REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 53 OF 2016

REPUBLIC………………………………………………… PROSECUTOR

VERSUS

GEORGE ONYANGO ANYANG ……………………………… IST ACCUSED

DENNIS ODUOL OGONJO ……....………………………… 2ND ACCUSED

JUDGEMENT

1. The Appellants **GEORGE ONYANGO ANYANGO**, and **DENNIS ODUOL ONGONJO** were the 1st and the 2nd accused at the Lower Court, they were 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 8th day of November, 2012 at [Particulars Withheld] Secondary School, Ugenya District within Siaya County, jointly and unlawfully killed **MAO.**

2. The Appellants were tried and found guilty, convicted and sentenced to serve 20 years imprisonment.

3. The conviction and sentence provoked this appeal through the firm of M/s. Onsongo and Company Advocates in which the Appellants set out ten (10) grounds of Appeal being as follows:-

> ***(i) The trial magistrate erred both in law and fact in failing appreciate that the prosecution had failed to establish their case to the required standards, i.e. beyond reasonable doubt.***
>
> ***(ii) The trial magistrate erred both in law and fact in failing to acknowledge and appreciate the glaring contradictions on the prosecution's case which definitely created reasonable doubts in the prosecution's case.***
>
> ***(iii) The trial court made reference to, relied upon, and took into account exterior matters to buttress an otherwise prosecution's case.***
>
> ***(iv) The trial magistrate erred both in law and fact in not only shifting the burden of proof, but also the instance of proof as well as lowering the standard of proof to the prejudice of the Appellants.***
>
> ***(v) The trial court failed to take into account, appreciate and raise issues with the prosecution's failure to call material, competent and compellable witnesses without ascribing any reason or explanation to the same.***
>
> ***(vi) The trial court erred both in law and fact in making conclusions, decisions and drawing***

inferences which are not based on evidence on record; using exterior matters to do so.

(vii) The trial court shifted both burden and instance of proof.

(viii) The Learned trial magistrate did not comply with Section 169 of the Criminal Procedure Code in writing the judgment herein.

(ix) The judgment of the subordinate court is against the weight of evidence on record.

(x) The sentence imposed on the Appellants is manifestly harsh and excessive in the circumstances.

4. The State was represented by M/s. Mourine Odumba, learned State Counsel. M/s. Mourine Odumba, conceded the appeal on the grounds that the prosecution did not prove the case beyond reasonable doubt, that though death was proved the cause of death was not proved, that vital prosecution witnesses were not called, that the Doctor's evidence on postmortem did not come out clearly on the cause of death and that the judgment was not properly reasoned.

5. I am the first appellate court and as expected of me I 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's case which sets out the principles that apply on a first appeal. These are set out in the case of **ISSAC NG'ANG'A 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)'

6. The facts of the prosecution case forms part of the record of appeal and I need not reproduce the same, however, I shall summarize the prosecution's case and the defence.

7. The facts of the prosecution's case are that, the two appellants are teachers at [Particulars Withheld] Secondary School. That on 8.11.2012, the 2nd Appellant came out of the classroom with a student, known as M, the deceased herein and went with her to a tree shade, started talking to her and later he beat her. That after that, he took her to another teacher, the 1st Appellant, after the exams, to the office from where the deceased could be heard crying as there was a lot of commotion in the office. That in the evening she went to the dormitory unable to speak. That on 10.11.2012 a Boda Boda rider was called by one of the teachers of [Particulars Withheld] Secondary School and was instructed to take the deceased home as she was sick. The Boda Boda in company of another student took the deceased, MAO, at her home at 6.50 p.m., whereby the deceased's brother requested the Boda Boda rider to take her to Ambira Hospital, whereby the deceased was admitted. The deceased was transferred to New Nyanza General Hospital, Kisumu whereby she died while undergoing treatment. That post mortem was carried out 22.11.2012, at 1.40 p.m. at New Nyanza Provincial Hospital and the cause of death was said to be excessive hemorrhage due to raptured spleen. The two appellants were subsequently arrested and charged

with this offence.

