REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HCCRA NO. 40 OF 2016

(CORAM: J. A. MAKAU – J.)

ISSA JOMO SEWEDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and the sentence dated 13th April, 2016,

in Criminal Case No. 481 of 2015 in BONDO Law Court before Hon. M. OBIERO – P.M.)

JUDGMENT

1. The Appellant **ISSA JUMA SEWEDI** 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 11th day of March 2015 at Nyamonye sub-location in Bondo Sub-County within Siaya County unlawfully killed **HELEN ATIENO ISSA**.

2. The learned trial Magistrate after full trial found the appellant guilty, convicted him and sentenced him to serve life imprisonment.

3. Aggrieved by the conviction and sentence the appellant preferred this appeal setting out seven (7) grounds of appeal as follows:-

i. ***That the trial magistrate misdirected himself in not finding that the charge sheet was so defective as to be a nullity in law.***

ii. ***That the Learned trial Magistrate's judgment is lacking in mandatory details of fact and law. It appears to be a "rush to convict".***

iii. ***That the appellant conviction and sentence for the offence of manslaughter was against the weight of evidence presented by the Prosecution witnesses.***

iv. ***That the learned trial magistrate erred in failing to inform the Appellant of his constitutional right to legal representation enshrined under the Constitution of Kenya, 2010.***

v. ***The Learned Trial Magistrate erred in failing to find and hold the Prosecution had failed to***

prove its case beyond a reasonable doubt as required by law thereby arriving at a decision unsustainable in law.

vi. ***The Learned Trial Magistrate erred in failing to find and hold the Prosecution had failed to prove its case beyond a reasonable doubt as required by law thereby arriving at a decision unsustainable in law.***

vii. ***The Learned Trial Magistrate erred in not considering or considering sufficiently the facts and factors which were favourable to the Appellant.***

4. At the hearing of the appeal the appellant appeared in person whereas State was represented by M/s. Odumba Learned State Counsel.

5. At hearing the Appellant relied on written submission which he filed with the Court. He urged that the prosecution case was based on hearsay, was a fabrication, speculative on a doctored signed declaration, that the trial Court erred in ignoring glaring contradictions in the prosecution's case, that the trial Court omitted clear evidence to the effect that the deceased was attacked by some thugs who invaded her farm, that the judgment is based on extraordinary matters, that photographs taken by PW4 were not authenticated to be true and which PW5 relied upon and that the signed declaration prepared by State in presence of PW2 was not signed by a witness and that prosecution did not prove their case beyond reasonable doubt.

6. M/s. Maurine Odumba Learned State Counsel strongly opposed the appeal on both the conviction and sentence stating the evidence from PW2, PW3 and PW5 was overwhelming and connected the appellant with the commission of the offence. That the deceased's, wife to the appellant before her death she was able to record her statement to the effect that her husband, Issa had attacked her. That all witnesses evidence point that it was the appellant who attacked the deceased. That the deceased's statement was produced as exhibit 3 to support the charge that the injuries sustained by the deceased were so serious demonstrating that the appellant's intention was to take away the life of the deceased. On sentence the State Counsel submitted the appellant was rightly given the maximum sentence for the offence.

7. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISSAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)"

8. The facts of the prosecution case is as follows:- that on 10th March 2015 at 7.00 a.m. PW4, NOAH ATELA OTIENO while at his home at Nyamonye received a call from his sister Mary telling him that some thugs had invaded her farm and attacked the lady who was living there and requesting him to go and

confirm. PW4 preceded to the scene, where he found a lot of blood at the door and many people, some of whom told him the attacked lady was dead. PW4 entered the house confirmed that the deceased was seriously injured. PW4 got a taxi and took the deceased to Bondo District Hospital from where she was transferred to Jaramogi Oginga Odinga Teaching and Referral Hospital in Kisumu. That while at Bondo the deceased was able to talk and told PW4 that Jomo had killed her. PW4 communicated to the people what the deceased had told him, thus Jomo and killed her. PW4 called the villager elder, PW1 Jeremiah Ombetha. PW4 also called the Chief PW4, took photographs at the scene which he handed over to Police Officer at Usenge. PW1, a village elder and PW3 received instruction from Chief by name Tiang' to go and arrest Issa Jomo Sewedi, PW1 and PW3 arrested the appellant and took him to Chief's Camp at Usenge. PW2 Jackline Atieno sister to the deceased stayed with the deceased in hospital for a month during which period Police went to the hospital and recorded statement from the deceased. The deceased had told PW2 that it was her husband by the name Issa who attacked her and assaulted her. PW2 knew Issa as her brother-in-law. Meanwhile PW5 on 10.3.2015 at 3.00 p.m. while at Usenge Police Station he received the appellant who had been arrested by members of public for allegedly assaulting the deceased on the night of 9th March 2015 at about 1.00 a.m. PW5 placed the appellant in cells and proceeded to the scene of crime and found the deceased had been taken to Bondo Hospital. He found a pool of blood at the scene PW5 went to Bondo Hospital, found the deceased had been referred to Jaramogi Oginga Odinga Teaching and Referral Hospital, Kisumu. He later learned the complainant had died. He later charged the appellant with this offence. PW5 took photographs of the deceased before she died. PW5 also recorded statement from the deceased which she signed. PW6 Dr. Dickson Mucha Mwaludindi carried out post mortem on the body of Heline Akinyi and from examination of her body formed an opinion of the cause of death was as a result of multiple organ failure following assault.

