was told that the deceased had died at the police station. She testified that she did not see the person who assaulted the deceased but she saw the appellant and was armed with a club. In her re-examination she reiterated that she saw the three accused persons (appellant and the two co-accused in the lower court).

65. In his defence, the appellant admitted to have been at the scene but denied having assaulted the deceased and stated that he went to look for the other alleged thief (Owuoth).

66. What clearly emerges from the above testimonies of prosecution witnesses is that the appellant was amongst the crowd who attacked the deceased. PW1, PW2, PW5 and PW6 place the appellant at the scene of the crime.

67. Thus it is not in dispute that the appellant was among the persons who frog-matched the deceased and assaulted him. Further evidence by PW1, PW2 and PW5 clearly leads to an inference that the appellant indeed did assault the deceased. PW1 testified as to how he saw the appellant hit the deceased with the rungu. He further testified that when he was going home after taking his mother from the market, he heard his father crying and asking Arimba and Odhiambo why they were killing him. This testimony is corroborated by that of PW2 who testified that when she heeded to the request by the people who had surrounded her husband and gave the phone, they led the deceased away towards the appellant home's direction but she did not follow them and that when the people had gone with the deceased, she heard the deceased screaming and telling the appellant and one Arimba that they were killing him yet he had not stolen the cow. PW5 interviewed the deceased while at the hospital and he told him that a group of people went to his home and found him and they raised alarm and tied him with ropes and started beating him and took him to the field and he was able to identify the appellant and Arimba Sude and that they were the ones who injured him.

68. Section 33(a) of the **Evidence Act**, provides for admissibility of evidence of a statement made by a deceased person relating to his cause of death. It provides that:

“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

69. This evidence is known as “dying declarations”. In **Philip Nzaka Watu vs Republic [2016] eKLR**, the Court of Appeal stated the following on admission and reliance on a dying declaration:

“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”

70. In **Choge V. Republic 1985 KLR 1**, the Court of Appeal held:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

71. The predecessor of the Court of Appeal in the case of **Pius Jasunga S/O Akumu v Republic [1954] EACA 333** succinctly held as follows:

“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval...it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (Republic v Eligu S/O Odel & Another [1943] 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration.”

72. From the above authorities, it is clear that dying declarations are admissible in evidence ***whether the person who made them was or was not expecting death when he made the statements. It is not the rule of law that a dying declaration must be corroborated to found a conviction but nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe. Otherwise it is very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross examination unless there is satisfactory corroboration.***

73. Applying the principles set in the above authorities to this case and exercising caution as was required therein, it is my opinion that the dying declaration made herein is admissible in evidence. PW 1 testified that he heard the deceased (his father) crying and asking Arimba and Odhiambo (appellant) why they were killing him. This testimony is corroborated by that of PW2 who testified that when she heeded to the request by the people who had rounded her husband and gave the phone, they led the deceased away towards the appellant home’s direction but she did not follow them and that when the people had gone with the deceased, she heard the deceased screaming and telling the appellant and one Arimba that they were killing him yet he had not stolen the cow. PW5 further corroborated this dying declaration when he testified that he interviewed the deceased while at the hospital and he told him that he was able to identify the appellant and Arimba Sude from the group who attacked him and they were the ones who injured him. The statement of the deceased to PW1, PW 2 and PW 5 is consistent and corroborated with the eye witnesses’ account of PW 1 who testified that he saw the appellant hit the deceased with a rungu; also corroborated the testimonies of PW1 and PW2 when he stated that he found the appellant at the scene and was armed with a rungu. Further the same is corroborated by that of the PW2 who testified that it was indeed the appellant who asked her to give the deceased’s phone to him. Further by the fact that the appellant in his defense testified that he was aggrieved by the fact that it was their cattle which had been stolen clearly leads this court to conclude that the appellant was the one who caused the death of the deceased. The above evidence taken as a whole irresistibly leads to a conclusion that the appellant herein took part in assaulting the deceased on suspicion that the deceased was a known cattle thief.