8. The 1st Appellant gave unsworn statement denying the offence. He stated that on 8.11.2011 a student came to report to him a case of cheating in CRE examination at around 4.00 p.m. He then asked the subject teacher, the 2nd Appellant who was seated under a mango tree with teachers including the School Principal about the matter. The case involved MO and EA. The two were called to where teachers were. The 2nd Appellant went for the papers to check whether there was cheating or not. The Appellant then went to the office. He later got a report that there was cheating among the students. That later the two students went to the 1st Appellant's office and apologized.

9. The 2nd Appellant gave unsworn statement stating that on 8.11.2012 he was seated under a mango tree after students had taken examination on the 2nd day, when he got some information from examination Department that his students namely E and M were cheating in the examination. He received the two scripts and on perusal he discovered the students had colluded in a particular question and deducted from them five marks and he informed the principal.

10. Mr. Onsongo, Learned Advocate for the Appellants, relied on the skeleton submissions, together with the attached authorities and supplementary list of authorities. He further submitted that he relied on the supplementary petition of appeal setting out 10 grounds of appeal filed on 15th July 2016, however, he condensed the 10 grounds of Appeal to four (4) grounds of Appeal as follows:-

> ***(i) Death of the deceased.***
>
> ***(ii) Failure to call crucial and competent witness.***
>
> ***(iii) General contradictions and inconsistencies on prosecution case.***
>
> ***(iv) Failure to comply with Section 169 (1) of the Criminal Procedure Code.***

11. M/s. M. Odumba concedes this appeal on the ground that the prosecution failed to prove the charges against both the appellants. That the postmortem Report did not establish the cause of death.

12. Mr. Onsongo, Learned Advocate, for the appellants contends that the death of the deceased was established but the cause of death was not. PW6 James Odiala, a nurse at Ligala Dispensary received the deceased on 9.11.2012 at Jera Dispensary who was sick and unable to sit. She had a sick sheet and she stated the deceased told her as follows:-

> ***"She had not been treated. She told me that she had been sick and she told me that she had not been beaten or fallen down."***

PW7, Scholastica Mangongo, a matron of [Particulars Withheld] Secondary School, testified that on 9.11.2012 at 6.00 a.m. she was informed of a sick student and as such proceeded to the dormitory and found M the deceased. She testified M had vomited and informed her that it was normal sickness. PW4 testified as follows:-

> ***"I reported that to the Principal. Arrangements were made for her to be ferried to hospital. She had problems since form one ………… The deceased was sickly. She always had Malaria and that is when we had quinine."***

13. The Doctor PW10, Lawrence Shikuku Makokha, who carried out postmortem on the deceased as per exhibit P1 formed an opinion on the cause of death as excessive hemorrhage leading to a raptured spleen. In regard to external appearance, the postmortem Reports indicates the following:- Body well preserved, no bruises noted, no fracture noted and petechiae was noted. The report did not indicate bruises or any physical trauma such as assault leading to the death of the deceased. The Doctor in his evidence in Chief stated he formed the opinion of the cause of death as follows:-

" the cause of death is as a result of excessive hemorrhage leading to raptured spleen. He did not take further specimen. ….. "

In the postmortem Report produced as exhibit P1 the doctor indicated the cause of death was due to excessive hemorrhage due to raptured spleen. That the two statements as to the cause of death are inconflict and one would ask what was the cause of death, is it due to "excessive hemorrhage, secondly to "raptured spleen" or "excessive hemorrhage" leading to a "raptured spleen."

The evidence of PW10, caused confusion as to what caused the death of the deceased. This confusion led to appellants' counsel to submit, the cause of death was not established beyond any reasonable doubt.

14. There are medical literature avail which show that rapture of the spleen can be as a result of many other reasons apart from physical trauma (see **non-traumatic Rapture of the spleen**, **An a typical presentation of the acute Abdomen, an article by Leijineh Michael and 3 Others)**

15. In the case of **Kihara V. Republic [1986] eKLR** the Court of Appeal sitting at Nakuru addressed itself thus**:-**

> ***" that it was male African 69 years, old. No external injuries. Internally everything was normal except in the digestive system where all bowels were bruised. A large amount of fluid blood present in the abdominal cavity. Spleen ruptures. I formed opinion that the cause of death was internal hemorrhage due to ruptured spleen caused by :blunt force" on the abdomen.***
>
> **………**
>
> **The prosecution had the opportunity of obtaining the necessary evidence from this witness but there was not much elicited from him and in particular the vital part that would have assisted the court as to the cause of rupture of the spleen. The injury noticed by the widow on her return from Nyahururu was not referred to the doctor."**

16. The rapture of spleen as per medical literature as the one I have referred hereinabove, can be caused by many reasons other than trauma. It can be caused by non-injury which usually results from a disease of the spleen and can in exceptionally rare cases occur spontaneously in the normal spleen. In cases of splenic disease that can potentially lead to rapture include infection, including malaria, cancer malignancy, metabolic disorders, vascular and hematological diseases.

17. 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 death.***
>
> ***(ii) That the accused committed the unlawful act which caused the death of the deceased.***

18. Having considered the evidence so far I am satisfied the prosecution proved the death of the deceased through evidence of PW2 who identified the body of the deceased to PW10 for postmortem purposes, who produced the postmortem Report exhibit P1, confirming the death of the deceased herein. The prosecution also proved the cause of death as per exhibit P1 to have been excessive hemorrhage secondary to raptured spleen., thus the first ingredient of an offence of manslaughter has been proved.

19. The appellants counsel contends the prosecution failed to call crucial and competent witnesses in this matter, in that the prosecution failed to call a witness from the New Nyanza Provincial General Hospital to avail and/or produce medical treatment records of the deceased to show what she was suffering from immediately before her death and further failed to call witnesses from Ambira Hospital to avail to the court medical treatment records of the deceased to shade light on what the deceased was being treated for immediately before her death. In criminal cases the prosecution is required to avail to the court all relevant evidence to enable court make an informed decision based on evidence available. This court is

alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. **Section 143 of Evidence Act (Cap 80) Laws of Kenya** provides:-

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

20. In the case of **Bukenya & Others V Uganda [1972] EA 549** court addressed itself thus:-

> ***"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.***

21. In the case of **Keter V Republic [2007] 1 EA 135** the court held inter alia thus:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

22. The medical officers from New Nyanza Provincial Hospital and Ambira Hospital who were not called featured prominently from the evidence of PW1, PW2, PW4 And PW5. The medical officers from the two institutions were involved in the treatment of the deceased before her demise. The nature of the evidence that the medical officers from the two institutions, it has been stated, would have shown what was the deceased suffering from immediately before her death and what she was briefly treated for immediately before her death. Their evidence would have enabled the court to know the actual cause of the death of the deceased, in view of the wanting evidence from the postmortem Report exhibit P1. The Postmortem Report in respect of the cause of death in this case was barely adequate and as such, in such situation the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution case. The evidence in the instant case was barely adequate and thus Court tends to make an inference that had those witnesses been called and relevant documents availed, they would have been adverse to the prosecution's case.

23. The appellants Counsel M/s. Onsongo, contends further that the prosecution case is riddled with general weaknesses, contradictions and inconsistencies. The appellants counsel submits that the evidence of PW6, Jane Odiala and PW7, Scholastica Aoko Mangongo contradicts evidence of E A O PW8 and PW3 Bernard Oluoch Obwar. PW8 EAO testified that she witnessed the deceased being caned by the 2nd appellant and that night M called her and told her that she was not feeling well as she had been beaten by teachers. PW3, Bernard Oluoch Obwar, testified that he saw the 2nd appellant beating the deceased and later the deceased was taken to the 1st appellant and PW3, heard her crying. PW8's evidence is contradicted by evidence of PW7 who saw the deceased on 9.11.2012 and who testified the deceased was vomiting and she told her she had normal sickness and had problems since form one. PW7 stated the deceased was always having Malaria. PW6 contradicted the evidence of PW8. She testified on 9.11.2012 she, saw the deceased who told her she had been sick and that she had not been beaten or fallen down. PW6 then treated her by injecting her and gave her Panadol.