9. The Appellant denied the offence and stated that on 11th March 2015 at 10.00 a.m. he was at Nyabondo Centre having come from the lake where he had gone to a shop when a group of people came in company of village elder, arrested him and escorted him to Usenge Police Station where he was detained for 3 days. That he was later charged with this offence. He testified at the time of the offence he was at the lake.

10. The appellant in his appeal contends the prosecution's case was based on hearsay evidence, fabrication, speculations doctored by the signed of a declaration. The prosecution witness PW1, after receiving a telephone call informing him Issa Jomo Sewedi had assaulted his wife, he was instructed by chief to arrest him. Similarly PW3 received telephone call from the Area Chief instructing him to arrest the Appellant for assaulting his wife. PW1 and PW3 did not witness the assault but only arrested the appellant on the allegation of having assaulted his wife the deceased person. PW2 was in Kampala on 10th March 2015 and when she came back to Kenya on 12th March 2015 she received information of her sister's admission at Kisumu Hospital. She went there on 13th February 2015 and stayed within her for about one month after which she died on 9.4.2015. PW2 observed her sister Hellen Akinyi Issa had a cut on the right arm, right wrist, right shoulder, neck, stab wound on her ribs but she was able to talk. That PW2 was present when Police Officer, PW5 recorded her statement. PW2 was told by the deceased it was her husband who attacked her and assaulted her. Issa was well known to PW2 as her brother-in-law. PW2 identified the accused in Court, thus the appellant. PW4 testified he was able to talk to the deceased while at Bondo, and she told him that Jomo had killed her. He did not know who Jomo was. PW4 informed people what the deceased had told him and called the village elder, PW1 and Chief. The deceased also at the hospital repeated to PW4 that when Jomo attacked her he was not alone. PW5 recorded the deceased's statement in presence of PW2, which he produced as exhibit 3. the deceased immediately she was able to talk, she was able to name her assailant to PW4, PW2 and PW5. She even in her statement to PW5 disclosed her assailant as the appellant. In her statement she stated partly in exhibit 3:-

> ***"He later broke the door and when I got out of the bedroom he caught my hands at the sitting room and started cutting my left shoulder with a panga and then I identified him as Jomo Issa somebody who is my husband. He later said that he had come to kill me and that I should know that he is a criminal and nothing police can do to him."***

11. The deceased in her first report to the people who came to her aid, her close relatives and police She

was able to name the appellant as her assailant. In the case of **Kioko Kilonzo & Others V R CRA 82-88 of 2011** the Court of Appeal considered the importance of first report, when it relied on the decision of **Terekaili & Another V R (1952) EACA** and started thus:

> ***"Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguards against late embellishment on made up case. Truth will always come out from a statement taken from a witness at the time when recollections is very fresh and there has been no time for consultation with others ….."***

12. In the instant case the appellant as per evidence of PW1, PW2 and PW3 was well known to them and the deceased as husband to the deceased, but though they had separated the deceased explained at the time of that attack she had time to talk to her attacker. She of course could identifying her attacker by his voice at the time of the attack. She gave the appellant's name to the close relatives and police. I find that she recognized her attacker as the appellant. The evidence of PW2, PW3 and PW4 who directly communicated with the deceased not once but severally their evidence is not hearsay, evidence nor fabrication nor speculation as asserted by the appellant. The evidence is direct evidence and the trial court made no error on relying on the evidence.

13. The Appellant contends the trial Court misdirected itself in law by failing to appreciate the glaring contradictions in the prosecution's case beside making a decision which was made without jurisdiction based on a belief or opinion and anticipation not warranted by evidence on record. The appellant in support of this ground did not state what were the glaring contradictions in the prosecution's case? and why the Court had no jurisdiction to deal with the charge of Manslaughter. The trial Magistrate is a Principal Magistrate and cause charge was of Manslaughter and cause of action arose within Bondo Sub-County with the jurisdiction of Bondo Law Courts. The Court had jurisdiction therefore to try and determine this matter. I therefore find no merits in this ground of appeal.

