



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 65 OF 2019

MAURINE CHEMUTAI ONGERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Chief Magistrate's Court at Kisumu

_(Hon. J. N. Wambilyanga PM) dated the 30th April 2019 in Kisumu CMCCRC No. 300 of 2018]

JUDGMENT

The Appellant, **MAURINE CHEMUTAI ONGERI**, was convicted for the offence of **MANSLAUGHTER**, contrary to **Section 202** as read with **Section 205** of the **Penal Code**. She was then sentenced to 25 years imprisonment.

1. In her appeal, the Appellant has raised 4 issues;

(a) The prosecution did not prove the

essential elements of the offence of

manslaughter.

(b) The investigations were doubtful and

lacked substance.

(c) Crucial witnesses were not called by

the prosecution.

(d) The circumstantial evidence was

incapable of proving the case against

the appellant.

2. When canvassing the appeal, the Appellant submitted that the evidence on record did not prove the case against her. She noted that the Medical Doctor who produced the Post-mortem Report in court, had made it clear that he did not know the person who had caused the death of the deceased.

3. Secondly, the Appellant submitted that it did not seem logical at all, that the person who was outside the house where the offence was committed was able to see the Appellant throw a knife, which then fatally injured the deceased, who was inside his house at the material time.

4. The Appellant wondered whether the post-mortem examination was intended to prove the death of the deceased or the offence of manslaughter.

5. As regards the issue of Crucial Witnesses, the Appellant submitted that the Caretaker of the residential units where the offence was committed, was an essential witness.
6. Her argument was that by failing to call the said essential witness, the prosecution failed to discharge the burden of proof.
7. The Appellant pointed out that the prosecution had the onus to prove both the *actus reus* and the *mens rea* of the accused perform. In her view, if the prosecution failed to prove any one of the elements of the offence, the accused person should be given the benefit of doubt.
8. It was the submission of the Appellant that the prosecution case herein was not anchored on pillars of fact. If anything, she believes that the prosecution founded its case on fanciful theories and speculations. Therefore, the Appellant asked this court to quash the conviction and set aside the sentence.
9. In answer to the Appellant's submissions, the Respondent submitted that the prosecution had proved the necessary ingredients to prove the offence of manslaughter which, in its opinion, are as follows;
 - (a) *The fact and cause of death;*
 - (b) *Who caused the death; and*
 - (c) *Intention or malice aforethought.*
10. The Respondent submitted that the evidence proved that the Appellant caused the death of the deceased, and that she had malice aforethought whilst stabbing him.
11. Secondly, the Respondent submitted that the Sentence of 25 Years Imprisonment was well anchored on the law.
12. Thirdly, the Respondent submitted that the Appellant had failed to demonstrate why she deemed the caretaker as an essential witness.
13. This court was told that facts are proved, not necessarily by the large number of witnesses who testify about it, but by the sufficiency of the evidence.
14. Being the first appellate court, I have an obligation to re-evaluate all the evidence on record, and to draw my own conclusions. However, as I carry out the said task of re-evaluation, I am required to bear in mind the fact that, unlike the trial court, I did not have the benefit of seeing the witnesses when they were testifying
15. **PW1, RICHARD OBARE KEYA**, was the father of **JOHN OPENDA OBARE** (Deceased).
16. He testified that a doctor working at the Jaramogi Oginga Odinga Teaching & Referral Hospital (JOOTRH) phoned him on 8th May 2018, inquiring if he knew the deceased.
17. When **PW1** answered in the affirmative, the doctor informed him that the deceased was undergoing treatment at the **JOOTRH**.
18. Upon arrival at the hospital, **PW1** met the Appellant, who was the wife of the deceased.
19. **PW1** testified that the Appellant knelt down and asked him to forgive her. **PW1** was shocked.
20. After the Appellant had sought forgiveness, a nurse informed **PW1** that his son (John Openda Obare) had passed away.
21. On 10th May 2018, **PW1** identified the body of his son, for purposes of post-mortem examination. After he had witnessed the post-mortem examination, **PW1** later buried his son.
22. During cross-examination, **PW1** said that the deceased had stated, whilst he was hospitalized, that it is his wife who had stabbed him.
23. **PW2, FLORIAN WANDWA**, testified that when he visited the house where the deceased used to reside, the neighbours told him that it was the Appellant who had killed the deceased; and that she did so using a knife.
24. However, the knife was not recovered.
25. It was the evidence of **PW2** that the Appellant tendered an apology to them, when they visited her house. He told the court that the Appellant told them, that she did not know that she was going to kill the deceased.
26. During cross-examination, **PW2** said that the Appellant apologized when he was with some other persons, at the Police Station.
27. **PW3, DR. FRAIZER OCHIENG**, was a medical doctor based at the **JOOTRH**, Kisumu.

