REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 37 OF 2019 [MANSLAUGHTER]

STEPHEN OUMA OWINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment, Conviction and Sentence delivered on 31st May, 2019

by Hon James Ong'ondo, Principal Magistrate in Siaya PM's Court Criminal Case No. 419 of 2017)

JUDGMENT

Introduction

1. The Appellant herein **STEPHEN OUMA OWINO** was charged before the Principal Magistrate's Court at Siaya with the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. Particulars of the offence as per the information dated 23rd August 2017 are that on the night of 4th and 5th August, 2017 at Lihanda Sub-location, Siaya County, the appellant unlawfully killed one Michael Oketch Abwao.

2. The appellant pleaded not guilty to the charge and the matter proceeded for hearing. The trial magistrate after hearing eight prosecution witnesses and the unsworn testimony of the appellant found that the prosecution had proved their case beyond reasonable doubt and proceeded to convict and sentence the appellant to serve 7 years' imprisonment.

3. Aggrieved by the said conviction and sentence, the appellant filed his initial petition of appeal on 12th June 2019 based on the following grounds which basically challenged the sentence imposed:

> **1.** ***THAT the trial court failed to appreciate that he was a first offender.***
>
> **2.** ***THAT the trial court failed to consider that the offence resulted from the appellant's act of self-defence.***
>
> **3.** ***THAT the trial court failed to consider that the deceased excessively provoked the appellant and even went ahead to launch an attack on him.***
>
> **4.** ***THAT the trial court failed to consider the appellant's defence despite the same being unchallenged by the prosecution.***

4. The appellant subsequently filed amended petition of appeal through his Advocates Ms Omaya & Co Advocates, with leave of court granted on d. The same is dated 12th June, 2020. The new grounds of appeal are:

> ***1. That the honourable Magistrate erred in law when he convicted on the uncorroborated evidence of our accomplice***
>
> ***2. That the honourable trial court did not evaluate the evidence properly and convicted on hearsay and purely circumstantial evidence without an eye witness account of what happened***
>
> ***3. That the conviction is based on a post mortem report that does not relate to the incident in question***
>
> ***4. That the honourable court relied on an exhibit that was not recovered from the scene and this led to a miscarriage of justice***
>
> ***5. That the honourable court erred in law when he allowed the prosecution to rely on a post mortem report whose matter was***

called for cross[sic]

The appellant urged this court to set aside the conviction of the appellant and set him at liberty.

Appellant's Submissions

5. In support of the above grounds of appeal, counsel for the appellant filed written submissions on 30th June 2020. The respondent did not file any submissions despite leave of court being granted.

6. It was submitted on behalf of the appellant that the trial magistratet fell into error when it gave a verdict not supported by evidence. That despite the trial court finding that both PW1 and the appellant committed the manslaughter as charged, he went ahead to convict the appellant alone. That the postmortem report and evidence of PW9 revealed that the deceased died from a single blow and that there was no evidence of any other injury on the deceased hence the trial court should have asked itself as to whose final blow caused the death of the deceased as one single blow cannot be caused by two people.

7. The appellant's counsel submitted that the trial court fell into error when it convicted the appellant on the basis of evidence of PW1 who was an accomplice and that no single witness testified that they saw the appellant assault the deceased except PW1 who was implicated by the other witnesses hence the conviction of the appellant when PW1 was also culpable was in error.

8. The appellant's counsel further submitted that the postmortem report was produced without calling its maker and that the trial court should have notified the appellant who was unrepresented of the consequences thereof and that it should have informed the appellant to insist on calling of the maker thereof so that he cross examines the maker of the postmortem report . it was submitted that the appellant suffered as a result of the omission on the part of the trial court to notify him of his right to insist on calling of the maker thereof.

9. Reliance was placed on section 77 of the Evidence Act and **Lucas Okinyi Soki v Republic Criminal Appeal No 26 of 2006**

10. According to counsel, the conviction of the appellant was unsafe, the evidence was unreliable, self-contradictory and purely circumstantial. Further, that the mere fact that the deceased was seen at the home of the appellant and bleeding did not mean that it was the appellant who assaulted him.

11. It was submitted that the body of the deceased was presented for postmortem before the deceased was killed.

12. It was further submitted that the issue of injury was introduced for the first time by PW9 as government functionaries including PW5 and PW7 the village headman and the area Assistant Chief did not see or collect the rungu or any other weapon from the scene hence the rungu that PW9 presented must have been used in another incident and not the one involving the appellant.

13. It was further submitted that there was contradiction because PW1 narrated the events of 3.8.2017 and that he confirmed that the offence took place on 3.8.2017 hence if the evidence of PW1 as believable then the appellant was not guilty as charged.

Analysis & Determination

14. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

> ***"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 R 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. R [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 the evidence adduced before the trial court, the prosecution case was as follows: PW1 Michael Ouma Ochieng testified that on the 3.8.2017 on his way from home to Omindo, he met the accused herein Stephen who is his neighbour and together they proceeded to Omindo where they reached at about 7.00pm. He stated that on reaching near a shop they found Michael the deceased near the door of the shop and Michael told Okech that he had now gotten him after he messed with him the previous day. According to PW1, the accused 'swept the deceased who fell to the ground and PW1 separated them when the owner of the Hotel approached them and that the appellant was still angry but that they were separated by BABU the Hotel owner. PW1 then left with the appellant to Babu's home so that the appellant could cool his tempers as he was still angry. This was now approaching 12.00am (meaning the following day which was now 4/8/2017) and so the witness left with the appellant Stephen.

16. According to PW1, on their way home, the appellant still wanted to fight the deceased Michael so PW1 went home but that the appellant ran to the home of Oketch and PW1 followed him from behind. Near Michel's home, PW1 tried to tell him to leave the matter but that the appellant refused and threw a stone on the roof of the house of Oketch. Michael then got out of the house and went to their home but the appellant followed him and PW1 arrived and found the two fighting with Michael holding a panga and sticks in his hands. At that time, the appellant had nothing in his hand but that at the scene, which was at the home of Oketch, PW1 saw the appellant Michael cut the deceased Stephen on the head and that there was moonlight. That the Appellant dispossessed the deceased of the stick and hit the deceased on the sides of the head and Michael fell down but rose up and his brother and nephew arrived as Michael screamed and Michael's brother stated separating the appellant and the deceased. That Michael was taken to his mother's veranda while bleeding from his mouth. That the Chief

arrived and handcuffed PW1 and treatment was sought for the injured but shortly thereafter Michael died. He added that the fight took place on 3.8.2017.

17. On being cross examined by the accused person, PW1 stated that the Police arrested him on 5.8.2017 and took him to Yala Police Station and later brought him to court and that after investigations were done, he was set free. He stated that they just met at the junction without an appointment. He stated that he was going to the shops while the appellant told PW1 that he was going to check on the trees that he was to cut the following day. He denied the suggestion that he fought Michael near the bar. He stated that he implored the appellant to go home in vain. He denied hitting the deceased. He could not tell who beat the appellant.

18. PW2 Benedetta Abwao a 70 year old lady from Omindo, Lihanda testified that on the night of 4.8.2017 at 1.00pm she heard noises of stones hitting the house of her son Michael Oketch as Michael approached her screaming and pleading his attackers to leave him alone. When she opened the door to her house and stood at her door, Michael entered her house and fell at the door and that he was being followed by two people, OWINO and OUMA. She stated that the deceased was shouting and saying that Owino and Ouma should stop killing him. She saw the two as there was moonlight and that the deceased was bleeding from the mouth, nose and ears. She picked his identity card and that Gabriel escorted him to hospital and later she heard that Michael had died.

19. On being cross examined, she stated that there were two people and that although she could not see clearly, they had rungus.

20. PW3 Gabriel Ouma Abwao testified that on the night of 4th and 5th August 2017 at 1.00am he was asleep when he heard commotion outside and heard his mother scream so he went outside to see. That he saw villagers who had already arrived and saw the deceased on his back and was bleeding from the mouth and on asking him what had transpired, the deceased told PW3 that Stephen and Michael took him out of his house and assaulted him. When he got nearby he found the appellant herein being assaulted by many people who claimed that he had assaulted the deceased Michael so he called the Assistant Chief who arrived and that some lady called the father of Stephen the appellant herein but on arrival he had lost his voice. Michael was referred to Oasis Hospital Kisumu for CT scan and that Stephen's father suggested that they both be treated. At Oasis they had no theatre so they took the deceased to Jalaram where he died on 6th and the witness reported the matter to Sinaga Police Station and the body was taken to the District Hospital.

