



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 108 OF 2015

(CORAM: J. A. MAKAU – J.)

CAROLYINE AKOTH APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence delivered on 19.11.2015 in Criminal Case No. 728 of 2014 in Bondo Law Court before Hon. M. Obiero – P.M.)

JUDGMENT

1. **CAROLYINE AKOTH** was charged with an offence of **Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code**. The particulars of the offence are that on the 20th October 2013 at about 11.00 a.m. in Omia Malo sub-location within Siaya County unlawfully killed **M A O**.

2. **PW1 H A B** testified that on 20th October 2013 at 11.00 a.m. she was with the deceased when she send her child to go and buy some body lotion from Caroline Akoth, the appellant. The child M A went and returned with a bigger lotion instead of that of the Ksh.15/= following which she was send back to bring a smaller lotion but instead the child bought a bigger lotion. The deceased decided to go to the appellant's shop with the child leaving PW1 at the house. That the deceased and her child took long and PW1 decided to go and check on them. That on the way PW1 met the deceased bleeding who told her she had been assaulted with a stone on the head by the appellant. She advised the deceased to go to the hospital. She stated that the deceased died later on 4.11.2013. During cross-examination PW1 testified that the deceased was her sister stating the incident occurred on 20.10.2013 and she died on 4.11.2013. She stated when the child came back with the two lotions the deceased not only was unhappy but was incensed. She also testified that the deceased was not x-rayed but she witnessed the postmortem at Bondo District Hospital.

3. **PW2 M O** testified that on 20.10.2013 at 10.00 a.m. the deceased approached him seeking that he takes her to the hospital after she had been assaulted by a shopkeeper. He stated she had a head injury. PW2 then took her to Ong'elo Dispensary where she was treated and discharged. That on 23.10.2013 PW2 took the deceased to Aram Police Station where she recorded her statement. That she was subsequently taken to Abidha Health Centre. PW2 described the Appellant as a shopkeeper within their area adding that the deceased did not tell her the name of the shopkeeper. During cross-examination PW2 testified that deceased was her mother-in-law. She stated that she did not know if the deceased had an history of sickness. She testified that she later heard that the deceased had died.

4. **PW3 K D O** testified that on 20.10.2013 at about 9.00 a.m. he was at Busia when he received a call from his wife M informing him she had been assaulted by the appellant on 21.10.2013 and that her head was aching. He advised her to go to the hospital. That on 3.11.2013 he went home and found the deceased with cuts (two) on the head. That on 4.11.2013 the deceased passed on. She had mentioned to PW3 that she had been assaulted by the appellant. During cross-examination PW3 testified that the deceased was not sickly.

5. **PW4 Perolis Ojuga** testified that on 4.11.2013 he received a report of death of the deceased. PW4 then went to Bondo District Hospital and identified the body of the deceased to a Doctor for Postmortem.

6. **PW5, M A**, a minor, who the Court found was intelligent enough and was in a position to swear, testified that on 20.10.2013 that she was at home with her mother and H (PW1) when her mother send her to a shop to buy body lotion at Mama K's shop worth Ksh. 15/= but she was instead given a bigger size. That on delivery of the lotion to her mother she did not approve of it so PW5 and her mother went back to the shop. That at the shop Mama K started assaulting PW5's mother. That Mama K's mother-in-law went and held PW5's mother. PW5's mother was hit on the head as a result of which she bled. That PW5 and her mother went home, then proceeded to the hospital and later died. PW5 identified Mama K in the dock. During cross-examination PW5 testified that she was send to buy lotion and when she bought the small size she was send back to the shop but returned with big size. She testified she had been given Sh.560/= by her mother and she was not given change. That when they went back with her mother was very angry and the two started to quarrel. That when her mother returned the lotion she told PW5 to ask for her money. That the appellant's mother-in-law held the deceased by her shoulders.

7. **PW6 M A** testified that on 20.10.2013 at around 10.00 a.m. she was at her home. That the appellant who is her daughter-in-law runs a shop in her house. That she heard some noises from the Kiosk as if people were fighting. That she proceeded to Kiosk and saw the appellant running inside the Kiosk as the deceased rushed towards the road. That the shop shelf had by then fallen down. That she found the fight was over. That the appellant had injuries on the breast being bite marks. During cross-examination PW6 testified that she did not witness the fight.

