



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 76 OF 2016**

**CHRISTINE SYOMBUA MUTHEMBWA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal against the conviction and sentence by Hon. M.A.O. Opanga delivered on 21<sup>st</sup> September, 2016 in Kithimani Senior Resident Magistrates Court Criminal Case No. 185 of 2013)

**JUDGEMENT**

1. The appellant was charged with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. The particulars were that the appellant on the 8<sup>th</sup> day of March, 2013 at Kavilila village, Kiatineni sub-location, in Masinga District within the Machakos County unlawfully killed Daniel Kaloki Mutua. She was convicted and sentenced to 10 years imprisonment.
2. The facts of the case as gleaned from the record are as follows. Charles Mbugua (PW1) received a report from one Joseph on 8<sup>th</sup> March, 2013 at 7.00 pm that the deceased who was his younger brother, had been attacked near the home of his (deceased's) in-laws. He called home and was informed that Mutie Machenzie had claimed that the deceased had gone to their home and insulted his mother and the appellant and that they had beaten him up. He together with his brother and mother went looking for the deceased and found him lying on the ground inside a thicket near his (deceased's) in-laws. The deceased was called out and he responded and he informed them that he had come from Nairobi and decided to visit his in-laws and to check on his wife and children. He informed them that he had lifted his child only for the appellant to snatch the child. He further told them that Mutie Machenzie hit him on the head using a stick and he fell down and the appellant took the stick and hit him on the ribs. He then dragged himself to the thicket. He was carried home and later taken to St. Tito dispensary. He was then referred to Thika for X-Ray but he died on the way to hospital and his body taken to Ndithini Mortuary. The matter was reported to the police and the police visited the scene. He stated Rose Mwendu and Joseph were sent by the deceased to call him.
3. Christine Wanza Mutua (PW2) who is the mother to the deceased was on her way from the market on the material day when she was called by PW1 and who informed her that the deceased had been assaulted at Mackenzie's home where the deceased's wife hailed from. She stated that while she was on her way she met Charles with whom they went searching for the deceased. While on the search, they heard the deceased calling out for help in a thicket. They found him lying in the thicket and was turning his head sideways. He was taken to nearby hospital where he was referred to a bigger hospital. PW2 took him to Thika Hospital. When asked what had transpired, the deceased informed her that he had gone to Mackenzie's home and when his son saw him and called him, the appellant started screaming and hit him on the head followed by Mutie. The deceased further informed her that they continued to beat him while on the ground and he raised alarm and asked them for forgiveness. That Mutie's mother was home but she did not come to his aid. That they left him when they saw him wounded. That he pulled himself on the ground and was unable to get up. She stated that the deceased died a day after the material day. That the matter was reported to the police who visited the scene and recovered one wooden stick.
4. Rafael Kithome (PW3) who is the deceased's brother was at home on the material day when PW2 who had arrived from the market inquired whether the deceased had arrived home. That she received information from Mutie that the deceased had gone to his home and caused a problem and they assaulted him. Later, PW1 arrived home and informed them that he had received information that the deceased had collapsed in a trench near the former chief's farm. They went in search of the deceased. He was called out and he responded in a weak voice. The deceased informed them that he had gone to find out if truly the appellant had gotten married to Mutie. That the appellant and Mutie assaulted him. The deceased was thereafter taken to a hospital in Ndithine and later to Thika District Hospital. He died the next day while he was on the way to hospital.
5. Sammy Makau Muoki (PW4) who is an uncle to the deceased witnessed the postmortem being conducted. Joseph Mutuku Kitua (PW5) was on his way to the shopping centre on the material day when he met Rose Mwendu. Rose told him to inform PW1 that the deceased had told her that he had been beaten at Machenzie's home and that he lay on a ditch near the former chief's farm. He relayed the said message and heard of the deceased's death the following day.
6. Francis Mutiso Mutua (PW6) who is the deceased brother confirmed that the appellant was earlier married to the deceased. That he

received a report that the deceased had come from Nairobi and had been assaulted in a neighbouring village and died a day after.

7. Police Constable Samuel Gacheru (PW7) received a report on 9<sup>th</sup> March, 2013 at 8.00 am from three men who claimed that their brother had been assaulted the previous night and died in the morning. He visited the mortuary where he saw the body. The deceased had injuries on his head, knees and chest. He then proceeded to the alleged scene and arrested the suspects. He later witnessed the postmortem done by Dr. Muli Kioko.