24. PW10, Dr. Lawrence Shikuku Makokha's evidence, on his findings during postmortem examination contradicts the evidence of PW3 and PW8 in that on external appearance of the body of the deceased, he noted no bruises or fractures nor discoloration of the skin. The doctor did not talk of any fracture. The oral evidence of PW10 also contradicts the entries in the postmortem report exhibit P1 as to the cause of death as he stated in evidence in chief the cause of death is as a result of ***"excessive hemorrhage leading to raptured spleen"*** whereas in his postmortem Report it is indicated as a result of his examination he formed the opinion that the cause of death was ***"excessive hemorrhage due to raptured spleen"*** I have examined the testimony of PW3, PW8 and PW10 and I am satisfied that there

are fundamental inconsistencies and contradictions that dent the prosecution's case. The Appellants Counsel succinctly identified the alleged inconsistencies of evidence of PW3, and PW8 and PW10 which is contradicted by the evidence of PW6 and PW7. The Appellant's Counsel has shown how such contradictions and inconsistencies dent the prosecution's case. The evidence on record support the appellants Counsel that the postmortem Report did not support the alleged beatings of the deceased by the two teachers, the 1st and the 2nd appellants herein as the deceased was sufferings from Malaria as per PW7 and that she was not beaten as she told PW6 nor had she fallen down but she was sick as per PW6 and PW7. I therefore find that the Second ingredient of the offence of manslaughter, thus the accused committed the unlawful act which caused the death of the deceased was not proved beyond reasonable doubt as required in a criminal case.

25. The Appellants Counsel contends that the trial Magistrate erred in law in failing to comply with **Section 169 (1) of the Criminal Procedure Code**. **Section 169 (1) of CPC** provides as follows:

> ***"169. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."***

26. I have perused the trial court's judgment and I have found that the same is signed and dated but it does not contain the point or points for determination, the decision thereon and the reasons for the decision. The trial magistrate after summing up the prosecution and defence case stated as follows:-

> ***"Having considered the entire evidence on record, I find that there was a close contact between the teachers accused persons) herein with the deceased prior to her death."***

27. In the case of a **Francis Kimani Muthoko and Another V Republic (2008) eKLR**.

> ***"This provision is an Act of Parliament. It is clearly mandatory and the word shall is used to demonstrate Parliament's emphasis on what the presiding officer of the court is required to do. We find it difficult to accept Mrs. Murungi's submission that such a requirement can be wished away under the provisions of Section 382 of the same code. In our mind, to do so would mean using provisions of section 382 of the Criminal Procedure Code to whittle down other provisions of the same act which are mandatory into mere irregularities. That could not have been the intention of Parliament."***

28. In the instant case the trial court did not set out the point or points for determination but generally considered the entire evidence on record and made general conclusion on the matter instead of setting out, the point or points of determination, make a decision thereon and give reasons for the decisions contrary to **Section 169 (1) of CPC**. The trial magistrate failed to comply with **Section 169 (1) of CPC** by failling to set out the points of determination, the decision and reasons for such decision. I find as the judgment is dated and signed it is in my view valid judgment inspite of partial compliance with **Section 169 (1) of CPC** as the default in it can be corrected by evaluation and analysis of the evidence on appeal. In this appeal I have evaluated and analyzed the entire evidence and as such I find the failure to comply with **Section 169 (1) of CPC** by the trial Court did not prejudice the appellants as this court has evaluated and analyzed the entire evidence and has come to its own conclusion. The appellants relied on this point in the case of **Francis Kimani Muthoko and Another V R (Supra).** The above case is distinguishable in that the judgment in question did not comply with **Section 169 (1) CPC** in that the trial magistrate's judgment was signed but not dated. However, in the instant case the judgment is signed and dated but the point or points for determination, the decision thereon and reasons for the decisions are lacking. It is for these reasons I find the judgment valid and point out the appellants shall not be prejudiced as in my judgment I have evaluated the evidence and analyzed the same, considered points for determination, made my decision and gave reasons for the same.

29. I find the State Counsel M/s Odumba quite properly conceded the appeal.

30. **The Upshot is that this appeal is merited. The conviction against the 1st and the 2nd appellant is quashed, and sentence set aside. The 1st and the 2nd appellants are set at liberty forthwith unless otherwise lawfully held**.

DATED AND SIGNED AT SIAYA THIS 1ST DAY OF DECEMBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 1ST DAY OF DECEMBER, 2016

IN THE PRESENCE OF:

M/S. ONSONGO FOR ACCUSED

M/S. ODUMBA FOR THE STATE

ACCUSEDS: PRESENT

C.A. 1. K. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE