



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.119 OF 2011

BETWEEN

BENARD REUTA MASAKE APPELLANT

AND

REPUBLIC RESPONDENT

(Being appeal from the conviction of Hon. Roselyne Oganyo, PM and sentence of Hon. B.O. Ochieng, SRM,

dated and delivered on the 8th day of June 2011 in the original Kilgoris SRMCR No.388 of 2009).

JUDGMENT

1. The appellant was charged with the offence of manslaughter contrary to **Section 202** of the **Penal Code** as read with **Section 205** of the **Penal Code** the particulars of which were that between 21st October 2007 and 3rd November 2007 at Olorbosoito area in Transmara District within Rift Valley Province unlawfully killed **Damaris Sempeiyo Kipteng**.
2. The appellant on 31st March 2009 pleaded guilty to the said charges but on 13th May 2009 when the facts were read to him the same stated that they were not correct and therefore a plea of not guilty was entered for the appellant.
3. He was tried, convicted and sentenced to life imprisonment. Being aggrieved by the said conviction and sentence the appellant filed this appeal and raised the following grounds of appeal:-
 1. *The Learned Trial Magistrate erred in law in admitting, relying on and/or taking into (sic) the confession alleged to have been made by the appellant to PW12, (the then D.C.I.O., Transmara District), in finding and holding that the appellant was guilty of the offence charged, in contravention of the provisions of **Section 254** of the **Law of Evidence Act, Chapter 80, Laws of Kenya**.*
 2. *The Learned Trial Magistrate erred in law in admitting, relying on and taking into account (sic) the hand written note, **Exhibit P8**, alleged to have been written by the appellant, in finding and holding that the appellant was guilty of the offence charged contrary to law.*
 3. *In admitting and relying upon the confession and (sic) the hand written note, the Learned Trial Magistrate invoked and relied upon the provisions of the **Law of Evidence Act, Chapter 80, Laws of Kenya**, which had been repealed and hence inapplicable.*
 4. *The Learned Trial Magistrate erred in fact and law in admitting, relying upon the evidence of a Minor **PW7**, without conducting the necessary and statutory inquiry and/or subjecting the evidence of the said minor to exhaustive scrutiny and consideration. Consequently, the Learned*

- Trial Magistrate has occasioned a miscarriage of justice.*
5. *The Learned Trial Magistrate erred in law in failing to heed and/or apply the provisions of **Section 124** of the **Law of Evidence Act, Chapter 80, Laws of Kenya**. Consequently, the conviction of the appellant based on the evidence of the minor, is manifestly unsafe.*
 6. *The Learned Trial Magistrate erred in fact and in law in referring to and relying on the previous proceedings and in particular, the alleged plea of guilty, hitherto rendered by the appellant before Ogembo Senior Resident Magistrate's Court, which proceedings and plea had been quashed and/or discharged.*
 7. *The Learned Trial Magistrate erred in law in finding and holding that the appellant was responsible for causation of the death of the deceased in the absence of any credible evidence or at all, to connect and/or link the appellant to the death of the deceased, whatsoever.*
 8. *The Learned Trial Magistrate erred in law in finding and holding that the appellant was guilty of causing the death of the deceased in the absence of a postmortem report being rendered to court, whatsoever.*
 9. *The Learned Trial Magistrate erred in law in putting undue consideration on the circumstantial evidence adduced by and/or at the instance of the prosecution, without seeking and/or obtaining the requisite corroboration, as by law required. Consequently, the Learned Trial Magistrate misunderstood and misconceived the efficacy of circumstantial evidence tendered.*
 10. *The Learned Trial Magistrate misconceived and/or misunderstood the nature of the appellant's defence, including the plea of Alibi and therefore failed to give due consideration and/or weight to the appellant's defence and thereby arrived at erroneous conclusion.*
 11. *The Learned Trial Magistrate erred in law in failing to consider and/or disregarding the appellant's defence without assigning any reason(s) and/or explanation(s), for such disregard. Consequently, the trial court did not afford the appellant a fair and reasonable treatment.*
 12. *The Learned Trial Magistrate failed to appreciate and address her judicial mind to the burden and standard of proof, in respect of criminal matter and erred in shifting the burden of proof to the appellant, contrary to the established principles of law.*
 13. *The Learned Trial Magistrate failed to cumulatively evaluate and/or analyze the totality of the evidence tendered and consequently, the Learned Trial Magistrate reached and/or arrived at an erroneous conclusion, contrary to the weight of evidence on record.*
 14. *The sentence of the learned sentencing magistrate is illegal and unlawful.*
 15. *The Learned Sentencing Magistrate erred in law in failing to adopt, consider and/or take into account the mitigation by the appellant. Consequently, the sentence meted out against the appellant is manifestly excessive.*
1. At the trial herein Mr. Oguttu appeared for the appellant while Mr. Majale appeared for the state and opposed the appeal.