8. Dr. Muli Simon Kioko (PW8) conducted a postmortem on 15<sup>th</sup> March, 2013 at Ndithini Mission Hospital. He stated that the body was identified by relatives in the presence of the police. That the deceased's clothes were blood stained. His nutrition was good and the body was well preserved. He had blueness of the fingers and had lost blood. He had bruised wound 3 by 2 cm on the head and wound on the leg. That at the left loin there was hematoma formation 3 by 5 cm. On dissection, he was found to have blood collection within the chest to 100 mls and in the abdomen there was bleeding 2.4 litres as a result of ruptured spleen. That his liver had laceration. That over his head was a bruised scalp and he had subdural occipital hematoma bleeding in the scalp.

9. Rose Mwende (PW9) was on the material day heading home when he found a man on the road lying on the grass about 100 metres off the road. He called her and asked for help. She stated that she did not see him but only heard his voice. That he was in the sub-chief's farm. She went to where he was but did not recognize him. He requested her to call his mother but she told him that she could not go back since she had a child and bag. He asked him if he was drunk but he told her that he had been beaten. She went along and met her husband's step-brother whom he sent to call his relatives. She later recorded her statement.

10. Inspector Michael Kahare (PW10) stated that on 11<sup>th</sup> March, 2013 Christine Syombua and Peter Mutie were booked at the police station on allegation of murder. He stated that on 8<sup>th</sup> March, 2013 at 5.00 pm the appellant went to Mackenzie at Kiateneni sublocation to do manual work. That she was to sieve maize in a sack and use a piece of stick to shell the maize. That deceased appeared from behind while she was doing the work and attacked her with kicks and blows. That the son of Susan Mackenzie, Peter Mutie responded and charged at the deceased. The deceased threw a stone at the Appellant which missed and hit Peter Mutie. Peter got hold of the deceased and took away the stick he had. The deceased was overpowered and he ran away. He stepped on maize cobs and fell. The appellant using a heavy stick with which she was using to shell maize struck the deceased severally on the head and chest. The deceased managed to run away but got stuck midway on the terraces and thicket. He called for help from a passerby who escorted him to hospital for treatment. That the Doctor inferred that the deceased suffered serious head injuries and was referred to St. Mulumba Thika. That being a remote area transport was a problem and no quick means was found and the deceased passed on the next morning when boarding a matatu. Post mortem was done by Dr. Muli Kioko who thereafter made findings. The investigating officer after conducting investigations concluded that the appellant had caused the deceased's death and he charged her. He stated that the appellant and deceased had separated for a while and the deceased traced her to the home where he thought the appellant had another lover namely, Peter Mutie. He visited the scene and recovered the heavy stick the appellant used to strike the deceased. The same was produced as P. Exhibit 2.

11. The appellant was put on her defence and she gave unsworn statement. She stated that she was at Kavilita on the material day doing some contract work when someone came from behind and started beating her. When she got up she saw that it was her husband with whom she had separated in the year 2009. When the son of the owner of that home heard screams, he got entangled with the deceased and started fighting and the deceased ran away. The next day at 10.00 am while she was at her aunt's place, a call was received that she was to go to Kavilita. She found the chief and sub-chief and was informed that the deceased had died. She was arrested together with the son of that home. She stated that she found her statement already written. The man was released and she was charged.

12. It was the appellant's ground of appeal that she was convicted on contradictory evidence. That PW1 and PW2 each gave a different account on what the deceased told them had happened. That PW2's evidence was not clear on whether she got the account of what happened to the appellant later or at the scene. She contended that there was no independent witness to corroborate what the two witnesses said. That the police did not take any evidence from the witness at the scene of the crime to independently verify what happened. She further claimed that her evidence was not considered. That the trial magistrate relied on extraneous matters in stating that the appellant did not produce documents to show that, she was assaulted by the deceased, hence trying to shift the burden of proof to the appellant. That the trial magistrate further disregarded the evidence gathered on the ground by the investigating officer. She submitted that the evidence on the ground points out that the assailant was Mutie Mackenzie whom the police arrested but released under unclear circumstances. She submitted that the sentence meted on her was excessive owing to the fact that she had three (3) children who were minors.

