



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 86 OF 2017**

**FREDRICK OTIENO OMONDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from judgment, conviction and sentence in Ukwala SRM*

*Criminal Case No. 93 of 2017 delivered on 11/9/2017*

*by Hon. G. Adhiambo, SRM)*

**JUDGMENT VIA SKYPE**

1. The Appellant, **FREDRICK OTIENO OMONDI** was charged with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code 63 Laws of Kenya. Particulars of the offence are that on the 24/10/2016 at Masiko village, West Asango sub location, North Uholo location in Ugunja Sub-county within Siaya County he unlawfully killed **PETER OMONDI ONYANGO**.
2. The appellant pleaded not guilty to the charge and the matter proceeded to full hearing, with the prosecution calling 8 witnesses. The appellant gave sworn statement of defence denying the offence and claiming that he did not kill the deceased.
3. The trial magistrate after hearing the prosecution and defence case found the appellant guilty of the offence of manslaughter and sentenced him to serve a 15 years imprisonment. This was after considering the mitigation put forward by the appellant on 11/9/2017.
4. Dissatisfied with the said judgment, conviction and sentence, the appellant filed his petition of appeal which he subsequently abandoned and filed amended grounds of appeal namely:

***1. That the trial court failed to consider that the first report did not disclose the alleged offence.***

***2. That the trial court failed to consider that the prosecution did not avail any eye witness who saw me hit the deceased with a jembe in support of their case.***

***3. That the trial court failed to consider that the alleged exhibit (jembe) was taken from Pw2's house and no further investigation was carried out on them that the trial court failed to consider that the post mortem report reveal that the deceased died as a result of brain injury where no evidence was tendered that the deceased was hit on the head.***

***4. That the trial court failed to consider my defense whereas no evidence was cogent enough to warrant me an acquittal.***

5. The appellant who was self-represented filed written submissions in support of his grounds of appeal and made oral highlights whereas the Respondent represented by Mr Okachi, Senior Principal Prosecution Counsel submitted orally.

**SUBMISSIONS**

6. In support of the amended grounds of appeal, the appellant relied on his written submissions which were adopted at the oral hearing of the appeal. He also made oral highlights. He submitted quite incoherently that when the first report was made to PW7 PATRICK who said that he received a call from the village elder that there was a fight in the house of one Beatrice, the truth will always come out from a statement taken from a witness when the alleged occurrence was still fresh and there has not been any time for consultation with others. According to

the appellant, PW8 confirmed to court that she was told by Beatrice that she found the appellant and the deceased quarrelling.

7. The appellant further submitted that the allegation that he hit the deceased with a jembe on the head was an afterthought as there was no eye witness who testified in support of that allegation. He further submitted that PW2 BEATRICE testified that she talked to the deceased when she arrived at the scene of crime but that the deceased did not tell her that the appellant had hit him with a jembe and further that PW3 testified that she found the accused Otieno and the deceased Omondi exchanging words but that she did not see the appellant hit the accused with a jembe.

8. Concerning the exhibits, the appellant submitted that PW2 alleged that the jembe was taken from her kitchen and that she was the one who took it back to her kitchen but that no eye witness saw her taking it back to her kitchen. He further submitted that the village elder who allegedly handed over the jembe to PW7 was not at the scene of crime at that time. He submitted that there was no evidence that the jembe was recovered at the scene of crime and or that it was used during the fight.

9. Further, the appellant submitted that PW1 testified that when she arrived with the deceased in the hospital, the doctor asked if she had brought him a drunk person. The appellant further submitted that the prosecution failed to confirm this allegation from SIGOMERE Health center where the deceased was put on a drip and why the same was done. {Sic}. The appellant further submitted that there was no evidence from the prosecution that the deceased was hit on the head as Pw6 Dr. BIKO concluded that the cause of death was a traumatic brain injury leading to right subdural hematoma.

10. Finally the appellant submitted that his defense was merely rejected by the trial court without weighing it against the strength of the prosecution case and further, that the burden of proving the alibi was shifted on him.