14. The Appellant contends the deceased was attacked by some thugs who invaded her farm and the prosecution made no attempts to avail Mary sister to PW4 to testify. PW4 testified he was informed by his sister Mary, the deceased was attacked by thugs who had invaded her farm. PW2 later was informed by the deceased that the appellant attacked her and he was not alone. The statement that she was attacked by thugs is therefore not farfetched taking into account that the appellant was not alone but with other attackers at the material time. The failure to call Mary I find did not prejudice the appellant as he did not state what he wanted her to came and tell the court?, further more failure to call all witnesses do not in my view prejudice the prosecution's case as prosecution has discretion to call the witnesses who they deem relevant to their case. It is not the number of witnesses which proves the prosecution's case but the quality of evidence. In of **Michael Kinuthia Muturi V R CRA 51 of 2002 (NRI) Court of Appeal stated** thus:-

> ***"Although no particular number of witnesses is required to prove a fact, the failure to call certain witnesses in the instances where the evidence on record is not sufficient to sustain a conviction will attract adverse inference. However, in the instant case, the evidence on record was sufficient and therefore the omission by the prosecution to call the elders and the investigating officer attracted no adverse inference."***

In this case I find there was sufficient evidence to sustain conviction and failure to call Mary sister to PW4 do not in my view attract any adverse inference. There is sufficient evidence on record and the prosecution is never required to call particular number of witnesses to prove a fact but can decide on the witnesses to call and not to call in a matter.

15. The appellant contends the trial court overlooked material factors and based its convictions on extraneous matters. The trial court's judgment is based on evidence of the prosecution witnesses mainly PW2, PW4, PW5 and PW6. The Appellant having not pointed out the material factors which the trial court overlooked and the extraneous matters relied upon, this Court cannot be involved in speculating the overlooked evidence and the extraneous matters. It was incumbent upon the appellant to have submitted

on the overlooked evidence and state clearly what extraneous matters influenced the court's decision. I find no merits on this ground. I dismiss the same.

16. The Appellant contends that the photographs taken by PW4 are the same photographs relied upon by PW5 and that the statement by PW5 from the deceased in presence of PW2 was not signed by him as a witness. PW4 testified that he took photographs at the scene and handed them to the Police officer at Usenge Police Station as MFI – 1 (a) to (h). PW5 testified he took photographs of the deceased before she died and of her homestead numbering 8. I have perused the court file and could not trace any of the photographs, as the photographs are not in the court file. PW4 testified he took photographs and produced the same whereas PW5 testified he took 8 photographs. It is difficulty for the court without seeing the photographs know who the maker is, however that may not be crucial in determination whether the deceased died as there is postmortem Report exhibit P2 produced by PW6 confirming the cause of death of the deceased was multiple organ failure following Assault. The deceased statement produced as exhibit 3 reveals that it was signed by the deceased as per evidence of PW5. The Appellant did not challenge the authenticity of the statement by the deceased . I find the statement as produced to be authentic.

17. The Appellant contends that the case was poorly investigated as no independent evidence was adduced to support the case such as an eye witness or any forensic evidence carried out on the blood stains. The prosecution did not call an eye witness as none was there at the time of the commission of the offence. The prosecution relied on direct evidence from the deceased, and her statement, and noted that she told PW2, PW4 and PW5 what had happened to her. The prosecution also relied on the forensic evidence exhibit P2 which corroborated the statement of the deceased as regards the nature of her injuries. The deceased's evidence directly put the appellant at the scene of murder and linked him with the offence she identified him through voice identification and recognition. I therefore find that ground without merits.

18. The Appellant lastly contends the prosecution's case was not proved beyond reasonable doubt. The Appellant faced a charge of **manslaughter contrary to section 202 as read Section 205 of the Penal Code.**

> **Section 202 of the Penal Code** Provides:-
>
> ***"202.(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter."***

19. The prosecution called evidence from PW1, PW2, PW3, PW4 PW5 and PW6. The prosecution proved that the Appellant's acts of assaulting and stabbing the deceased was unlawful. PW6 produced postmortem report which reveals that the deceased died as a result of multiple organs failure following assault the death and cause of death of the deceased was proved. The appellant it was proved was the person who unlawfully assaulted the deceased and it is from the injuries sustained by the deceased that she passed on. The prosecution I find and hold proved that it was the appellant who caused the death of the deceased and I find the prosecution proved their case beyond reasonable doubt. This ground of appeal similarly has no merits.

20. Whether the appellants defence was considered? The appellant defence is a defence of alibi. In the case of **Charles Anjare Mwamusi V. R. C.A. Criminal Appeal No. 226 of 2002 Court of Appeal** stated:-

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."***

21. I have considered the Evidence of PW1, PW2, PW3, PW4 and PW5 which put the appellant at the scene of the crime. The Appellant who was well known to the deceased was clearly seen and recognized

by the deceased as per exhibit 3 and she elaborated described to PW5 how the appellant assaulted and stabbed her. The trial court considered the appellant's defence and rejected the same as without merits. I have carefully considered the defence of alibi against the evidence of PW2, PW4 and PW5 and find that the prosecution witnesses, evidence dislodged the appellant's defencee of alibi. The trial Court correctly found the appellant's defence of alibi to be without merits and so do I.

22. **The upshot is that the appeal is dismissed. I uphold the conviction and confirm the sentence that were imposed by the Learned trial Magistrate.**

DATED AND SIGNED AT SIAYA THIS 10TH DAY OF NOVEMBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED THIS 10TH DAY OF NOVEMBER, 2016

IN THE PRESENCE OF

APPELLANT IN PERSON PRESENT

M/S. M. ODUMBA FOR STATE

C.C.

1. K. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE