REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HIGH COURT CRIMINAL APPEAL NO. 1 OF 2018

BETWEEN:

ALBERT NYATI MWAMBURI.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. N. Njagi SPM at the SPM's Court

at Wundanyi. CR. Case No. 87 of 2017 delivered on 3rd January 2018)

J U D G M E N T

1. The Appellant now before the Court is appealing against the conviction and sentence imposed by Hon N. Njagi SPM at the SPM's Court at Wundanyi delivered on 3rd January 2018. The Appeallant was convicted of manslaughter contrary to ***Section 202*** as read with ***Section 205*** of the ***Penal Code***. The sentence imposed was 30 years imprisonment.

2. The Petition of Appeal was filed on 17th January 2018. The Appellant relies on the following grounds:

> "1. THAT the learned Magistrate erred in delivering a judgment on a date scheduled for mention to confirm filing of submissions and highlighting of the submissions contrary to law;
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> 2.THAT the learned Magistrate erred in law and in fact be delivering judgement 20th December, 2017, without notice to Counsel who represented the accused person which is contrary to law.
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> 3. THAT the Learned Magistrate aforestated actions denied the accused his right to fair trial as enshrined in the Constitution of Kenya.
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> 4. THAT the learned Magistrate erred in law and in fact in denying the accused counsel an opportunity to file written submissions.
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> *5. THAT the Learned Magistrate erred in law and in fact in finding that the facts as narrated by the complainant and its witnesses amount to offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code.*
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> 5. THAT the Learned Magistrate erred in law and in fact in finding that the evidence availed supported the charge and warranted convicting the appellant on the evidence availed.
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> 6. THAT the Learned Magistrate erred in law and in fact in denying the appellant the benefit of doubt created by the prosecution evidence.
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> 7. THAT the Learned Magistrate erred in law and in fact by ignoring the glaringcontradictions in facts/evidence adduced;
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> 8. THAT the conviction of the appellant is against the weight of evidence before the trial court
>
> 9. THAT the sentence is manifestly excessive in the circumstances of the case before the learned magistrate.

3. On 27th February 2018, the Appellant appeared before the Court without an Advocate. The Court directed the filing of Submissions. As time went on and submissions were not filed, similar directions were given. Eventually two different Advocates Mr Olwande (the trial Advocate) and Mr Muthami filed Submissions. Mr Muthami informed the Court that he was acting instead of Mr Olwande although no formal notice of change was filed. The Appellant confirmed that Mr Muthami was his Advocate. The Appellant through his Advocate asks the Court to expunge the earlier Submissions filed by Mr Olwande. The Court has declined to do so. Those Submissions form part of the record and remain as such in case of any subsequent appeals. The Court records that those Submissions are superseded by the Submissions filed by J.M. Muthami and Co 0n 28th June 2018. The Submissions now before the Court adopt the Grounds of Appeal contained in the Petition filed on 17th January 2018.

4. The Appellant's Written Submissions also put forward another Ground which is not included anywhere in the Petition. What is complained of is that the certified proceedings show that after the close of the defence case "*the trial magistrate ordered that judgment to be delivered on 19th December 2017*".

5. From the Grounds of Appeal and Submissions, it is apparent that the Appellant is appealing against conviction and sentence but also alluding to a mis-trial. The State as Respondent is opposing the Appeal. As this is a first appeal the Court is charged with the obligation of re-considering and re-evaluating the evidence, all along being aware that it did not have the advantage of seeing the witness give their evidence and therefore did not have the opportunity to assess their demeanour.

6. Dealing first with the issue of mistrial. The Appellant complains that he was denied the opportunity to submit to the Court at the Close of the Defence case. That Ground relies on the certified proceedings showing that there were no reference to any submissions recorded between the close of the Defence case and the Trial Magistrate giving a date for Judgment. In response it is submitted by the Respondent that at the time the Appellant was represented by Counsel. It is therefore interesting that this Ground relies only on the typed proceedings to raise a complaint of mis-trial. It seems to this Court that had there been any merit in that argument, the Appellant would have raised it at the first opportunity - through his Counsel - and not wait until he was convicted. Further, there is no statement from the Counsel who was then present setting out exactly how his client was denied a fair trial. In the circumstances, this Court is satisfied that Ground is simply an afterthought and an opportunistic interpretation of the Certified Proceedings.

7. The Appellant also argues that the Prosecution evidence was not probative because the witnesses contradicted each other. As stated, the burden of proof lies on the Prosecution. The standard of proof in criminal trials is beyond reasonable doubt. The assessment of reasonable doubt is done at two stages in the trial. At the close of the Prosecution's Case, the Court assessed whether there was a case to answer. The Learned Trial Magistrate decided that there was a case to answer. That demonstrates that the Trial Court did not feel the evidence did not cross the required threshold. In the circumstances the Accused has two opportunities to introduce reasonable doubt, firstly through cross-examination and then through the testimony of the Accused and the witnesses for the Defence. In this case, the Learned Trial Magistrate was satisfied beyond reasonable doubt. The Appellant says that in so doing he did not take into account the contradictory accounts of the Prosecution witnesses.

