



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 88 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. STEPHEN JALANG'0 – SRM delivered on 14th July 2017 in Makadara CMC. Cr. Case No.2889 of 2014)

JOSEPH MARTIN OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joseph Martin Ochieng was charged with the offence of **manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The particulars of the offence were that on 8th June 2014 at Kariobangi North Estate, Nairobi County, the Appellant unlawfully killed Isaac Kimani Wanjiru. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted of the offence yet an essential witness had not been called to testify in the case. He faulted the trial magistrate for relying on contradictory and inconsistent evidence as a basis of his conviction. He was of the view that the evidence adduced by the prosecution witnesses was uncorroborated and could not form a basis for a conviction. He took issue with the fact that his defence was not considered before the trial court reached the impugned decision. He was aggrieved that he had been sentenced to serve a custodial sentence that was harsh and excessive in the circumstances. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court his written submission in support of his appeal. He urged the court to allow the appeal. Ms. Atina for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which connected the Appellant to the commission of the offence. She narrated the circumstances in which the offence was committed, which in her view raised no doubt whatsoever that it was the Appellant who killed the deceased as a result of being angered by the relationship between the deceased and his daughter. She urged the court to disallow the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is mandated to always take into account the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination is whether the prosecution adduced evidence to support the charge of **manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission both written and oral presented by the Appellant and the State. The prosecution was required to establish the ingredients that establish the charge of **manslaughter**. In **Republic –vs- George Onyango & Another [2016] eKLR**, Makau J held thus:

“In a case of manslaughter the prosecution is supposed to prove the primary ingredients of the offence namely:-

- (i) The death of the deceased and the cause of the death of the deceased.***
- (ii) That the accused committed the unlawful act which caused the death of the deceased.”***

In the present appeal, the prosecution did establish that the deceased, Isaac Kimani Wanjiru met his death as a result of being stabbed on the left side of the chest between the 2nd and 3rd ribs. The stab wound ruptured the left atrium wall thus causing the deceased's death. The post mortem report was produced by Dr. Oduor Johansen who testified as PW4. There was no doubt therefore that the deceased's death was caused by a stab with a sharp object on his chest. The prosecution established to the required standard of proof that the deceased did not die of natural causes but due to an action by another person.

As regard the identity of the perpetrator, the prosecution called PW1 Monica Waithera Irungu, the grandmother of the deceased and PW2 Mercyline Atieno, a neighbour of the Appellant. According to PW1, on 17th June 2014 at about 7.00 p.m. in the evening, the deceased arrived home, parked his motorcycle, and told her that he was going to visit his girlfriend one Tecla Adhiambo who happens to be the Appellant's daughter. According to PW1, the girlfriend was four months pregnant at the time with the deceased's child. The Appellant and PW1 lived in the same neighbourhood. PW1 testified that after a short while, she heard people screaming from the direction of the Appellant's house. Someone rushed to her house and told her that the deceased had been stabbed. She rushed to the scene but found that the deceased had already been taken to the hospital. She followed the deceased to the hospital but unfortunately found that the deceased already succumbed to his injuries. She saw a stab wound on the deceased chest which was oozing blood.

PW2, a girl then aged 13 years, testified that on the material day at about 7.00 p.m., as she was coming from school, she saw the deceased and Tecla Adhiambo, the Appellant's daughter, talking outside the gate to the Appellant's house. The two were known to PW2 prior thereto. Shortly thereafter, she saw the Appellant, come out of the house while shouting insults at the deceased. The Appellant was inquiring from the deceased what he was discussing with his daughter. The deceased was unfazed. This appeared to annoy the Appellant. The Appellant then rushed to his house, emerged with a knife then stabbed the deceased on his chest. The deceased fell down. Tecla Adhiambo screamed that the Appellant had killed the deceased. Neighbours rushed to the scene. One of them was a boy by the name Ben who sought to rescue the deceased. He was also stabbed by the Appellant. The deceased was then rushed to hospital. PW2's testimony was direct evidence. She testified in regard to what she saw on the material evening. The Appellant and the deceased were known to her prior to the stabbing.

When he was put on his defence, the Appellant denied stabbing the deceased. He was of the view that the evidence adduced against him by the prosecution witnesses did not establish that he was the one who stabbed the deceased and caused him to suffer fatal injuries. He testified that a crucial witness in the case, Tecla Adhiambo, her daughter was not called to testify in the case. Other persons who were allegedly at the scene when the stabbing occurred were not called to testify in the case. He was of the view that if these witnesses were called, they would have illuminated on who actually stabbed the deceased. Nevertheless, he stated that he was not involved in the fatal stabbing of the deceased.

Upon re-evaluation of the evidence adduced by both the prosecution and the defence, it was clear to this court that the prosecution did indeed establish to the required standard of proof beyond any reasonable doubt that it was the Appellant who stabbed the deceased and caused him to sustain the fatal injury. The testimony of PW1 gave the motive for the Appellant's action. From PW1's evidence, it was clear that the Appellant was unhappy with the relationship between the deceased and his daughter, Tecla Adhiambo. The fact that she was pregnant is more the reason to support the conclusion that the Appellant was not only unhappy but was distraught that his teenage daughter had been impregnated by a man who was not likely going to marry her. The deceased had not approached the Appellant to inform him of his intention hence the Appellant's annoyance at the deceased's action of surreptitiously seeing his daughter.

The testimony of PW2 placed the Appellant at the scene when the deceased was stabbed. Her evidence was cogent, consistent and gave a truthful account of what transpired on the material day. PW2 had no reason to give false evidence against the Appellant. The evidence of PW2 was that of a child. It required corroboration. Corroboration was provided by the testimony of PW1 who testified that the deceased had told her that he was going to see Tecla Adhiambo, the daughter of the Appellant. PW1 was aware that the said Tecla Adhiambo and the deceased were romantically involved because Tecla Adhiambo had visited her home. PW2 was an independent eye witness. The Appellant's defence to the effect that PW2's testimony was diluted by the fact that other material witnesses were not called to testify in the case is not supported by the law.

The prosecution has no legal obligation to call all persons who may have witnessed the stabbing. It is only required to produce witnesses as are necessary to establish the charge brought against the Appellant. The authority for this position is **Section 143** of the **Evidence Act** which provides that:

“No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact.”

In **Keter –vs- Republic [2007] 1 EA 135**, the court held thus:

“The prosecution is not obliged to call superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

The Appellant's defence did not dent the otherwise strong culpatory evidence that was adduced against him by the prosecution witnesses.

His appeal against conviction therefore lacks merit and is hereby dismissed. As regard sentence, the Appellant is on firmer ground. It was clear to the court that the Appellant stabbed the deceased when he was emotionally unbalanced as a result of what he perceived to be disrespect by the deceased. The Appellant was at the material time a retiree. He was aged 71 years. He is old school in his appreciation of certain issues. In the circumstances that led to the stabbing of the deceased, it was understandable but not excusable that he would strongly react to what he perceived as slight to his dignity and respect as the father of Tecla Adhiambo.

In the premises therefore, this court agrees with the Appellant that the custodial sentence that was meted on him by the trial court was harsh and excessive. The trial court, in sentencing the Appellant to such a custodial sentence, did not appreciate the cultural dynamics that were at play at the time the Appellant stabbed the deceased. If the court appreciated that, it would most certainly have sentenced the Appellant to serve a lesser period in prison. In the circumstances, this court forms the view that the four (4) year period that the Appellant has been in

lawful custody is sufficient punishment. The Appellant's custodial sentence is therefore commuted to the period served. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2018

L. KIMARU

JUDGE