8. PW7 No. 219173 Ip. Francis Njagi, Deputy OCS Aram testified that on 11.11.2013 at 11.30 a.m. while at the station he received a report of a death. That the deceased had been assaulted on 20.10.2013 and report made on 21.10.2013 and she was treated. PW7 proceeded to the mortuary and a postmortem was done. During cross-examination PW7 testified that after postmortem he recorded witnesses statements and that of the appellant. That the fight near the appellant's shop and that the deceased was hit by a stone. He identified P3 form which was recorded as MFI – P2. The appellant was later charged with murder. During cross-examination he testified that fight took place on 21.10.2013 and report made on the same day. PW7 testified he did not know the motive of the fight. He testified the fight was outside the shop. He testified after the fight the deceased was issued with a P.3. form but it was not filled. He testified the fight was witnessed by PW5 and PW6.

9. PW8 Dr. Bob Amimo, a medical officer, based at Bondo District Hospital, testified that he had a postmortem report for M A which was carried out Bondo District Hospital.

On 12.11.2013 at 10.30 a.m. of a body of a female African which had a blunt stitched wound on the head. That it had no external fractures and the only system affected was the head. That there was haematoma on the right side of the head. PW8 formed the opinion that the cause of death was a result of trauma to the head second to head injury. PW8 who had signed the reported produced it as prosecution exhibit P1. During cross-examination he testified that the postmortem Report has everything he noted. He stated the cause of death was trauma to the head.

10. The Appellant' when put on her defence opted to give sworn statement and opted to call no witness.

11. DW1, Caroline Akoth, the Appellant herein, testified that she is a business person and lives at Omia Malo. That on 20.10.2013 she was at her shop when the deceased sent her child to buy a body oil for Sh.15/= and as she did have it the child went away and after a while she returned and she gave her body

lotion worthy KSh35/= but she returned back with body oil and noted it had been used. DW1 told her to go away. That after a short while the deceased went to DW1's shop and threw the body oil at her and went away. The deceased returned back and attacked DW1 biting her breast, in the process PW6 showed up and both PW6 and the deceased left. That during the incident DW1 stated she struggled with the complainant pushing her out of her shop. That after 1 month she received report of the deceased's death. That she was later arrested and charged with the offence. During cross-examination DW1 testified that she sold the wrong size of body oil to the deceased. That she refunded the money but the deceased bit her breast but she did not take any action. She stated M A was not at the scene. The appellant denied hitting deceased with a stone.

12. The trial magistrate evaluated the prosecution's evidence and the appellant's defence and convicted the appellant for the offence of manslaughter and sentenced her to five years imprisonment.

13. The Conviction and sentence provoked the appellant to prefer this appeal setting out six(6) grounds of appeal as follows:-

(a) The learned trial Magistrate erred in law incoming to the conclusion that the prosecution had proved the case against the appellant beyond any reasonable doubt.

(b) The learned Magistrate erred in law by shifting the burden of proof to the appellant.

(c) The learned trial Magistrate erred in law by failing to properly analyze the evidence and come to the only logical conclusion under the circumstances and give the appellant the benefit of doubt.

(d) The learned trial Magistrate erred in law and in fact in passing a sentence that was manifestly harsh and excessive in the circumstances.

(e) In passing his sentence, the learned trial Magistrate erred in law and in fact in failing to impose on the accused a lesser or non-custodial sentence, taking into consideration the circumstances of the case and mitigation on behalf of accused person.

(f) In sentencing the accused, the learned trial Magistrate erred in law and fact in failing to appreciate that the accused was a first offender, was sick and was nursing a six month old baby.

14. That at the hearing of the appeal the learned Counsel Mr. Odhiambo B.F. appeared for the appellant whereas the State was represented by Mr. E. Ombati the learned State Counsel.