13. The respondent submitted that the statement made by the deceased to PW1, PW2 and PW3 amounted to a dying declaration within the meaning of section 33 (a) of the Evidence Act. That though there was no eye witness, the dying declaration was sufficient evidence to be relied upon to convict the appellant. Citing **Philip Nzaka Watu v. Republic [2016] eKLR**, it was submitted that the contradictions pointed out do not exonerate her from being the person who assaulted the deceased. That the evidence does not in any way affect the substance of the charge that the appellant was facing and does not prejudice her and that the same was curable under section 382 of the Criminal Procedure Code. It was submitted that the defence was a mere denial and did not dispel the overwhelming evidence tendered by the prosecution. It was further submitted that any person who commits the offence of manslaughter is liable to imprisonment for life and therefore the sentence meted on her was a lenient sentence.

14. I have given due consideration to the evidence tendered before the trial court and the submissions herein. The issues for determination are:

- a. Whether or not the appellant was convicted on contradictory evidence.
- b. Whether or not the appellant occasioned the deceased death.

15. The appellant contended that she was convicted on contradictory evidence specifically that the PW1 and PW2 gave different accounts of what the deceased told them had happened. It is to be noted that no two witnesses recall exactly the same thing therefore some discrepancies are to be expected. What the court should concern itself with is whether or not such inconsistencies affect the material substance of the case.

See **Ajode v. Republic [1972] EA 32**. The inconsistencies complained of by the appellant do not affect the material substance of the case. The said witnesses all stated that they found the deceased in a thicket and that he informed them that he had been beaten up by the appellant and Mackenzie. Those facts came out without contradiction in PW1, PW2 and PW3's testimonies. That ground therefore fails.

16. On the second issue, it is an undisputed fact that the deceased died as a result of beating at Mackenzie's home on the material date. The only issue in contention is who exactly beat up the deceased resulting to his death. There was no eye witness in this case and the prosecution is relying on circumstantial evidence. Circumstantial evidence has been widely discussed. The court in **Choge v. Republic [1985] KRL 1** observed:

**“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”**

17. In **Sawe v. Republic [2003] KLR 364** the Court of Appeal held as follows:

**“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**

**2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

**3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused...**

**7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”**

18. It emerged from the prosecution witnesses, PW1, PW2 and PW3 that the deceased informed them that he had been beaten up by the appellant and Mackenzie. That the deceased had gone to Mackenzie's home when the appellant screamed and hit him using a wooden stick. That one Mackenzie joined in and beat up the deceased. When he got overpowered, the duo left him. He dragged himself to the thicket. The said evidence is corroborated by PW9 who stated that the deceased informed her that he was not drunk but rather he had been beaten and that she found the deceased in a thicket. On the other hand, the appellant denied beating the deceased. She stated that she was working when the deceased who came from behind beat her up and on raising alarm, Mackenzie came and beat the deceased up.

19. The prosecution evidence establishes that the deceased was beaten up by the appellant and another person. The appellant's evidence does not in my view cast any doubt to the prosecution case. It is unclear why as stated by the appellant, Mackenzie would beat up the deceased to that extent without provocation. The Appellant had been shelling maize using a stick which she used to attack the deceased. The assault weapon was later recovered and produced as exhibit. It transpired from the evidence that it was the appellant's blow that finally ended the life of the deceased. Further there is no doubt that the Appellant having separated from the deceased and secured another lover was not happy about the deceased turning up unannounced to put a spanner in the works to her changed status and thus attacked the deceased. I find the appellant had a motive to harm the deceased and did injure him from where he died due to those injuries. It appeared that the appellant after separating from the deceased had moved on with her life and that the deceased was no longer welcome into her life anymore.

20. In the end, I find that the prosecution proved its case against the appellant beyond reasonable doubt. The sentence meted on the appellant is lawful and lenient bearing in mind the fact that the sentence for manslaughter is life imprisonment. Accordingly, this appeal lacks merit and is dismissed. The trial court's conviction and sentence is hereby upheld.

Orders accordingly.

**Dated, Signed and delivered at Machakos this 10<sup>th</sup> day of December, 2018.**

**D. K. KEMEI**

**JUDGE**