28. He produced in court, the Post-Mortem Report prepared by Dr. Otieno.
29. By the time when **PW3** was testifying, Dr. Otieno had been transferred from the **JOOTRH**.
30. **PW3** testified that the deceased had a “*knife-mark*” on the right upper chest. He also said that there was a stab wound on the left side of the chest wall.
31. He said that the penetrating stab wound on the lower chest of the deceased, cut through the pleura, which is the covering of the lungs.
32. He further testified that there was blood on the thorax cavity; and a laceration on the upper pole of the spleen.
33. According to the post-mortem report, the cause of death was;

***“Left Haemopneumothorax secondary
to penetrating chest injury, secondary
to stab by knife.”***

34. During cross-examination, the doctor said that he did not know who caused the fatal injury upon the deceased.
35. **PW4, ERICK OTIENO MBONA**, testified that he was a neighbour to the deceased. He lived in House No. 4, whilst the deceased lived with the Appellant in House No. 3.
36. On the night of 5th May 2018, **PW4** was in his house, when he heard a commotion in House No. 3.
37. He said that he was able to hear the Appellant and the deceased fighting, as the houses they lived in were made of iron-sheets.
38. It was the testimony of **PW4** that the Caretaker of the houses which they resided in lived nearby; and that when the Appellant fought with the deceased, the said Caretaker separated them.
39. According to **PW4**, it is the son of the Caretaker who called the father; and that the said child used to live in House No.2.
40. **PW4** testified that the Caretaker told the deceased to prepare himself to go to work; and the Caretaker told the Appellant to carry on with her household chores.
41. It was the evidence of **PW4** that when the Caretaker was leaving;

***“..... I saw the accused take a knife,
held it with her right hand and threw
it in the house; then the man started
crying, stating
‘she has stabbed me, she has
stabbed me, Help me.’
He came out with the knife still on
his chest.”***

42. During cross-examination **PW4** said that the deceased and the Appellant used to have “*domestic issues*.” He also said that the person who used to sort out the said domestic issues was the Caretaker.
43. **PW5, SENIOR SERGEANT SAMWEL MENGANYI**, was based at the Kisumu Police Station, Central Office, at the material time.
44. Having been assigned to investigate the case, **PW5** visited the scene, where he met the Appellant.
45. **PW5** testified that he investigated the case and recorded statements from the Appellant; the father of the deceased; and neighbours.

46. According to him, all the statements indicated that the deceased was injured when the Appellant threw a knife at him.

47. During cross-examination, the Appellant only questioned the Investigating Officer about the place where he found her. He answered that he had found her inside her house.

48. After PW5 testified, the prosecution closed its case.

49. Thereafter, when the Appellant was put to her defence, she gave a sworn testimony.

50. **DW1, MAUREEN CHEMUTAI ONGERI**, said that she had understood the charges preferred against her, and that she had also understood all the evidence adduced in court.

51. The Appellant said that on the material date she was with the deceased, who was her husband.

52. She said that the deceased started becoming violent when the Appellant informed him that she needed to take the child to the hospital. Apparently, the deceased had not understood what the Appellant told him.

53. The Appellant went away with the children, spending the day at her aunt's place.

54. Upon her return, at 6p.m, there were no issues raised by the deceased.

55. However, the deceased is said to have started violence, the following morning.

56. The Appellant testified that she ran away to a neighbour.

57. Thereafter, the deceased left his house, and the Appellant did not see him again.

58. During cross-examination the Appellant confirmed that on the material date;

“... we had domestic issues which were a bit violent. When he started the violence the following day I left the house.”

59. After the Appellant testified she closed her case.

60. I have now re-evaluated all the evidence on record.

61. I find that the prosecution has proved that **JOHN OPENDA OBARE** is deceased.

62. I also find that the cause of death was;

“Left Haemopneumothorax secondary to penetrating chest injury, secondary to stab by knife.”

63. The person who inflicted the fatal stab wound upon the chest of the deceased, committed an unlawful act.

64. Secondly, as the said stab wound was so deeply penetrating that it cut through the covering of the lungs, and caused a laceration of the spleen, I find that the person who inflicted it had either the intention to cause the death of or the intention to do grievous harm to the deceased.

65. But even if the person who inflicted the injury to the deceased was indifferent whether or not death or grievous harm would be caused, or even if he did not wish that it be caused, I find that he had knowledge that his action could cause either death of or grievous bodily harm to the deceased. I so find because there is absolutely no other possibility that a knife, flung with such force as to cause it to entrench itself into the chest of the deceased, could have been intended to achieve a result other than grievous bodily harm, at the least.

66. The remaining issue for determination is whether or not it was the Appellant who caused the fatal injury.
67. **PW4** heard the Appellant and the deceased fighting. At first he was inside his house, which was next door to the house where the deceased lived with the Appellant.
68. He was able to clearly hear what was happening as the houses they lived in were made of iron-sheets.
69. In her defence, the Appellant also confirmed that she and the deceased had domestic issues, which were a bit violent.
70. Therefore, the Appellant corroborated the case of the prosecution, to some degree.
71. I find that it is the Appellant who flung the knife which fatally wounded the deceased. **PW4** saw the Appellant throwing the knife.
72. Immediately thereafter, the deceased came out from inside his house, saying that the Appellant had stabbed him.
73. The Appellant did not challenge that evidence during cross-examination.
74. She also did not challenge the evidence of **PW1**, when he testified that the deceased stated, (whilst he was hospitalized), that it was the Appellant who had stabbed him.
75. **PW2** testified that the Appellant apologized to him, about having killed the deceased unintentionally. However, the Appellant did not challenge that evidence.
76. I find that **PW4** was an eye-witness to the incident in which the Appellant hurled the knife which caused the deceased to suffer fatal injuries.
77. In the circumstances, the conviction of the Appellant was based on solid evidence.
78. As the evidence adduced was adequate to prove all the ingredients of the offence beyond any reasonable doubt, I find that the prosecution did not need to call any further witnesses. In other words, there was no crucial witness who was not called by the prosecution. A person is deemed to be a critical or a crucial witness when his evidence was necessary to prove one or more elements of the offence which was allegedly committed by the accused person.
79. In the result, there is no merit in the appeal. It is therefore dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 10TH DAY OF JUNE 2020

FRED A. OCHIENG

JUDGE