11. In his oral highlights, the appellant submitted that he did not commit the offence.

12. The Prosecution Counsel Mr. Okachi in opposing the appeal submitted that the prosecution proved its case against the appellant beyond reasonable doubt. Counsel reiterated the evidence adduced in the lower court on how the deceased met his death adding that PW6 confirmed the cause of the death of the deceased was due to the injuries sustained as a result of the assault. On sentence, counsel submitted that the same was lawful and that the appellant mitigated before he was sentenced hence the sentence was lenient. Counsel urged that this appeal be dismissed.

13. In a rejoinder, the appellant submitted that PW3 stated that she never saw the appellant assault the deceased at a particular part of the body. He also submitted that Dr Biko in his testimony did not say for how long the deceased had brain injury. Further the appellant claimed that there are three different dates on which the deceased died meaning the deceased died three times. He submitted that the Doctor who first attended to the deceased never testified and that no witness said that they found the appellant assaulting the deceased.

#### **ANALYSIS OF EVIDENCE BEFORE THE TRIAL COURT**

14. This being a first appeal, the court must consider the principles espoused in **Okeno v Republic (1972) EA 32** where the then Court of Appeal for Eastern Africa held:

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V Republic [1975] 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 Republic [1957] E.A. 570. It is not the junction 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 1978) E.A. 424.”***

15. Revisiting evidence adduced before the trial court, **PW1, JACOB OMONDI OKOTH** the appellant’s father testified that on 24/10/2016 at about 7.30 pm he was relaxing in his house at Mosiko Asango when a child from the home of **PW2 BEATRICE AOKO OHAMA** went and told him that the appellant was fighting with the deceased at the home of PW2 and that PW2 was calling him. PW1 further stated that he proceeded to the home of PW2 and on arrival he found the appellant and the deceased standing and that PW2 told him that the deceased and the appellant were fighting. He asked the two why they were fighting and noticed that both were drunk. That they told him that they were fighting and that they wanted to go to the Mbosie AP Camp. That the two then started walking and PW1 and PW2 followed them from behind via Anyado Stream. That as they walked, reaching behind the home of Daudi Nalo, Omondi the deceased sat down saying he was unable to walk and so they got a motorcyclist and assisted him on it and took him to Sigomere Health Centre. That at the Health Centre the Doctor asked the witness whether he had taken thee a drunk person because the deceased was smelling alcohol. The doctor put the deceased on a drip and demanded that the witness remains in hospital with the patient-deceased

16. He confirmed that they followed the deceased and the appellant as they went to the Mbosie AP Camp.

17. PW2 Beatrice Aoko Ohawa testified that on 24/10/2016 at around 6:30 pm she was at her home when the appellant herein arrived while running. She explained that by then it had not grown dark and that she could clearly see what the appellant was doing. She stated that when the appellant arrived at her home while running the appellant appeared to be looking for something and that she asked the appellant what he was looking for but he did not respond. PW2 stated that the appellant then entered her kitchen and left the kitchen while carrying a jembe. She stated that when she saw the appellant running with the jembe towards her gate she followed him but could not move at the same pace because she had sustained an injury on her leg. She stated that by the time she caught up with the appellant at a corner outside her home she realized that the jembe/ho which the appellant carried from her kitchen was not the same as it had a broken handle. PW2 further testified that at the time the deceased was lying quietly on the ground whereas the appellant was scolding the deceased telling him that he had caused him to suffer losses many times and that day he would see.

18. PW2 narrated how she took the jembe with the broken handle from the accused and took it back to her home. She stated that after that she rushed back to where the appellant and deceased were, she found the appellant trying to lift the deceased. PW2 further testified that the deceased at that time appeared drunk and that she thought that the deceased was drunk but she stated that the appellant was sober. PW2 testified that the appellant continued assaulting the deceased by punching, kicking, pushing him severally and even dragging him on the ground while telling him that they had to reach Mbosie that is Mbosie AP Camp.
19. The testimony of PW2 was corroborated by PW3 her daughter in law who told the court that on that 24/10/2016 at 7: 00pm she was at her home when her children as well as the children of her neighbor told her that Otis (the appellant) was beating Omondi (the deceased). PW3 did not follow up on the report the children made to her because she said that she thought it was something simple but later as she was going to her co-wife's home she saw Omondi seated outside PW2's home and that PW2, the appellant and other children were outside standing there. She said that she moved closer and heard the accused telling the deceased that the deceased had said that if he (the appellant) beats him, the deceased would take the appellant to Mbosie Police Station.
20. PW4 testified that on 24/10/2016 at around 8:00 pm she was at her house when one Pamela Owino, PW5, rang her and told her to avail the deceased, her brother in law who had been beaten and was to be rushed to hospital as he was naked.
21. PW5 testified that on 24/10/2016 at around 7:00 pm heading to 7:30 pm as she was heading home from her place of business, she heard screams emanating close to her compound and she thought that her children were in trouble. She said that she walked faster so that she could find out what was happening and that when she reached her home she realized that the noise was not emanating from her home but ahead of her home. She further stated that she heard people saying that the appellant and the deceased were fighting.
22. PW6 Dr. Biko Opidi testified that he conducted the post-mortem on the deceased and concluded that the cause of death was traumatic brain injury leading to right subdural hematoma. PW6 further He produced a post mortem report which was marked as exhibit 2.
23. PW7 Patrick Okokwo, the Assistant Chief of West Asanga sub location told this court that on 25/10/2016 at around 8:00am he received a phone call from the village elder of Mosiko village who said that on 24/10/2016 at around 8: 00 pm there was a fight at the home of PW2 between the appellant and the deceased. PW7 further stated that he later visited PW2's home where he was shown the jembe which was used during the fight which jembe he stated he noted had a broken handle.
24. PW8 N. 43479 PC Jeremiah Moru of Sigomere Police Station told this court that on 25/10/2016 at around 4: 00 pm he was at the Sigomere Police Station when a lady by the name of Doreen Atieno went and reported that her brother in law Peter Omondi Onyango had been beaten by Fredrick Otieno Omondi on 24/10/2016 at around 7:30 pm while at Musiko village at the home of one Beatrice Ohawa. PW8 testified that whilst investigations were ongoing the appellant escaped to Nairobi but after the accused received information that Peter Omondi had died he travelled back and surrendered himself at the Ugunja Police Station on 29/10/2016. PW8 further stated that the appellant did not disclose why he disagreed with the deceased but appellant just said that he was drunk.
25. The appellant gave a sworn testament in which he stated that on 24/10/2016 at around 6:00pm he went to the home of Beatrice Aoko Ohawa, PW2 who sells chang'aa where he alleges a dispute arose between the deceased and one Frederick Ohawa, a son of PW2. The appellant testified that he attempted to stop the dispute but was not able. The appellant further testified that the jembe produced by the prosecution as exhibit was broken when the deceased and the aforementioned Fredrick Ohawa fought over it. The appellant testified before the trial that since he had to report to work at Nairobi that evening he boarded the morning bus and in the course of travelling he received a call from his father, PW1, who informed him that PW2 had changed the whole story and implicated him in beating the deceased.
26. The appellant further testified that the following day that is the 26<sup>th</sup> his father rang him and told him that they were called to the Sigomere Police Station where his mother and his father were placed in cells and the police demanded for Kshs. 10,000 from them and it is at that time his father told the police that he (the accused) who had been alleged to have killed Peter Omondi was travelling back. He said that his parents were not allowed to record their statements but they were allowed to leave and told to avail themselves at the police station later for purpose of signing statements. He said that on 28<sup>th</sup> he travelled from Nairobi at night and reached Ugunja in the morning where he met his father who then told him that Beatrice had framed him up for killing Peter Omondi. He said that he went to the Ugunja Police Station and showed the police officer his receipt for fare and the police officer was convinced that if he had availed himself all the way from Nairobi then he was innocent.
27. He said that he was later taken to the Sigomere Police Station where he was placed in cells before his statement was recorded. In cross examination the appellant stated that as he was escorting the deceased to Mbosie AP Camp, the deceased was staggering and that he was holding his hand. The appellant further made allegations that PW8, the investigations officer made him sit on spikes.
28. Section 202(1) of the Penal Code Cap 63 Laws of Kenya provides that “**any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.**”
29. Further section 202 (2) of the Penal Code Cap 63 LAWS OF Kenya provides that “**an unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to accuse death or bodily harm.**”
30. Section 205 of the Penal Code Cap 63 Laws of Kenya also provides that “**any person who commits the felony of manslaughter is liable to imprisonment for life.**”
31. The appellant does not dispute that on 24/10/2016 he was at the Musiko village West Asanga sub-location, North Uholo location Ugunja sub-county Siaya County and that he was with the deceased or that PW2 found him holding a jembe whose handle was broken and by the time the said jembe was being removed from the kitchen of PW2 the handle of the said jembe was not broken. Further the appellant is not disputing that at the time he was with the deceased they were heading to Mbosie AP Camp but it reached a point where the deceased could