SUBMISSIONS

2. It was submitted by Mr. Oguttu that the trial court erred in law in convicting the appellant on the basis of an alleged confession by the appellant to Chief Inspector Ali Ndiema who did not testify but which confession was produced by PW12 the DCIO Transmara District who was not the author thereof contrary to **Section 33** of the **Evidence Act** and is therefore null and void. It was further submitted that the said confession was made before a police officer contrary to **Section 25** of the **Evidence Act** as amended.
3. It was submitted that the trial magistrate put undue provision on the evidence of PW7 who was a child of tender age in class three which evidence required corroboration and should have been treated with caution as provided for under **Section 124** of the **Evidence Act**.
4. It was further submitted that when the court ordered for a retrial the earlier plea had been set aside together with all proceedings thereunder and that by relying on those proceedings a miscarriage of justice was occasioned. It was further submitted that the postmortem report was not produced and in the absence of the same there was no proof of death.
5. It was submitted further that the trial court failed to appraise evidence and consider the defence evidence including a plea of alibi which were not considered in the judgment. It was submitted that the trial court failed to address her mind to the contradictions in the prosecution case and

- therefore the trial was not free and fair contrary to constitutional provisions.
6. On behalf of the state it was submitted that the confession was taken before a police officer of the rank of Chief Inspector in conformity with **Section 25A** of the **Evidence Act**. In respect of the evidence of PW7 who was a minor it was submitted that a voire dire was conducted and the court was satisfied that the minor was intelligent enough and that this witness was corroborated by subsequent witnesses.
 7. It was further submitted that the handwriting expert matched the handwriting on note produced as **Exhibit No.8** and matched the same with the appellant. It was submitted that the conviction was not based upon the earlier guilty plea and that the sentenced given to the appellant was legal and justifiable.
 8. This being a first appeal, the court is required to reassess all the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that it did not have the advantage of seeing and hearing witnesses as the trial court.
 9. The prosecution case was stated by 13 witnesses. **PW1 William Lesume Kipteng's** evidence was that he was living with his daughter the deceased who on 20th October 2007 as was her practice left for their rural home for the weekend. On 21st October when she was expected to return she did not. When he inquired from one Alex Sindore he confirmed that the deceased attended church on Saturday. When he went to the school to check, the head teacher called a classmate who confirmed that they were together on Saturday. The appellant who was also a teacher at the said school also confirmed that he was with her in a crusade in Kilgoris town.
 10. When he went back home, his wife told him to check with the appellant once again since he had been seen by small children at the home on Sunday at 10 a.m to give the deceased a cassette. On 30th October 2007 he met one Simeon Ole tipis who informed him that the deceased had gone to his house to ask for a cellphone to call someone in Maasai Mara and he promised to get his cellphone so that he could give him the number of the person she had called.
 11. On 3rd November 2007 he was informed that a letter had been found saying why the deceased had been killed written to him and upon checking therein found the bones, hair and clothes together with skull with teeth in the farm of Regina Mbatiany as was stated in the letter upon investigation by the police the appellant was arrested and under interrogation told the police that he had thrown the deceased's shoes in the toilet and he led the police to recover them together with the cooking fat and vegetables which the deceased was carrying home.
 12. PW1's evidence was corroborated by **PW2 Priscillah Moraa Kipteng** who asked the children at home who informed her that the appellant had gone to her home looking for the deceased and that one of the children J informed her that the teacher who usually wear spectacles had gone to her home. When the body was found she confirmed the clothes the deceased was wearing on the material day.
 13. **PW3 Grace Kipteng** testified that the deceased who was her sister left was told by two minor boys named C aged 9 years and D that the appellant had gone looking for her at 10.00 a.m and asked her to meet him at the nearby posho mill. She stopped eating hurriedly put her clothes and left to Kilgoris where she was living with PW1. She was given cooking fat and cabbages to take to PW1. She was wearing a maroon blouse, black skirt with white open shoes. When the body was found she confirmed the clothes the deceased was wearing on the material day.
 14. It was **PW4 Simon Lemashon Ole Ngome's** evidence that he was the head teacher of Oltanki Primary School where the deceased was a pupil, that on 22nd October 2007 the deceased who was then in class seven had not reported to school. Later that day her father PW1 came to the school to check whether she was in school and that upon checking with other pupils he was informed by one pupil that on 20th October 2007 she had met the deceased on her way to the posho mill and she had asked her whether she had seen the appellant anywhere.
 15. **PW5 Meshack Leteya Kipteng's** evidence was that on 19th December 2007 the police went with the appellant to Oloiborsoito Seventh Day Adventist Church in a police vehicle and he pointed to the church toilet from which they recovered the deceased's open shoes which he recognized. From there he got into the police motor vehicle with the appellant who told them that he killed the deceased because she attempted to deter him from taking poison and that when he blocked her mouth he suffocated her. He then carried the body to the maize farm from where it was found.
 16. **PW6 John Leshoo Kipteng** testified how he organized a search for the body when a letter had