21. On being cross examined he stated that his house was about 100 meters from his mother's house and that the deceased was being beaten on the way. He stated that when they spotted a torch on the appellant PW3 saw an injury on the leg and that he was not with the deceased who was bleeding from the nose and mouth and had injuries on the head. He stated that Michael Owino was mentioned as one of the culprits.

22. PW4 Hilda Muya testified that on 4.8.2017 she was at her home sleeping at 1.00a when she heard screams from so she got out and found PW2 asking in Dholuo" **why have you killed him?"** PW4 left quickly for the home of PW2 where she found the deceased Michael lying at the door on his side bleeding from the mouth and nose and was unconscious. There was light from the lamp and that PW2 told her that it was Stephen and Michael [PW1] who had attacked the deceased. She saw the appellant in the compound with injuries on the head and hands and bleeding helplessly and lying down so she went to call the village elder but the Assistant Chief arrived then Michael-PW1 Came but was not injured so the Chief handcuffed him and PW4 went to call the village elder.

23. PW5 Jackton Wesonga Ochola testified that he was a Village elder from Omindo Village. He testified that it was at night at about 12.am when PW4 went to call him and he followed her to the home of John Abwao where he found the deceased Michael Oketch lying down near his mother's door while the appellant herein lay down at another house and that the deceased was bleeding from the mouth and nose. That he heard the appellant crying from where he was lying and that he had been injured on the hands, legs and ears and that PW1 Michael Ouma was standing without any injuries on him.

24. On being cross examined, PW5 stated that it was about 12.00am when PW4 went to call him. He stated that he did not see a weapon where the appellant lay.

25. PW6 Peter Abore testified that on 10/8/2017 he attended post-mortem on the body of the deceased Oketch at Kisumu and that the deceased was his nephew.

26. PW7 George Odhiambo Silla testified that he was the Assistant Chief of Yala Sub location. He stated that on 5th August 2017 he was at his house asleep when he received a telephone call from an area resident Lilian Anyango telling him that some people had attacked Michael and injured him and were fighting so he left on his motor cycle and passed the scene at Nyamunde and found a crowd within the homestead of PW2 the deceased's mother Bernadetta Andega and that he found the deceased sitting next to his mother's house in a subconscious state as he could not talk or understand and besides him was Michael Ouma Ochieng and Stephen Owino Ouma lying down in pain….sic. he organized for the two injured to be taken to hospital and at 4.00pm he received information that the deceased Michael had passed on. He stated that they arrested Michael PW1 and Stephen the appellant. He later recorded his statement.

27. On being cross examined, PW7 stated that he took about 15 minutes to reach the scene and reiterated his evidence in chief. He denied handcuffing anybody. He stated that the parents of the appellant and of Michael were present. He stated that he did not get the weapon used in the assault at the scene. He stated that they arrested PW1 when the deceased passed on.

28. PW8 Dr Ruth Ochieng from Kisumu County Referral Hospital testified and produced a post-mortem report on behalf of her colleague Dr Robert Omollo after several adjournments to call Omollo. She stated that she had worked with the Dr Omollo for 12 months during her internship at Jaramogi Oginga Odinga Teaching and Referral Hospital [JOOTRH] in 2017 and 2018 and that the said Doctor was on study leave at Moi Teaching and Referral Hospital. She stated that she was familiar with his handwriting and signature. She testified that the post mortem was done on the deceased on 10.8.2017 and that the cause of death was cardia pulmonary Haemorrhage due to assault. She produced the post-mortem as exhibit 1 for the prosecution.

29. On being cross examined, she stated that there were no injuries on the upper limb meaning hand not head. She stated that the doctor just

ascertained the cause of death and that the body was brought on 4.8.2017.