74. Accordingly, I find no error in the finding by the learned trial magistrate that the appellant together with his co-accused indeed caused the death of the deceased herein.

75. On the ground that the trial magistrate erred in law and fact by placing the Appellant at the scene of crime on the strength of the evidence of PW1 yet the said witness was not at the scene, as I have analyzed the evidence above, PW1 testified that he indeed saw the appellant beat the deceased with a rungu. He testified that he was standing about 30 metres away. I believe the testimony of PW1 that he was at the scene and that he saw what happened to his father. He saw the appellant beat the father. There is nothing on record to show that PW1 could have been lying when he testified as to what he saw.

76. The allegation by the appellant that the village elder, Chief and Assistant Chief were not called is unfounded as these people whom he names are simply local administrators who were never at the scene of the crime therefore their evidence would be mere hearsay. The evidence adduced in my humble view, by prosecution witnesses was sufficient to found a conviction against the appellant. The court’s duty is to apply the evidence before it and come with a verdict of either guilty or not guilty. As was held by the Court of Appeal in **Richard Munene v Republic [2018] eKLR**, the elementary principle of criminal law is that although the prosecution must avail all witness necessary to establish the truth and whose evidence appear essential to the just decision of the case, no particular number of witnesses is required for the proof of any fact; and that the prosecution is not obliged to call a superfluity of witnesses. This position is further buttressed by **section 143 of Evidence Act** which provides that;-

“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.” (See also **Republic v George Onyango Anyang & another [2016] eKLR** where J.A Makau J quoted with approval the decision in **Bukenya & Others V Uganda [1972] EA 549**).

77. The said evidence as adduced by the prosecution witnesses in my opinion was not contradictory as alleged by the appellant as he did not even point out what kind of contradictions he was claiming existed in the prosecution evidence.

78. On whether the trial court erred in not considering his defense, it is my opinion that the prosecution evidence was so overwhelming such that the defence proffered by the appellant that he was not at the place where the deceased was being assaulted and that he left the people and went to look for Owuoth) cannot stand. The trial magistrate cannot be faulted for arriving at the decision that he did that the appellant together with the co-accused indeed committed an unlawful act and which was assaulting the deceased and the said assault caused the death of the said deceased. ***I find and hold that all the elements of the offence of manslaughter were proved beyond any reasonable doubt against the appellant herein.***

79. On whether the sentence imposed was proper? The appellant raised a ground of appeal to the effect that the sentence of 7 years imprisonment was excessive in the circumstance of the case. Though this ground was not argued, it is important to consider it. Section 205 of the Penal Code provides that:

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

80. The trial court sentenced the appellant to serve seven years imprisonment after he was given an opportunity to mitigate and thereafter the court called for victim impact assessment report. In sentencing the appellant and his co-accused persons, the court noted as follows; -***I have considered the victim impact assessment report filed herein. I do sentence each of the accused persons to serve seven (7) years***

imprisonment.”

81. This sentence is much less than the maximum that a trial court can mete out as prescribed by law for the offence of manslaughter. However, the Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** stated that: *“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist...”*

82. **In my humble view**, the sentencing of the appellant to 7 years imprisonment as opposed to life imprisonment was justified. This court ought not to interfere with the same as it was too lenient bearing in mind the fact that the appellant was a first offender abut a life was lost.

83. The Supreme Court of Kenya in the now well appreciated decision in **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, Petition No. 15 of 2015, where the court held that (in relation to section 204 of the Penal Code- murder):**

“[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right...”

84. For all the above reasons, I find and hold that the appellant’s appeal against conviction and sentence is devoid of merit. The same is dismissed. The conviction and sentence imposed by the trial court is upheld.

85. Orders accordingly.

Dated, Signed and Delivered at Siaya this 5th Day of May 2020 via Skype due to Covid 19 Situation.

R.E.ABURILI

JUDGE