- been picked by the road giving information as to why the deceased had been killed and where the body lay. In the shamba they managed to spot a broken rib. They also noticed a place where there was a lot of blood and natural human hair, they then recovered a dark skirt full of blood and mud, spaghetti top, a maroon blouse and a white petticoat. In the home of the appellant he testified that a bone was recovered near the wall and in the shamba he recovered a skull whose teeth he recognized as the deceased all which were taken to Transmara morgue. He further testified that he was later informed by the DCIO Mr. Toya that the handwriting expert's had confirmed that the appellant had written the note on the death of the deceased and the whereabouts of the body.
17. **PW7 C L** a minor testified that on 21st October 2007 together with one J alias D met the appellant near their home who asked them whether the deceased had come home the previous day when they confirmed. The appellant told them to tell the deceased to meet him at the posho mill. They went home but forgot to tell the deceased. It was his evidence that when they remembered, the deceased was eating. They gave her the information and went away to look after the cattle.
 18. **PW8 Ernest Kisembe Enkerai** testified how on 3rd November 2007 he noticed a white paper near a fence post with a stone on top addressed to pastor Kipteng, he picked it and read the content which shocked him. He thereafter joined the search for the body. **PW9 PC Austine Ohonde** testified how together with **PW10 CIP David Ngokho Simiyu** went to the scene at Olororsoita where parts of the body of the deceased was recovered.
 19. It was PW10's evidence that acting on information he arrested the appellant who confessed confession to the crime and stated that he had removed the shoes the deceased was wearing and dumped them in a pit latrine from where they were recovered. **PW11 Dr. Robert Mutulla** testified that the appellant was examined and found fit to stand trial but was unable to produce the postmortem report prepared by Dr. Albert G. Gathau.
 20. **PW12 CP Samson Thoya's** evidence was that he took over the investigations from PW10 and ordered a postmortem examination which confirmed that the bones recovered were that of female human being. He further took the specimen handwriting to the Chief Document Examiner which confirmed that the appellant was the author thereof upon which the appellant confessed that he was the one who had killed the deceased. The confession was thereafter taken by **CIP Ali Ndiema** in which the appellant stated that he wanted to end his life since he had been left by his girl friend in Mombasa.
 21. He further stated that when the deceased stopped him from taking poison he was up in rage, grabbed her neck and squeezed life out of her. He then carried the body and buried it in a shallow grave. He further confessed that he would from time to time pass there to check until it finally attracted wild animals. Because of guilt he wrote the letter which led to the recovery of the remains of the deceased. **PW13 Asst. CP Emmanuel Kenga** confirmed that he examined the letter and the writing from an exercise book of the appellant and came to the conclusion that they were comperable.
 22. When put on his defence the appellant stated that on 20th October 2007 he was with the deceased and one Paul Korir attending an SDA Crusade in Kilgoris Town and that on 19th October she had requested him for a radio cassette but she did not pass by his place for it. On 22nd October 2007 he met the deceased's father who told him that he had lost a cow over the weekend. At 11.00 a.m he saw him in the school headed for staff room. On 3rd November 2007 as he was preparing to go to church he heard screams he went to the place. On 4th November 2007 he attended a meeting called by the area chief. On 23rd November 2007 the remains of the deceased were buried.
 23. The appellant further testified that on 29th November 2007 he received a call from the DCIO Transmara where he was interrogated on 18th December 2007. He was interrogated by OCS Ali Ndiema and PW12 when he wrote what was not the truth in what they called confession. He further stated that on 19th December 2007 the DCIO called him and said they would go for the shoes from the latrine. He accompanied them on a police land rover and they came out with a shoes to his surprise. He further stated that PW5 was called and he said he did not know of the shoes. On 18th January 2008 he was charged at Ogembo Law Courts and subsequently retrial was ordered on appeal.
 24. In convicting the appellant the trial court had this to say:-

