



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL CASE NO. 109 OF 2018**

**HOSEA KIPRUTO KIPCHUMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal from the Judgment of the Chief Magistrate Honourable C. Obulutsa*

*in Eldoret Chief Magistrate's court Criminal Case No. 4475 of 2017 dated 2<sup>nd</sup> November, 2018)*

**JUDGMENT**

The appeal arises out of the judgment and conviction in Eldoret CMCC No. 4475 of 2017. The appellant was found guilty of the offence of manslaughter contrary to *Section 212(1)* as read together with *Section 205* of the *Penal Code* on 2<sup>nd</sup> November 2018. He appealed against the conviction and sentence on 8 grounds.

**APPELLANT'S CASE**

The appellant submitted on the appeal orally. He submitted that there were a lot of contradictions in the evidence of the witnesses. PW1,2,7,8 and 12 were eye witnesses to the incident. PW3,4,5,6,15 and 16 did not see what happened. PW9 was at the scene but never saw what happened.

The evidence of those who saw was contradictory, each gave a different version of what happened. The incident allegedly happened in a building that was occupied by university students but the Investigating officer did not ascertain whether the appellant committed the offence. It appeared that the students who testified were out to cover their colleague who might have been the culprit as of against the appellant.

PW4's evidence shows that on the material night he hosted a party and at about 10pm the appellant who was the caretaker joined them for dinner. After the dinner someone went and called the appellant. PW5,15 and 16 confirmed it but did not state who called the appellant. PW9 accompanied the deceased and said when they entered, the appellant opened the gate for them and proceeded to 2<sup>nd</sup> floor, room 28 where the party was hosted by PW4. Two people got outside the house and asked them whether they had money to buy alcohol. When they answered in the negative the two assaulted them pushing them downstairs. The appellant had been at the gate at the time. PW4,5,15 and 16 who were in the room denied knowledge of the presence of the deceased and PW9 at the place. PW1 said he was a roommate to PW2 and when they heard the commotion outside they got out of the house. PW1 said there was no party at the place but PW2 said there was and there was drinking and shouting at room 27, their evidence is contradictory.

PW1 alleges to have known the deceased as a fellow student and he witnessed him being assaulted. He went to sleep leaving him in a critical condition. PW12 says there were about 40 people at the compound. The appellant submitted that they would not have left the accused assaulting the deceased for 2 hours doing nothing and would not have left him in a critical condition and gone to sleep.

The evidence of PW8 shows that a roommate called *Faith Kinyanjui* took a video lasting more than an hour. The video was not given to the investigating officer and was not shown to other students in the building. When cross examined she said that she deleted it. The appellant submitted that it was deleted to safeguard the real culprit. That is why the IO recommended an inquest.

The witnesses could not agree on the number of caretakers in the building and the number of people who were assaulting the deceased. The appellant

urged the court to find that the case was not proved beyond reasonable doubt.

The appellant further alleged that the burden of proof was shifted to him in the judgment, as per Page 73 of the record appeal line 13.

On sentence the appellant submitted that the custodial sentence of 30 years for the offence of manslaughter was harsh and excessive. The circumstances of the case did not warrant such a harsh sentence. Precedents were not followed. In view of the mitigation tendered if well evaluated, would have led to a more lenient sentence. Mitigation was not considered at all. The appellant urged the court to quash the sentence and if the same was upheld the court to issue a lenient sentence or a non-custodial sentence.

In response to the respondent's submissions, the appellant maintained that there were inconsistencies. That the post mortem indicated that the deceased died as a result of mob assault. The witnesses gave contradictory evidence on the number of people present and the weapons used. That goes to the root of the evidence and trial. Page 72, line 8 shows that the court did not believe the evidence of PW9. It could not have come from him that the appellant knew the deceased. He was relied on and had been discredited. There were doubts in the case which should have been resolved in favour of the appellant. The sentence is lawful but harsh and excessive.

## **RESPONDENT'S CASE**

The respondent submitted that it opposed the appeal.

There was direct evidence tendered by the eye witnesses PW1,2,7,8 and 12. They were residents of Canaan premises. They all got to the scene at different times when they heard the commotion. Their evidence is corroborative in nature. PW1 & 2's evidence agrees with what actually took place. The Post Mortem report is in support of what eye witnesses saw. The inconsistencies do not go to the root of the charges, that is if at all they exist. They can be excused as memory lapses.