15. The Counsel for the appellant filed written submissions which he highlighted relying on all the six(6) grounds of appeal. He consolidated grounds Nos. 1 and 3 urging that the trial Court failed to note and hold the prosecution had not proved their case beyond reasonable doubt, that the evidence of PW5 was wanting as she did not state she saw the appellant hit the deceased with a stone adding in the trial Court's judgment it stated the appellant hit the deceased with a stone yet there was no evidence on record to that effect, that PW6 who was at the scene did not in her evidence mention any stone but stated she saw the appellant bleeding from her breast, that the trial Magistrate introduced new evidence or relied on extraneous matters, that the evidence of PW8 on cause of death was contradictory, as at one time he said the cause of death was trauma and on other occasion talked of chronic epidural haematoma due to the head injury urging the incident took place on 20th October 2013 and deceased died on 4.11.2013 almost 15 days later. He urged if the cause of death was as stated by the doctor thus chronic epidural haematoma the death would have occurred instantly and as there was no fracture he suggested the cause of death was not as per doctor's opinion. He urged failure to produce death certificate and medical treatment notes was fatal to the prosecution's case. That had death certificate been produced the actual cause of death would have been disclosed. He therefore submitted the cause of death was not proved beyond reasonable doubt.

16. On ground No. 2 of the appeal, the learned Appellant's Counsel urged the trial Court erred in shifting the burden of proof to the accused. He urged that there was no evidence to show what the accused used

to hit the deceased with referring to evidence of PW6 and urged it is possible the deceased hit her head on shop shelf that fell down. He added the deceased was the aggressor.

17. On grounds numbers 4, 5 and 6 of the appeal Mr. Odhiambo B.F. Learned Advocate urged the sentence of 5 years was excessive and harsh urging the appellant should have been sentenced to serve non-custodial sentence. He relied on a bundle of authorities attached to his written submission. He prayed that the appeal be allowed and sentence set aside.

18. Mr. E. Ombati learned prosecution Counsel opposed the appeal. He submitted that the prosecution proved their case beyond reasonable doubt. He urged that the evidence of PW1, PW5 and PW6 placed the appellant at the scene of the incident. PW5 testified she witnessed the appellant assault the deceased causing injuries on her. PW1 testified that the deceased told her the appellant hit her on the head with a stone. PW6 confirmed that the appellant was at the scene and she sustained injuries to her head. Mr. E. Ombati stated that the trial Magistrate did not rely on extraneous matters but on evidence placed before him, that PW1's evidence is that the deceased was hit with a stone and as she told her so. On Doctor's medical report Mr. E. Ombati, learned counsel submitted there was no contradiction. On Death certificate he submitted that though the same was not produced the postmortem Report was produced urging there is no better explanation cause of death other than a postmortem Report which was produced by the Doctor who made it and that Death Certificate is of no value once a postmortem report is produced. He therefore submitted failure to produce a copy of Death Certificate and treatment notes was not fatal to the prosecution's case. On burden of proof Mr. E. Ombati submitted the trial court did not shift the burden of proof to the appellant by pointing out that the appellant in her defence was evasive.

19. On sentencing Mr. E. Ombati submitted that it is discretionary where the law has not limited the Judicial officer, urging under **Section 202 as read with Section 205 of the Penal Code** provides for a Sentence of upto life imprisonment. He submitted that the trial Court exercised the discretion judiciously and the fact that the trial Court did not call for a probation's report is not an error that can be visited on his judgment. On authorities relied upon by the Appellant's counsel he submitted they point to one point thus the sentencing is a matter of discretion of a Judge and that is the position even in this present matter. He urged court to dismiss this appeal and uphold both the conviction and sentence.

20. **Section 202 of the Penal Code defines Manslaughter** as follows:-

“(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

(2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm”

In view of the aforesaid Section the ingredients of **the Offence of manslaughter** can be said to be as follows:

(a) Unlawfully Act or Omission.

(b) Death of Another person.

21. The Appellant urged the prosecution did not prove their case beyond reasonable doubt or as to the required standard. For the prosecution to succeed in proving the charge of Manslaughter they were required to prove Appellant's unlawful Acts or omission caused Death of Another.

22. In the instant case the only witnesses who witnessed the incident were PW5 and PW6. PW5 testified that she went to the appellant's shop with her mother after she had been not given the right size of the body lotion. That they found the Appellant at the shop who started assaulting PW5's mother and hit her on the head upon which she bled. That after the incident they went home and the deceased proceeded to the hospital. She added that before the fight her mother was angry with the Appellant's acts and at the

scene the two quarrelled before they started fighting. PW6 testified the appellant was on 20.10.2013 at the Kiosk when she heard noise coming from the Kiosk. That she proceeded to the Kiosk and saw the appellant running towards inside of the Kiosk while the deceased was running towards the road. That she found the fight was over. That the appellant had injuries on her breast. PW1 in her evidence testified that after PW5 and her mother, the deceased, took long to return she decided to go and check on them and that is when she met the deceased who told her she had been assaulted with a stone on the head by the appellant. PW1 then advised her to go to the hospital. PW5 and PW6 did not mention that the Appellants hit her with a stone but it is clear that immediately after the assault the deceased met PW1 and told her she was hit with a stone on her head by the Appellant. PW5 did not mention the object which hit the deceased on the head but she was categorically clear that the deceased was hit on the head. PW6 came after the fight was over so could not know what object used was used to hit the deceased on the head. The offence took place during daytime and PW1, PW5 and PW6 placed the appellant at the scene of incident. There was no mention of any fight between the deceased and any other person other than the appellant. I am satisfied the person who assaulted the deceased was the appellant and the object used was a stone as the deceased told PW1. I therefore find and hold that prosecution proved the case beyond reasonable doubt that the appellant wrongfully and unlawfully assaulted the deceased on her head using a stone. That the evidence of PW1, PW5 and PW6 was not contradictory or inconsistent in anyway and the failure by PW5 to mention the object used to hit the deceased on the head do not contradict PW1's evidence who stated what the deceased told her was used by the appellant to hit her on her head.

23. **PW8 Dr. Bob Awino** in his evidence he testified that the deceased had a blunt stitched wound on her head noting the affected system was only head. That there was heamatoma on the right side head and he gave the cause of death as trauma to the head. In exhibit P1 the doctor gave the cause of death as chronic epidural Haematoma due to head injury. The Appellant's Counsel argued that PW8 did not note fracture on the scalp of the deceased yet he made the opinion that the cause of death was chronic epidural haematoma due to head injury and urged in that case the cause of death could not have been due to Epidural haematoma as if that was the cause of the death, the deceased death the deceased death could not have occurred 20 days after the alleged fight and if that was the case the deceased could have died within hours of the incidence. The Appellant's Counsel made submission before the trial Court on that point and the trial Magistrate considered the submissions and addressed himself as follows:-

“According to the accused persons Advocate, the epidural hermatoma could have not occurred from the injury which the deceased sustained during the incident. My considered opinion is that the opinion given by the doctor is an expert opinion and can only be challenged by another expert opinion. From the evidence on record, there is no other expert opinion to challenge the findings of the doctor. To that extent I am of the findings that the causer of death was secondary to the injury which was inflicted by the accused person the head of the deceased.”

24. I have considered the evidence by PW8 on the cause of death as stated in exhibit P.1. The submissions by the Appellant's Counsel were substantially considered and fully addressed by the trial court. The Appellant did not cross-examine the doctor on by the alleged contradictions. The doctor in his evidence clearly stated the cause of death was as a result of trauma to the head second to head injury. He did not state as submitted by Appellant's Counsel, that it was due to head injury. He also stated of there was no fracture. It was upon the appellant if she was disputing the cause of death as per doctor to call a medical expert PW8 to challenge the evidence of the doctor and in absence of any contradictory evidence I find the trial Court was correct in accepting the evidence on proof of the cause of death rather than engaging in speculative arguments.

25. The Prosecution did not produce death certificate nor treatment notes. The Appellant's argument is that the cause of death would have been found in the Death Certificate and failure to produce the said document was fatal to the prosecution's case. The Death Certificate is usually produced to confirm death of an individual. It also shows the cause of death whereas treatment notes shows the ailment and treatment given to the patient. The Death Certificate and treatment notes cannot replace postmortem Report which Report is made by a doctor who carried out the postmortem to determine the cause of death and to give opinion of the possible cause of death. In completing Death certificate there is no requirement for postmortem report always. In view of the foregoing the document which gives better particulars or

proper cause of death is postmortem and not death certificate or treatment notes. The failure by the prosecution to produce Death Certificate and treatment notes is in my view not fatal to the prosecution's case as they produced the most relevant and important document to show the cause of death, thus postmortem Report PW8 a doctor performed postmortem on the deceased's body and gave opinion on the cause of death and as such I have no doubt as to the cause of death of the deceased. The cause of death was as per prosecutions report exhibit P.1. Thus chronic epidural hematoma due to injury to the head.

26. The Appellant urge that the trial Magistrate erred in law by shifting the burden of proof to the appellant. The learned Appellant's Counsel urged that in absence of the stone that was allegedly used to hit the deceased with on the head that any suggestion to the contrary was shifting burden of proof to the appellant. The trial Court in his judgment found and held that the accused person quarrelled and subsequently fought the deceased who sustained the injurious on her head and found from the evidence of PW5 it was the appellant who inflicted injuries on the head of the deceased. The stone was mentioned by PW1 who was told of its use by the deceased against her by the appellant. It is not mandatory that every exhibit be produced and penalty where it is not traced at the time of investigation. The the failure to recover and produce the stone allegedly used to hit the deceased do not amount as submitted by Appellant's counsel to shifting the burden of proof to the Appellant. That apart from producing the stone there was sufficient evidence or PW1, PW5 and PW6 to the effect, that appellant and the deceased fought and the deceased sustained head injuries which was inflicted by the appellant. I therefore find no merits in this ground of appeal.

27. The Appellant in ground No. 4, 5 and 6 of the appeal urged that the sentence was harsh and excessive in the circumstances of this case, urging the appellant deserved, a non-custodial sentence as it was demonstrated that she was a first offender, was sick and nursing a six months old baby. The Appellant urged that it was the deceased who attacked her at her shop by going to the appellant's shop where she confronted the appellant. He urged the deceased was was the aggressor and cause of her misfortune. He referred that court to myriads of authorities. In the case of **R V Barongo Kenyeny H. Cr. C. 45 of 2013 (Kisii)** in where the accused was charged with an offence of manslaughter and was sentenced to serve a probation sentence for 1 year under supervision and directions of the Probation Officer Machakos County, in the **R V Thomas Gilbert Cholmondely H.Cr.C. 55 of 2006 (Nairobi)** where it was observed the position of law is that sentencing is a matter for the sole discretion of the trial judge In the case of **R V. Aron George Morara H. CR.A 57 of 2012** where the accused was charged with an offence of manslaughter and was sentenced to 2 years non custodial sentence during which period he was to be supervised by the probation officer of his area.

28. I have in the instant case taken into account the facts of this case which were triggered by failure of the appellant to supply the right size of the body lotion to the complaint's minor daughter, and which angered the deceased who proceeded to the appellants shop and a quarrel arose between the two leading to a fight. The deceased who proceeded to the appellant's shop did not engage her in a civilized discussion with a view to settle the misunderstanding between them but engaged her in a fight.. In the process of the fight the appellant was bitten her breast. She hit the deceased on the head with a blunt object, allegedly a stone, from which the deceased sustained serious injuries and died 20 days later. The appellant and the deceased, I note were neighbours, the appellant, was arraigned before court on 22.7.2014 and was released on bond on 5.8.2014 and convicted on 19.11.2015. She has been in prison for 4 months and this must have had a lot of psychological effect not only on her but also on her family.

I have taken into account that she is a first offender and she shall live with the guilty consequence for the rest of her life for having unintentionally caused death of the deceased. That she has a small child who requires to be brought up in a health environment. I consider that the fact the deceased was aggressor. I am of considered view that the appellant's sentence of 5 years ought to be set aside and substituted with a non-custodial sentence.

29. The upshot is that the appeal against conviction is upheld, the sentence meted against the appellant is set aside, and substituted with non-custodial sentence, the appellant to serve a probation sentence for a period of 2 years under supervision of probation and direction of the probation officer, Siaya County.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 7TH DAY OF APRIL, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 7TH DAY OF APRIL, 2016.

In the presence of:

Mr. Odhiambo B. F. for Applicant.

Mr. Ombati for State

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akidae

J. A. MAKAU

JUDGE