“It is glaringly emerging that nobody saw the accused person actually committing the offence of killing the late Damaris Sempeiyo Kipteng and I find so. The close incident however that link accused to the charges in the evidence before court is that on 21st October 2007 at 10.00 a.m the accused went to the home of the deceased. PW7 a minor known as C L aged nine at the time of taking his testimony was firm that the accused went to their home to seek after the deceased person. The accused also admitted that on 20th October 2007 they were to pass to his house so that the deceased would pick a cassette but that the deceased took long with one Paul Korir of Kilgoris Boys.

..... Secondly he made a confession to PW12 Samson Thoya who was the then Transmara DCIO. The same asked Chief inspector of police and the OCS Kilgoris Mr. Ali Ndiema to take the statement. The same is produced as P. Exhibit 9. The confession tallies with the evidence of PW7 that the accused went to look for Damaris on 21st October 2007”

25. It is then clear that the appellant was convicted on purely circumstantial evidence together with the alleged confession by the appellant to PW12 as recorded by CIP Ali Ndiema. It must be pointed out that the said confession was given to PW10 who being the investigating officer asked CIP Ali Ndiema to record the same. I would therefore agree with submission by Mr. Majale for the state that the confession was properly taken under the provisions of **Section 25A** of the **Evidence Act**.
26. In convicting the appellant the trial court relied upon the principles set out in **Rex -vs- Kipkering Arap Koskei 16 EACA 135** as followed in the case of **Paul Migwi Gethangwa -vs- Republic (2007) eKLR** and therefore find that the trial court properly directed her mind on when the court may rely solely upon circumstantial evidence in reaching a conviction.
27. From the evidence tendered before the trial court I find that the evidence of PW5 Meshack Letaya Kipteng corroborated the evidence of PW12 and that all the circumstantial evidence tendered before the trial court including the evidence of PW7, the recovery of a letter written by the appellant as is confirmed by PW13 the recovery of the deceased shoes and body parts of the deceased and her clothes pointed to the guilt of the appellant.
28. I therefore find that the conviction of the appellant of the offence of manslaughter was safe, the prosecution having proved its case beyond reasonable doubt. I therefore find that the appellant's appeal on conviction lacks merit and is hereby dismissed.
29. On the sentence, **Section 206** provides that any person who commits the felony of manslaughter is liable to imprisonment for life. In sentencing the appellant to imprisonment for life, the court noted that the appellant was a first offender and had mitigation therefore giving the appellant the maximum sentence the court fell into error.
30. Having looked at the evidence tendered and the circumstances leading to the death of the deceased, I would allow the appeal on sentence and having taken into account the appellant's mitigation and his age would reduce the sentence herein to 40 years imprisonment from the date of the judgment of the trial court which I believe is an appropriate sentence herein.
31. In the final analysis I hereby dismiss the appeal on conviction but allow the appeal on sentence which I hereby quash and substitute the same with a sentence of 40 years imprisonment and it is hereby ordered.

Delivered, signed and dated at Kisii this 4th day of February, 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Mr. Majale for the State

Mr. Ochwangi for Appellant