The burden of proof was not shifted to the appellant. The trial court stated a fact of what happened during the proceedings. The evidence was wholly analysed. The appellant caused the death of the deceased. The sentence was legal. The offence has life imprisonment on the higher side. The court observed the students were being killed in their premises. Mitigation was considered.

The evidence of PW9 at page 21 shows that the deceased was known to the appellant. The appeal lacks merit.

## **ISSUES FOR DETERMINATION**

- a) Whether the respondent proved its case to the required standard
- b) Whether the sentence was excessive

## **WHETHER THE RESPONDENT PROVED ITS CASE TO THE REQUIRED STANDARD**

The respondent's appeal is based on the inconsistency of the evidence given by the witnesses. PW1 testified that he was asleep and was woken up by noise, he found 4 people at the stairs and he witnessed the accused and the others beating the deceased.

PW2 testified that he heard a commotion outside at 1p.m and when he got out he found 5 people at the gate and saw the deceased being beaten by the accused and later he was locked in the caretaker's house.

PW3 did not see the accused being beaten. He was called and came and found the deceased with another person after they had been beaten. He was not present when the incident happened.

PW4 testified that he was at a house party on the premises in room 27 with the accused who joined them at 10 p.m. the accused was then called at 2pm by an unknown person. He never witnessed the incident.

PW6 did not witness the incident either. PW7 witnessed the accused with the deceased and another person beating them and accusing them of stealing. She saw the two being taken into the caretakers' room. She later learnt that the two had been beaten and one died.

PW8 was visiting her friend at the premises on the material date and she also saw the deceased being beaten. She watched for one hour and recorded a video of the incident but deleted it. She saw him beat the deceased and the other students with a stick and a wooden broom. No student participated in the beatings.

PW9 submitted that they went to the premises after drinking and they were allowed in at the gate to go to the room where there was a party. As they neared the room, they were approached by 2 people who asked them if they had money for the party. They were allowed in but he also stated that they were slapped and taken outside and beaten. The guards beat them and put them in a room. They were slapped and stripped and he passed out only to wake up at Chepkoilel Health Centre. He did not know who beat him and *Kemboi*.

PW10 and 11 did not witness the incidents that led up to the death of the student.

PW12 testified that when he came home late at 1a.m he saw the commotion at the gate and he could see that the 2 had been beaten. He saw the appellant trying to whip the 2 and others restraining him.

PW14, the investigating officer testified that he went to the scene 10 days after the incident and he didn't establish the people who were housed there. He couldn't tell who assaulted the victim. Further, he was told that the deceased was found at the staircase. He testified that he was to take photos and not to investigate.

PW15 did not see anyone being assaulted. She recalls Hosea being called out of the room at 11pm by *Victor*. PW16 corroborated that Hosea

was with them at 10pm but was later called out by 2 people.

From the testimonies of PW1,2,7,8 and 12, it is clear that the deceased attended a party on the premises. It is also clear that the appellant was seen assaulting the deceased and others attempting to restrain him. It is evident that the injuries inflicted resulted in the death of *Sam Kemboi* and that those injuries were as a result of the beatings by the appellant. The trial court did not err in its assessment of the evidence in finding that the appellant was guilty of manslaughter as the injuries inflicted led to the death of the deceased. The post mortem and the testimony by PW13 confirmed this. The appellant has not pointed out the inconsistencies in the testimonies to warrant the court rescind the conviction. They do not go to the root of the offence. On the conviction I find that the court did not err, and the same was warranted.

#### **WHETHER THE SENTENCE WAS EXCESSIVE**

The appellant contended that the sentence of 30 years was excessive.

*Section 205 of the Penal Code* provides;

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

The appellant did not offer a defence. There was no reason given as to why the deceased was accused of being a thief. Further, he was known to the caretaker. The sentence is within the law and in the circumstance I find no cause to disturb it.

The appeal therefore lacks merit and is hereby dismissed.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF OCTOBER, 2019.**

In the presence of:-

The appellant

Mr. Chacha for state

Ms Abigaël - Court assistant