8. The Accused was charged with the Offence of manslaughter contrary to ***Section 202*** as read with ***Section 205*** of the ***Penal Code***. The components of that offence are that (1) the Accused committed an unlawful act that caused the death of the deceased and (2) the death of the deceased. The Appellant is arguing that the Prosecution has failed to prove those components. The Witnesses for the Prosecution started with the Doctor who performed the autopsy (PW-1 Dr Machi). He introduced into evidence his Report and the P-3. That is challenged by the Appellant. The evidence before the trial Court proving the death of the deceased was (1) the oral testimony of the pathologist who performed an autopsy. It is highly unlikely that he would have been able to perform an autopsy on a live person. Secondly, there is the evidence of PW-2 the Father of the Deceased. He told the Court that he saw the body of the deceased and he was his son. The Court also had the benefit of photographic evidence introduced by the Scenes of Crime Officer. They show a person who appears to be dead. They also show that the corpse was lying in a pool of blood and the blood was emanating from his nose, mouth and the back of his head. The cause of death was severe head injury causing bleeding on the brain. The cause of that was a wound on the occipetal region of the head/neck which is the back of the head. The evidence was that the injury manifested itself as a cut of about 4 cm on the surface and a fracture of the skull also of about 4 cm. The Court also heard from the Investigating Officer who told the Court he visited the scene and found that it was a hard surface with rocky portions meaning the ground would have been very hard.

9. The Court also heard from the eye witnesses. PW-3 related that she saw an altercation at the bodaboda stage and she saw the Accused (1) holding the deceased, (2) holding the shirt of the deceased, (3) hitting the deceased including hitting him on his cheek and the right side of the neck (4) the deceased falling (5) the deceased losing consciousness and (6) the administering of first aid without result. She made no mention of a kick. However, in cross-examination Counsel asked about the Accused kicking the Deceased. That cross-examination also introduced evidence that it was the Accused who approached the Deceased and not the other way around. PW-4 also said she saw the Accused approach the Deceased and ask him about a mobile phone. She said the Accused hit the deceased on both legs. She says she say the Deceased fall backwards and she said that the Deceased remained on the ground where she saw him bleeding from the mouth. Itis noteworthy that this witness says she knows the Accused and he was chairman of the bodaboda group. She confirmed under cross-examination that there was a fight involving fists and kicks. The Deceased was running away from the Accused. The evidence of the injuries is corroborated by the medical evidence and the evidence of the Police Officers investigating the offence as set out above. PW-6 also confirmed that he saw the Accused and the Deceased argue and then fighting.

10. In cross-examination, it is clear that the Defence sought to introduce a defence of self-defence by painting the Deceased as the aggressor, for example statements as to his having stabbed his brother etc. However, that stabbing could not have been operating on the mind of the Accused at the time. It is clear from the evidence of the eye-witnesses even the Accused, that he took it upon himself to investigate the loss of a customer's phone. That customer did not give evidence. He took it upon himself to accuse the Deceased and that resulted in an altercation. The Accused was clearly the aggressor. The Accused says in his unsworn testimony that he was defending himself and that he neither kicked nor hit the Deceased. The Accused was contradicted by (1) sworn testimony and (2) the testimony of several witnesses. The Appeal argues that those witnesses contradict each other. In fact, a rational reading of the proceedings shows that the evidence of the witnesses is cumulative. They came upon the scene when they were going about their ordinary business eg buying groceries, going to the dispensary etc. Each one say an altercation. Each one saw the Accused strike a blow against the Deceased. The Appellant's testimony served to corroborate the eye witness accounts.

11. The evidence is clear and the Appeal has not raised any grounds on which the Honourable Trial Magistrate misdirected himself or misunderstood the evidence. For those reasons the Appeal against conviction must fail.

12. Moving onto the sentence. It is a well accepted principle that an Appellate Court will not interfere with the sentence of a Subordinate Court merely because the Appellate Court would have applied a different sentence. There must be an error of principle; an exercise of discretion that is not judicious or a sentence which for any other reason is manifestly excessive. In this case, it is clear to this Court that a sentence of 30 years is manifestly excessive.

13. What then is the correct sentence. The Appellant puts forward a number of authorities:

(1) ***High Court Criminal Appeal 156 of 2013***: Musee Musyoka -v- Republic

(2) ***High Court Criminal Appeal No 117 of 1998***: Onesmus Musa Singi -v- Republic

(3) ***High Court Criminal Appeal No 108 of 2015***: Carolyine Akoth -v- Republic

(4) ***High Court Criminal Appeal No 164 of 2003***: Allan Muhoro Kamenju -v- Republic

In those cases the Court applied handed down a sentence of 2 years. The Submissions on behalf of the Respondent also include one authority; ***High Court Criminal Appeal No 40 of 2017*** at Kabarnet High Court R -v- James Kimosop where the Court applied a sentence of two years. That was a family dispute.

14. This Court accepts those authorities as a starting point. However, in this case there are further aggravating factors. Firstly, the Accused was the Aggressor. From the eye witness accounts it is clear that he used his position as chairman of the bodaboda group to give him some kind of entitlement to call others to account for alleged criminal offences. His accusations of the Deceased have not been substantiated during the trial. He simply decided who he would accuse and punish for the loss of a customer's phone. The Appellant then put the family of the Deceased through the anguish of a trial re-visiting the evidence and loss of their member. He then gave unsworn evidence that was a bare denial and then sought to malign the Deceased. It is clear the Appellant was the aggressor. In the circumstances of this case, it is clear that were the same circumstances to arise again, the Appellant would act in the same way. This Court takes that and the protection of society into account.

15. In the circumstances, the sentence of the Subordinate Court is set aside. The Appellant is sentenced to serve 5 years imprisonment instead. During the course of his incarceration it would be advisable for the Appellant to undergo counselling and in particular anger management to deal with his aggressive tendencies.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 17th day of July 2019.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: Mr Ongeto holding brief for Mr Muthami

Respondent: Ms Mukangu