



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.129 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. O. Oluoch (Mrs.) - PM delivered on 26th July, 2013 in Kiambu CM. CR. Case No.428 of 2011)

SIMON NDUNGU MBUGUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Simon Ndungu Mbugua was charged with **manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**. The particulars of the offence were that on 4th March 2011 at Ruaka in Kiambu County, the Appellant unlawfully killed Raymond Kuria Ikere (hereinafter referred to as the deceased). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve eight (8) years imprisonment. He was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised seven (7) grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted when the evidence adduced by the prosecution witnesses had not established his guilt to the required standard of proof. He took issue with the fact that the trial magistrate had failed to properly analyze the evidence before arriving at the decision to convict him. The Appellant faulted the trial magistrate for relying on speculation to convict him in the absence of actual evidence. He was aggrieved that he had been convicted on the basis of evidence with obvious discrepancies, contradictions and inconsistencies. He took issue with the fact that his defence had not been properly evaluated and considered before he was convicted. He was convinced that he had been convicted against the weight of evidence adduced during the trial. He was finally aggrieved that the sentence imposed on him was excessive in the circumstances. Immediately after lodging the appeal, the Appellant was released on bail pending the hearing and determination of the appeal.

During the hearing of the appeal, this court heard oral rival submission made by Mr. G. Kamau for the Appellant and by Ms. Nyauncho for the State. Mr. G. Kamau made submission urging the court to find that the prosecution had failed to establish to the required standard of proof that the Appellant stabbed the deceased causing him to sustain the fatal injuries. He pointed out the inconsistencies in the evidence adduced by the prosecution witnesses. He stated that there was no one who witnessed the Appellant stab the deceased because the incident took place at night. There were signs of a struggle at the scene of crime.

It could not therefore be said with certainty that it was the Appellant who had stabbed the deceased. There were other people at the scene who could have committed the crime. He explained that the dispute between the Appellant and the people who accompanied the deceased was as a result of the road being blocked. In the course of the dispute, the Appellant was robbed of Kshs.10,000/- and was injured. He submitted that there was no evidence which connected the Appellant with the deceased. The Appellant's clothes were analyzed by a government chemist and found not to contain any bloodstains from the deceased. He urged the court to consider the circumstances in which the deceased was stabbed and reach an appropriate finding that it cannot be said that it was only the Appellant who could have committed the crime. He submitted that there was contradictory evidence by the prosecution witnesses in regard to what actually happened at the scene of crime. He urged the court to allow the appeal in view of the inconsistencies in the prosecution's case.

Ms. Nyauncho for the State conceded to the appeal. She submitted that the investigating officer had not carried out proper investigations. The knife that was used to stab the deceased was not dusted for fingerprints. There was contradiction between the evidence of prosecution witnesses who were at the scene. She was of the view that some of the evidence adduced by the prosecution witnesses supported the position taken by the Appellant in his defence which was to the effect that there was a scuffle between the deceased and the Appellant. She submitted that it was the Appellant who first made the report of the incident to the police. She stated that the trial court placed emphasis on evidence which was not germane to the real issues in controversy. She also took issue with the fact that the trial court dismissed the Appellant's defence without ascribing any reason for doing so. She urged the court to allow the appeal.

This court, as the first appellate court, is required to look afresh at the evidence adduced before the trial court before arriving at its independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard (See **Okeno -vs- Republic [1972] EA 32**). In the present appeal, the main issue for determination is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **manslaughter** contrary to **Section 202** as read with **Section 205** of the **Penal Code**.

This court has carefully re-evaluated the evidence adduced by the prosecution witnesses and the defence offered by the Appellant in the trial court. The court has also considered the grounds of appeal put forward by the Appellant and the submission made by his counsel and on behalf of the State. There are two (2) versions that emerged during trial in regard to what transpired on the night of 4th March 2011. The first version is by prosecution witnesses. PW1 Richard Mutonga Munyui, PW2 Stephen Kamande Munyui and the deceased were travelling in motor vehicle registration No.KBH 456 X. PW1 had requested PW2 to escort him to the barrier at the gate of Rosslyn Estate which was manned by security guards. PW2 knew the guards hence the request. PW1 and PW2 were accompanied by the deceased. The deceased had asked to be given a lift. PW1 and PW2 testified that when they were about to reach the barrier, they saw an oncoming motor vehicle. It was a small van.

PW1 testified that it was about 7.40 p.m. at the time. He drove his motor vehicle to the extreme left of the road. The oncoming motor vehicle did not get out of the road. PW1 reversed his motor vehicle for some distance. The oncoming motor vehicle still drove in the middle of the road. PW1 stopped the vehicle. He got out of the vehicle and confronted the driver of the other vehicle. PW2 recognized the driver of the other motor vehicle as the Appellant. He referred to the Appellant as his neighbour, Simon Mbugua. PW1 left the motor vehicle and went to the nearby shop to buy a soda. Meanwhile according to PW2, a quarrel ensued between himself and the deceased on one hand and the Appellant on the other. After a short while, he heard the deceased scream that he had been stabbed. PW2 saw that indeed the deceased had been stabbed in the abdomen. A knife was protruding from his abdomen. PW3 Martin Rugendo was at his home at Ruaka on the material evening. At about 7.30 p.m., he heard a commotion from the road. He heard someone scream. He went to investigate and found a man writhing on the ground with a knife sticking from his abdomen. According to PW2, the Appellant entered his motor vehicle, reversed it and drove away from the scene. PW1 and PW2 drove the deceased to Avenue Hospital where the deceased was pronounced dead on arrival. Arrangements were made to take the body of the deceased to the mortuary. They went to report the incident at Parklands Police Station. They were

accompanied by PW3.