30. PW9 Inspector Martin Bor from Sinaga Police Post testified that he investigated the case. He recalled that on the night of 4th and 5th August 2017 he was at the Police Post when he received a call from the Assistant Chief of Lihanda telling him that there an incident at Omindo village where 2 people had fought and seriously injured one another so he instructed the Assistant Chief to take them to Hospital. The appellant was taken to Sagam while Michael the deceased was taken to Dolphine Nursing Home in Rabuor and referred to Jalaram Hospital in Kisumu on 5/8/2017 at 21.00 hours and later the Assistant Chief notified him that the deceased had died so he booked the report and in 10 minutes the relatives of the deceased reported the death, blaming the appellant herein and Michael Ochieng so he proceeded to arrest Michael Ochieng with the Chief's assistance and interrogated him. He received information from his two colleagues that the appellant was seriously assaulted so upon discharge the appellant was taken to Yala Hospital and on 11th the officer heard that the deceased's family were baying for the blood of the appellant so he transferred him from Yala Police Station to Sinaga and charged him with the offence on 13th august 2017. He took over the rungu allegedly used to assault the deceased and produced it as PEX2.

31. On being cross examined he stated that he had been an investigator for over 30 years and that the deceased was injured on the night of 4th and 5th August 2017 at 1.00am and that Michael Ochieng who was with the appellant implicated the appellant and that he believed Michael.

32. On being referred to his statement, he stated that it was Inspector Khainga who recorded statement of Michael Ouma and that it shows that the deceased had a single injury and that the appellant had stated that he was beaten by the brother to the deceased. He denied that the charges were trumped up against the appellant.

33. Placed on his defence, the appellant gave unsworn testimony and called no witness. He stated that he was Stephen Owino Ouma aged 27 years married with one child. He denied killing the deceased and stated that the person who killed the deceased was at large and that it was Michael Ouma Ochieng. He stated that the evidence was not true as the Assistant Chief testified that he did not get any weapon.

Determination

34. I have carefully considered the appellant's appeal, the evidence adduced before the trial court and the submissions filed by his counsel on record. In my humble view, the issues for consideration flow from the appellant's amended grounds of appeal which I will consider one by one.

35. The appellant complains that the trial court erred in law when he convicted the appellant on uncorroborated evidence of an accomplice, who was PW1. From the evidence of PW1, he was an eye witness to the incident where the appellant is said to have attacked the deceased first by sweeping him off his feet and then a struggle ensured and they were separated but the appellant continued following the deceased up to his house, the deceased locked himself into his house but the appellant threw stones at the house prompting the deceased to leave for his mother's house. However, the appellant followed him and beat him up leaving him for dead. PW1 was clear that when he and the appellant met the deceased, the appellant remarked that he had finally got the deceased who had messed up with him the previous day.

36. Section 141 of the Evidence Act provides that:

> "***An accomplice shall be a competent witness against an accused person; and conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.***

37. Scott J in **Emperor v Maganlal, 14 Bom 119** held that though there may be cases of exceptional character in which an accomplice's evidence alone convinces the judge of the fact required to be proved, the uncorroborated evidence of such a witness should generally be held to be untrustworthy for three reasons, namely: (1) because the accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because as a participator in the crime he is an immoral person who is likely to disregard the sanctity of an oath; and (3) because he gives his evidence under promise of pardon or in expectation of an implied promise of pardon and is therefore liable to favour the prosecution.

38. In **Canisio s/o Walwa v The Republic (1956) 23 EACA 453**, after reviewing a number of decisions and dicta in years gone by, the judges concluded their judgment with a compendious statement of what they regarded as the true rule of law as to convicting on the uncorroborated evidence of an accomplice and the proper manner of applying that rule to any given case. On page 458 the said passage reads as follows:

