



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 80A OF 2015

ROBERT KIPROTICH KIRUI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case NO. 236 of 2013 Bomet SPMs Court Hon. P. Achieng PM)

JUDGMENT

This appellant was convicted and sentenced to 10 years imprisonment for the offence of manslaughter Contrary to Section 202 as read with Section 205 of the Penal Code.

The particulars are that on the 31st day of July 2008 at around 7.30 p.m. at Njerian village Bomet County unlawfully killed PAUL KIPKOECH MUTAI

The prosecution called five witnesses in support of their case whereas the defence called three.

This is the first appellate court. It has a duty to evaluate and reconsider the evidence on record bearing in mind that this court did not have the opportunity of observing the demeanour of the witnesses. **Okelo V R 1972 EALR.**

Brief Facts

Robert Kiprotich Kirui (1st accused) Benard Cheruiyot Kirui (2nd Accused) and Robert Kiprotich Korir (3rd Accused) were arraigned at Kericho High Court for the offence of murder contrary to Section 203 as read with Section 205 of the penal code vide Cr Case No. 31 of 2008.

Plea was taken on 22/9/2008 subsequently the case proceeded to hearing. On 7/10/2012 an application was made by the prosecution to discontinue the case against the 3rd Accused which application was granted.

On 16/10/2012 another application was made before the Judge for discontinuance of the case against the 2nd Accused. the court had its reservations against the second application but late acceded to it. The reasons for discontinuance were that the accused persons had agreed to testify against the first Accused. On the same day a plea agreement was tendered before the court which was to the effect that the 1st Accused was to be charged with the offence of manslaughter C/S 202 as read with S.205 of the penal code and that the Accused shall enter plea of not guilty to the charges/information and that the matter was to be referred to the Chief Magistrate's court for trial.

Subsequently Robert Kiprotich Kirui was singularly arraigned in court on 2/4/2013 on a charge of manslaughter C/s 202 of the penal code.

It is instructive to note that his co-accused persons were not called to testify against him after they were discharged but the Accused later called them to testify in support of his defence in the lower court.

The evidence by Edna Mutai (PW1) is that the incident took place outside her house when her husband went to find out the reason for the screams. PW1 did testify that it was dark but not very dark.

The prosecution in this case appears to have been compromised right from the time it was being heard in the High court. After the murder case was heard for close to four years the prosecution commenced applications for the discontinuance of the case for the accused persons who were charged with the Accused in that case.

After the 2nd and 3rd Accused persons were discharged for purposes of testifying against the 1st Accused, everything went quiet. A plea agreement was reached whereby the Accused was charged with manslaughter. The case in the lower court commenced on 2/4/2013 and was determined on 3/11/2015. It commenced in the High Court on 13/8/2008. This is a span of close to seven years while in custody. This trial was not fair and expeditious.

The evidence against the Accused was largely by the wife of the Deceased. It was dark at the time and identification was doubtful and suspect. PW1 ran away and returned to find her husband having been seriously attacked.

I am not satisfied that this case was proved beyond reasonable doubt. The conviction was not safe.

The appeal has merit. The conviction is quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this 7th day of March 2018 in open court and in the presence of counsel for the prosecution Mr. Barasa, the appellant in person. Court Assistant Rotich.

M. MUYA

JUDGE

7/3/2018