PW4 Samuel Munyui Kamau, testified that on the night of 4th March 2011 at about 8.30 p.m., he was called by PW2 and told to go to Parklands Police Station. At Parklands Police Station, he was informed that the deceased had been stabbed and succumbed from his injuries. He testified that upon receiving the information, they decided to go to Avenue Hospital to collect a letter from a doctor to certify that the deceased was dead. At the hospital, they found the Appellant's motor vehicle parked outside. They informed the police. The police arrived at the scene. When the Appellant saw the police, he tried to drive away. He hit the motor vehicle that PW4 was being driven in. After a chase, they found the Appellant at Muthaiga Police Station. He was arrested and detained at the police station.

The version of the Appellant is that on the material night as he was driving through Rosslyn Estate near the gate on the Ruaka direction, he saw a motor vehicle flashing at him. He drove on. The motor vehicle followed him. When they reached at a narrow road, the two motor vehicles stopped. PW2 came out of the motor vehicle and started hurling insults at him. There was a scuffle. He was hit with a blunt object. He fell to the ground. He realized that if he did not take action, he would be overwhelmed. He struggled to free himself and managed to get into his motor vehicle. He reversed the motor vehicle and drove off. He made a report to Gigiri Police Station that he had been attacked. He told the court that in the course of the attack, the rear windscreen of his motor vehicle was damaged. He also lost Kshs.10,000/-. He drove to Avenue Hospital for treatment. While at the hospital, he rang PW5 Joseph Ng'ethe to take him money so that he could pay the consultation fee. When he reached the hospital, he did not find the Appellant. The Appellant then called him and informed him that he was at Muthaiga Police Station. He went to Muthaiga Police Station and found the Appellant. The Appellant's hair had grass and his shirt was dusty. The Appellant produced medical treatment papers from Avenue Hospital. A P3 form produced indicated that the Appellant had sustained mainly soft tissue injuries around his neck, on his back and on his hands. The injuries on his hands were multiple and consisted mainly of thorn pricks. The P3 form was produced by DW2 Richard Munene, a clinical officer based at Karuri Health Centre.

Post-mortem was performed at Chiromo Funeral Home on the body of the deceased by PW6 Dr. Peter Ndegwa. He observed a penetrating stab wound on anterior abdominal wall 3 cm long with a thrusting effect. Internally, the abdominal aorta had been severed. There was blood in the abdominal cavity amounting to three (3) litres. He formed the opinion that the cause of death of the deceased was due to excessive bleeding caused by the abdominal injury.

The thrust of the Appellant's appeal is that no one saw him stab the deceased and therefore it was wrong for the trial court to convict him. PW2, who was at the scene at the material time, did not see the Appellant stab the deceased. However, he testified that the Appellant, his neighbour, got out of the car when the two motor vehicles were being driven on a narrow road. From PW2's testimony, it was apparent that the Appellant was not prepared either to give way or drive his motor vehicle in such a manner as to allow passage to the motor vehicle being driven by PW1. There was an altercation between PW2, the deceased and the Appellant. From the evidence adduced by both the prosecution witnesses and the Appellant, this court finds that there was a scuffle between the Appellant and the deceased. The Appellant and the deceased fell to the ground. PW2 heard the deceased cry that he had been stabbed. The Appellant fled from the scene. PW2 saw that indeed the Appellant had been stabbed in the abdomen. There was a knife sticking from the abdomen. He was rushed to hospital but succumbed to his injuries before he could be attended to.

Although the Appellant denied stabbing the deceased, the evidence adduced by PW1 and PW2 clearly shows that he was the aggressor. He provoked the situation by refusing to give way. He confronted PW2 and the deceased. A scuffle ensued. The deceased was stabbed causing him to sustain fatal injuries. There was no evidence to suggest that either the deceased or PW2 was armed with a knife. This court reaches a finding, by circumstantial evidence, that it was the Appellant who was armed with a knife and therefore stabbed the deceased during the scuffle. There was no one else at the scene other than the Appellant, PW2 and the deceased. This was a case of road rage that clearly got out of hand. Although the State conceded to the appeal, this court re-evaluation of the evidence adduced before the trial court clearly points to the Appellant and no one else as the perpetrator of the offence. The explanation he gave in his

defence did not exonerate the Appellant from the crime. He was the one who stabbed the deceased. In the premises therefore, the appeal lodged by the Appellant against conviction lacks merit and is hereby dismissed.

On sentence, this court will consider the appropriate sentence to be meted upon the Appellant after obtaining a report from the probation. This matter shall be mentioned on 22nd June 2015 to receive the Probation Officer's report. The report must include views from the family of the deceased. The bail pending appeal granted to the Appellant is hereby extended. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF JUNE 2015

L. KIMARU

JUDGE