> ***"Generally speaking it is a practice, founded upon prudence when applying the rule as to the onus of proof, not to convict without any evidence corroborating that of accomplices. But there are exceptional cases in which a departure from that general practice is justified. The criterion as to whether such an exceptional case has arisen is the credibility of the accomplice or accomplices combined with the weight to be attributed to the facts to which they testify. The principal factors to be considered when assessing their credibility are not only their demeanor and quality as witnesses but also their relation to the offence charged and the parts which they played, in connection therewith, that is to say, the degree of their criminal complicity in law and in fact. A departure from the general rule of practice is only justifiable where, on applying that criterion in that manner, it clearly appears that the accomplice evidence is so exceptionally cogent as to satisfy the Court beyond reasonable doubt, and where accordingly the judge or judges of fact, while fully conscious of the general inherent danger of any such departure, is or are convinced that in the particular instance concerned the danger has disappeared."***

39. Having considered the evidence for the prosecution as a whole including the defence and the appellant's grounds of appeal as initially filed and as amended by his advocate on record as well as the written submissions, I observe that albeit PW2 stated that she heard noises of stones hitting the deceased's house and then the deceased approached her house screaming and pleading with the attackers to leave him alone. This witness was 70 years old. She did not say that she saw the deceased being beaten by both the appellant and PW1 but she corroborated what PW1 stated that when the deceased ran into his house the appellant followed him and threw stones at his house and this

prompted the deceased to get out and ran to his mother's house with the appellant in hot pursuit. PW1 testified that the reason why he followed the appellant as he followed and beat up the deceased was because he was pleading with the appellant not to beat up the deceased but the appellant persisted in his quest of beating up the deceased. In my humble view, whereas in such circumstances a person who tries to save another may be mistaken for an accomplice, I find that the evidence of PW1 as narrated does not leave any doubt that he was trying all along to save the deceased from being beaten by the appellant.

40. In addition, albeit the evidence of PW3 was that he found the deceased lying outside his mothers' house and bleeding from the mouth after hearing screams from his mother, and that the deceased told him that he was beaten by the appellant and PW1 who took him from his house, the evidence of PW1 was that the deceased ran into his house for safety then the appellant threw stones at it after which he got out and ran to his mother's house. Further, the evidence of PW2 was that when she heard stones being thrown at the deceased's house, she also heard screams from the deceased who ran and fell at her door. However, according to the evidence of PW4, the deceased was seriously injured and unconscious. PW5 also stated that the deceased lay in a subconscious state.

41. Although the stated witnesses claimed that the deceased said that he was assaulted by the appellant and PW1, that evidence was not corroborated as the deceased was seriously injured and his capacity to tell who assaulted him was impaired. It therefore leaves the evidence of PW1 as the only evidence of a person who was with the deceased and the appellant from early evening until late in the night and the fact that PW1 was mentioned by witnesses who never saw him with the appellant jointly assault the deceased does not exonerate the appellant from guilt.

42. PW1 saw the appellant cut the deceased on the head with a panga when the deceased reached his mother's house. The evidence in the post mortem report filled by Dr. Omollo was that the deceased had a compound fracture right parietal region with massive intracranial haemorrage. The deceased also had multiple bruisings on his lower limbs- right thigh, right leg and right foot anteriorly which is consistent with the evidence of PW1 that when the deceased ran to his mother's house followed by the appellant, PW1 followed them and that the appellant had a panga and sticks and found them fighting. The compound fracture on the head leading to bleeding in the brain could have been caused by the appellant hitting the deceased with a panga or club or any other heavy object.

43. Furthermore, this court observes that in his initial grounds of appeal which were later amended by his counsel who came on record later, the appellant claimed as follows:

> ***1. THAT the trial court failed to appreciate that he was a first offender.***
>
> ***2. THAT the trial court failed to consider that the offence resulted from the appellant's act of self-defence.***
>
> ***3. THAT the trial court failed to consider that the deceased excessively provoked the appellant and even went ahead to launch an attack on him.***
>
> ***4. THAT the trial court failed to consider the appellant's defence despite the same being unchallenged by the prosecution not challenged the conviction by the trial court.***

53. Thus, the appellant had basically lodged his appeal based on the defence of self defence but in his evidence before the trial court he never proffered or tendered that defence. I believe the evidence of PW1 that it was the appellant who attacked the deceased and beat him to death.

54. Having so found, I am satisfied that PW1 spoke the truth when he said that the appellant while on the way to Omindo in the company of PW1 and on seeing the deceased said that he had found the deceased and therefore decided to deal with him because the deceased had allegedly messed up the appellant the previous day.