not walk and that later the deceased was taken to the Sigomere Health Center where he passed on. What the accused person is disputing is the allegation that he was the one who unlawfully killed Peter Omondi. None of the prosecution witnesses saw the deceased's death. That leaves the Court with no option but to make reasonable deductions from the available circumstantial evidence taking into consideration the fact that the Accused being an interested party may have lied to save herself.

32. As we know from *Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20*

***“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial.”***

33. I have considered the severity of the injuries suffered by the deceased and I do not agree with the appellant that he was attacked by one Frederick Ohawa. It is noted that even PW1 the father of the accused confirmed before the trial court that the accused and the deceased told him that they were fighting. PW1 did not at any time state that his son, the appellant, tell him that it is Fredrick Ohawa who was fighting with Omondi on beating up Omondi and that he only intervened.

34. I have analyzed the testimony of the prosecution witnesses, PW1, PW2, PW3, PW4 and PW5 the alleged eye witnesses are consistent. One of the factors to be considered while determining the credibility of witnesses is the consistence of their testimonies.

35. PW2 told the trial court that on 24/10/2016 the appellant entered her kitchen and left the kitchen while carrying a jembe. She stated that when she saw the appellant running with the jembe towards her gate she followed but that by the time she caught up with the accused at a corner outside her home she realized that the jembe had a broken handle while the deceased was lying quietly on the ground. PW1, the appellant's own father and PW3 both corroborated PW2's testimony.

36. PW1 told the trial court that on 24/10/2016 some children from the home of PW2 went to his home at around 7:30pm and told him that the appellant was fighting with the deceased. PW1 further stated that he reached the scene the deceased and the appellant told him that they were fighting and that they wanted to go to the Mbosie AP Camp. I am in agreement with the trial magistrate that PW1 being the father of the accused was highly unlikely to tender incriminating evidence or testimony against the appellant. PW1 narrated that he left Omondi undergoing treatment on the morning of 25/10/2016 and that later he learnt that Omondi died.

37. PW6 proved the deceased's death and concluded that the cause of death was traumatic brain injury leading to right subdural hematoma.

38. In respect to the defense of alibi, I am alive to the principle that by setting up an alibi defense, the accused does not assume the burden of proving the alibi (*Ssentale v. Uganda [1968] EA 36*). The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt (*Wang'ombe v. Republic [1976-80] 1 KLR 1683*).

39. However, the accused was required to raise the defense of alibi at the earliest opportunity to enable the prosecution and the investigating officer time to check it out to determine its veracity or lack thereof. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In *R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145*, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."***

40. The question thus arises is whether the appellant's defense was an afterthought? In *Festo Androa ASenua v. Uganda, Cr. App. No. 1 of 1998* the Court made the following:

***“We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.”***

41. The prosecution did not call for evidence to disprove the alibi raised by the appellant and therefore this court must weigh the alibi against the evidence of the prosecution. I have compared the alibi by the accused and the evidence by the prosecution. My opinion on the matter is that the appellant was telling lies to the court. It is my opinion and I am convinced beyond reasonable doubt that all the circumstantial evidence satisfies the principles of circumstantial evidence as enunciated in numerous authorities including the case of *R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135*, in the Court of Appeal for Eastern Africa had this to say:

***“In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.”***

42. This principle was expanded by the same Court in *Simoni Musoke v R. [1958] EA 715*, which cited with approval the following passage

from the Privy Council decision in Teper V. R. [1952] AC 480 at P.489, to add the following:

***“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”***

43. Having considered the circumstances under which the offence was committed as well as the appellant’s defence, I find no reason to interfere with the sentence meted against the appellant by the trial court.

44. In the premises, this appeal against conviction and sentence fails and the same is hereby dismissed.

**Dated, Signed and Delivered at Siaya this 5<sup>th</sup> Day of May, 2020 via skype due to Covid 19 situation.**

**R.E. ABURILI**

**JUDGE**