55. The allegation that the deceased may have been injured by someone else in the company of PW1, which allegation was never proven did not in my humble view, water down the evidence that the appellant was involved in the death of the deceased and therefore the appellant cannot be said to be innocent merely because he was not alone when he fatally injured the deceased. The court is concerned with the evidence adduced and the person who was charged with the offence, whether the evidence adduced against him proved his guilt beyond reasonable doubt that he was involved in the assault of the deceased leading to his demise.in addition, albeit the defence counsel in his submissions claimed that PW1 was an accomplice, and albeit the appellant claimed that the deceased was killed by PW1, no evidence was led to prove those allegations. The statement by the trial magistrate that the evidence of PW2 amounts to a dying declaration which proves that the accused and PW1 committed the offence cannot be a basis of acquitting the appellant herein who chose not to testify against the said PW1. Albeit the appellant had the right not to say anything in defence and not to give any self-incriminating evidence, having chosen to say that PW1 is the one who killed the deceased, it was upon him to adduce such evidence as nothing prevented him from adducing evidence linking PW1 to the offence. In law, it is not mere allegation that matters but proof of those allegations.

56. I therefore find the ground of appeal not merited as the evidence of PW1 was not discredited in any way by the appellant whose defence was that the deceased was killed by PW1 but he did not say how PW1 killed the deceased.

57. The appellant also claimed that the trial magistrate did not evaluate the evidence properly and convicted the appellant on hearsay and purely circumstantial evidence without an eye witness account of what happened. My finding on this ground is that PW1 was an eye witness on what transpired between the appellant and the deceased right from around 7.00 pm on the material night and that evidence cannot be said to be hearsay or circumstantial as it was very detailed on what happened from the time they met the deceased to the point of the deceased going to his home and the appellant following him with PW1 imploring the appellant not to follow the deceased but the appellant insisted and eventually the appellant cut the deceased with a panga and the deceased was left for dead. The trial magistrate's brief summary of evidence was right to the point as the evidence on record was clear and precise. I find no error in the manner he evaluated the evidence on record.

58. On whether the post mortem report relied on did not relate to the incident in question, I have perused the post-mortem report by Dr Omollo. It is dated 10/8/2017. The incident took place on the night of 4th and 5th of August 2017. The deceased was Michael Oketch Abwao. The body was identified to the Doctor by George Otieno Abwao and Peter Obare Ligenda –PW6 an uncle to the deceased. Although the appellant's counsel submitted that it was wrong for the trial court to allow production of a post-mortem by the person who did not carry out the autopsy on the deceased's body, Dr Ruth Ochieng Awino was a competent witness as she produced the post-mortem report on behalf of her colleague who was on study leave from the Kisumu County Referral Hospital, at Moi Teaching and Referral Hospital and she was clear that she had worked with him for 12 months during her internship at Jaramogi Oginga Odinga Teaching and Referral Hospital in August 2017 and 2018 August. She identified his handwriting and signature very well and the appellant on being asked whether he had any issue with production of the said post-mortem report by PW8 he did not object.

59. Section 77 of the Evidence Act provides:

> ***"(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.***
>
> ***(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."***

60. Under Section 33 (b) of the Evidence Act:

> ***"Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—***
>
> ***when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;"***

61. In **Gathonjia Hiram vs Republic [2014] eKLR**, Emukule J (as he then was) held:

> ***"Firstly, these were forms which were filled by a medical officer in the course and discharge of his professional duty (S. 33(a)). Secondly, the reports were made by a Medical Practitioner 77(1)), and under Section 77(2) the court is called upon to presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. Thirdly the court has the discretion to summon such medical practitioner and examine him as to the subject matter.***
>
> ***Again it is clear to me unless the court deems it necessary (although it is always good practice to do so), failure to call and examine such medical practitioner as to his report is not fatal to the prosecution's case as suggested by some authorities, and the appellant. That is the effect of the proviso to Section 124 of the Evidence Act.***
>
> ***But even if the medical evidence were excluded, (and there is no legitimate reason to do so), the evidence adduced by the prosecution of the circumstances of the offence are clear that it was committed by the Appellant."[Emphasis added]***

62. In **Chaol Rotil Angela vs Republic [2001] eKLR** the Court of Appeal held that a post mortem report was properly produced by the investigating officer in the trial therein as it was prepared in the course of a professional duty.

63. This court agrees with the holding of the court in the **Gathonjia Hiram vs Republic(Supra**) case that since the P3 form was a public document that, it was not necessary that its maker had to be called to tender the same in evidence. Having said so, it was clear from the holding in the case of **Chaol Rotil Angela vs Republic (Supra**) that certain prerequisites had to be met before such a document was produced by another person. These conditions were that the written or oral statements or electronically recorded made by a person who was dead, or who could not be found, or who had become incapable of giving evidence or whose attendance could not be procured without an amount of delay or expense could be produced by another person other than the maker of the said document or statement. The doctor who performed the autopsy on the deceased's body was no longer in the hospital which received the body of the deceased. He was on study leave and the doctor who produced the postmortem report reported on what Dr. Omollo had found on the deceased's body. I find no prejudice was occasioned on the appellant by the production of an autopsy report which is a public document filled by Dr. Omollo in the course of his public duty. The suggestion by counsel for the appellant that the trial court should have insisted that the prosecution call the maker of the postmortem report for the appellant to cross examine him does not make any legal sense in view of the above established jurisprudence. The fact of PW8 stating in cross examination that the body was brought on 4/8/2017 in my view is not fatal contradiction and neither does it render the postmortem irrelevant as the autopsy form speaks for itself that the postmortem was done on 10/8/2017 and that the deceased was allegedly assaulted by a known person on 4/8/2017. The evidence of PW1 and other witnesses clarifies that the incident-as per the charge sheet-Information dated 23rd August 2017 occurred on the night of 4/8/2017 and 5/8/2017. This is because the fight broke out on the evening of 4/8/2017 and escalated into the night of 5/8/2017. PW9 who investigated the case confirmed the position. Therefore, I find the

complaint by the appellant is found to be petty and devoid of any merit and is hereby dismissed.

64. On allegation that the trial court relied on exhibit that was not recovered at the scene and only introduced by the investigating officer, the evidence of PW1 was that he saw the deceased leave his house armed with a panga and sticks when the appellant threw stones at the house of the deceased prompting the deceased to escape to his mother's house and that PW1 saw the appellant cut the deceased while at the house of the deceased's mother, PW2. The investigating officer IP Martin Bor who testified as PW9 only produced a rungu which was allegedly used to assault the deceased. No panga was recovered and PW9 did not say exactly where he recovered the rungu from. However, PW1testified of a stick which the appellant disposed the deceased after the deceased hit the appellant who fell down.

65. In my humble view, non-recovery of a murder weapon in itself and in this case a panga that inflicted the serious injury being a cut on the head leading to brain haemorrage is not fatal to the prosecution's case as there was no evidence that the panga was recovered but not produced as an exhibit.

66. The Court of Appeal has on several occasions guided quite correctly that non-production of a murder weapon is not in itself fatal to the prosecution's case. In **Julius Mutei Muthama v Republic [2018] e KLR** citing **Ekai v Republic [1981] KLR, 569**, the Court of Appeal stated:

> ***"This Court held that failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the postmortem report had established the cause of death. See also Karani v Republic [2010] 1 KLR 73. We adopt the same holding here and reject that ground of appeal.***

67. In my humble view, the fact that the Assistant Chief or village headman did not recover any murder weapon does not mean that the deceased was not killed using a murder weapon as the postmortem report shows that the deceased had cut on the head meaning a sharp object must have been used to cut him and it is that cut injury, according to the postmortem that led to his demise. The argument by counsel for the appellant that the rungu produced in evidence must have been used in another offence is in my humble view superfluous.

68. I find no prejudice occasioned by the production of the rungu-club as the prosecution through the investigating officer merely produced one of the weapons allegedly used in assaulting the deceased. From the postmortem report, the deceased had not only the injury involving a cut on the head that led to his death but some other multiple bruises on the lower parts of the right side of the body-limbs. Those bruise injuries in my view, considering the postmortem report did not lead to the death of the deceased hence the allegation that the Investigating Officer said that there was only one injury are farfetched since the postmortem report speaks for itself.

69. Albeit the appellant's counsel alleged several contradictions in the prosecution evidence of PW1 and more specifically relating to the date of the incident, I find that those contradictions were minor as PW9 the investigating Officer who investigated clarified that the incident happened on the night of 4th and 5th August 2017. PW2, PW3 and PW7 too stated that the incident was taking place on the night of 4th-5th August 2017.

70. On the whole, I find and hold that the grounds of appeal as advanced against conviction of the appellant are without merit I dismiss them.

71. On sentence, the penalty, upon conviction for manslaughter as provided for in section 205 of the Penal Code is life imprisonment. The appellant was sentenced to serve 7 years' imprisonment. This was after the prosecution stated that he was a first offender and the appellant stated in mitigation that he was also injured. The law on the power and jurisdiction of an appellate court to interfere with any sentence passed by a trial court is well stated in the case of **Ogalo s/o Owuora 1954 24 EACA 70** that:

"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice."

72. Similarly, the former Court of Appeal of East Africa stated in **Wanjema v Republic [1971] EA 494** that:

> ***"An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

73. In the instant case, after convicting the appellant, the trial Magistrate accorded the appellant an opportunity to mitigate before imposing the seven year prison term. The appellant in his mitigation stated that he was also injured. The trial magistrate then meted pout sentence after considering mitigations.

74. Albeit the appellant was a first offender, and albeit he clams in this appeal in the initial grounds of appeal that he acted in self defence, the defence of self defence was never advanced during the trial and in his defence. This court cannot, in considering whether or not to interfere with the sentence imposed bring to life the defence of self defence which was never advanced by the appellant as he denied unlawfully killing the deceased and stated that the person who killed the deceased had been made a witness.

75. I have however considered the circumstances under which the deceased was unlawfully killed by the appellant. The evidence adduced points to the appellant as having been determined to eliminate the deceased by following him and assaulting him despite the deceased escaping and locking himself in the house. The part of the evidence that irresistibly points to the appellant as the person who was determined to kill or cause grievous harm to the deceased is that of PW1 who stated that he was present when the appellant started assaulting the deceased at the shop.PW1 with the help of one, Babu, restrained the appellant and took him away only for the appellant to return and follow the deceased to his house. When the deceased locked himself in the house, the appellant threw stones at the roof prompting the deceased to leave the house armed with a panga and club and proceeded to his mother's house. The appellant followed him and caught up with him at the

compound and dispossessed him of the club and cut him to death. The deceased did not deserve to die under those circumstances. Live and let live. Article 26 of the Constitution guarantees every person a right to life and no one has any right to take away the life of another except by law provided.

76. The post-mortem carried out on the body of the deceased on 10/8/2017 revealed that the deceased had a fractured skull leading to the conclusion that the deceased passed on as a result of Cardia Pulmonary Haemorrhage due to assault. Did the appellant have to butcher the deceased to that extend in the circumstances? The answer is NO.

77. For the above reasons and as the appellant was given the least custodial sentence compared to the life imprisonment which is the maximum penalty for manslaughter, I find and hold that the trial court properly exercised his discretion in sentencing the appellant to serve seven years imprisonment.

78. A precious life that did not deserve to die was lost. The appellant has only lost temporary liberty and he will complete sentence and return back into the society. He requires rehabilitation and reformation to appreciate that human life is sacrosanct and nobody should ever take the law into their own hands to butcher others to death.

79. I find no reason to interfere with the discretion exercised to sentence the appellant. The appeal against sentence therefore fails and the same is hereby dismissed. The appellant to serve the lawful lenient sentence imposed, taking into account the period he was in remand custody prior to being released on bond.

80. In the end, this appeal against conviction and sentence is hereby dismissed.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 15th Day of September, 2020

R.E. ABURILI

JUDGE

In the presence of:

Appellant in prison, virtually

Mr. Okachi SPPC for the Respondent State

Mr. Omaya counsel for the appellant

CA: Modestar and Brenda