REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 29 OF 2014

KATUKU KWARYA ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Criminal Court at Mwingi No. 438 of 2012 of the Principle Magistrate Court at Mwingi).

J U D G M E N T

The appellant was charged in the subordinate court with manslaughter contrary to section 202 as read with 205 of the penal code. The particulars of the offence were that on 18th July 2012 at Kyethani Village in Mwingi District within Kitui County unlawfully killed Muthui Kitheka. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 4 years imprisonment.

Dissatisfied with the decision of the trial court the appellant filed the present appeal, through his advocate Mulinga Mbaluka and company on the following grounds:-

1. The learned trial magistrate erred in fact and law by failing to acknowledge that the appellant did not commit the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code.

2. The learned trial magistrate erred in fact and law by failing to appreciate the appellants defence.
3. The sentence on the appellant is harsh and excessive.
4. The learned trial magistrate erred in fact and law when he failed to appreciate the evidence of the defence.
5. The learned trial magistrate misdirected himself in both facts and law when he failed to make a finding in the prosecution evidence was contradictory and could not have sustained the charge against him.
6. The learned trial magistrate erred in facts and law when he failed to record the medical evidence leading to the cause of death and generally by disregarding the cause of death.
7. The decision of the learned trial magistrate was against the weight of the evidence.
8. The learned trial magistrate erred in law and facts when he considered extraneous matters not in the evidence to sentence the appellant.

The appellant through counsel also filed written submissions to the appeal. On the hearing date Mr. Nyaga who appeared for the appellant adopted the written submissions. I have perused and considered the said written submissions.

Mr. Orwa the learned prosecuting counsel opposed the appeal. Counsel submitted that key issues

had been articulated by the trial court in the judgment. Counsel urged this court to uphold the judgment of the trial court.

At the trial the prosecution called 13 witnesses. PW1 was Rose Mwikali the mother of the deceased. It was her evidence that the deceased was a Std 6 pupil aged 16 years. That on 5th of July 2012 at 6.00 Am the deceased and other children proceeded to school. In the evening she came home and asked other children of the whereabouts of the deceased and they informed her that he was in bed and had complained that he had been beaten or assaulted by the appellant. They slept until the next day and she asked the deceased to go to school but he refused. She persuaded him but he walked slowly with the assistance of a stick. They went to the school and the appellant admitted beating the deceased. The mother then took the deceased to the dispensary where they met the Chief and the Headmaster. They then went back to the school and met the Headmaster and the appellant. The appellant admitted canning the deceased but stated that he did not know about the serious injuries. On the 8th of July 2012 she took the deceased back to the dispensary and the doctor stated that he suspected internal injuries and advised that she takes him for x-ray examination. When the father of the deceased came home from Nairobi, he took the deceased to the hospital on 16th July and he was treated for malaria. On 18 July however the deceased died after complaining of severe waist and head pain. They thus took the deceased to the mortuary. In cross examination she stated that the appellant was her cousin.

PW2 was Alexander Kitheka Kovai the father of the deceased. It was his evidence that he did casual work in Nairobi. That he was called on phone and informed that his wife needed Kshs 500/= to take the deceased to hospital. He sent the money but continued receiving calls that the deceased was not getting better. He was also informed that the deceased had been assaulted by a teacher. He thus came back home, took the deceased to the hospital but on 18th July the deceased died after vomiting. He identified the deceased for post mortem examination. According to him the doctor said that the kidney of the deceased had been affected and that there was slow brain hemorrhage which caused the death.

PW3 was Ndannu Musyoka a minor of 13 years. She stated that she schooled with the deceased and on 5th July 2012 at 2.00 Pm they were divided into groups for discussion. The children however started to read the Bible in kikamba language and a fellow student went and reported them to the appellant who came, questioned the pupils and canned some five pupils including the deceased for talking in vernacular.

PW4 was Violet Munyithia also a minor aged 13. She also stated that the deceased and others were reading the Bible in Kikamba language. This witness went and reported to the appellant who came and canned the culprits including the deceased.

PW5 was Kasyoka Juma also a minor aged 13 in Std 7 at Kyethani Primary School. He stated that he was in the same group with the deceased and the appellant canned the pupils for using vernacular language.

PW6 was Ndila Nyamai. She stated that she witnessed the caning and that she was also canned by the appellant. She stated that the Chief later came and told them not to be afraid to say the truth.

PW7 was Gideon Mulwa Mutambu the then Headmaster of Kyethani Primary School. He stated that on the 19th of July 2012 the Chief went to his office and reported the death. He reported the death to the Education Office. That on 23rd July 2012 the Chief came and addressed Std 7 pupils. That the next day he received a report that the parents of the deceased had offered pupils Kshs 200/= to record statements.

PW8 was PC Jackson Kaluma. He recorded statements from witnesses. He also witnessed post mortem examination of the deceased.

PW9 was PC Tony Akungu. He stated that on 19th July 2012 he visited the scene of sudden death and found a body in the house on a mattress which was on the floor. He noted a little bleeding on the nose. He took the body to the mortuary.

PW10 was Peter Mulonzya Kimanzi. It was his evidence that on 9th July 2012 he received a report from Mutysia Kalumbu that there was a beating of a pupil. As the chief he proceeded to the dispensary and saw the mother queuing at the dispensary. The mother gave him a story of the beating and he advised her to take the child for x-ray. On the 18th July 2012 the father of the deceased reported that the child had died. He thus called the OCS and the DO and informed them of the incident. He stated in cross examination that no formal complain was made to him. He also stated that he visited the school and entered class 7 and addressed the pupils in the presence of the police. He denied an allegation that the appellant had disagreed with him because of a complain of misuse of relief food.

PW11 was Police Constable Daniel Talamu. He was the Investigating Officer. He recommended the charge of manslaughter though there was pressure from Human Rights groups to charge the appellant for murder.

PW12 was Dr. Geoffrey Muthama a Private Pathologist. It was his evidence that the family requested him and 26th July 2012 he conducted a joint post mortem examination on the deceased with Dr. Nyambati of Mwingi. He noted hemorrhage in the brain. That was the cause of death. The bleeding was 3 days old and was caused by a blunt object or falling or traffic accident. He stated in cross examination that he noted bruises on the lower back and legs but those could not have caused the death.

PW13 was Hellen Wambui a nurse. It was her evidence that she had the possession of the register and records which confirmed that indeed the deceased attended medical treatment. The entries were however done by another officer Mr. Frank Leni.

When put on his defence the appellant gave sworn testimony. He stated that on the 5th of July 2012 he did not have any dealings with the deceased. That on 19th July 2012 while at the school he was summoned by the Headmaster and asked about the alleged in incident. He was later told that the chief had incited people at the market against him. He also heard on Musyi FM in the evening that he was being sought. He had to hide at home as he received many threats to his life. On 23rd July 2012 he reported the threats at Mwingi Police Station. He was told to report later and on 26th July 2012 when he reported to the police station he was arrested. In Cross Examination he stated that the threats were from the father of the deceased.

He called 3 witnesses. DW2 was Conelius Kasamu Mbao the Deputy Headmaster of the School. It was his evidence that on 5th July 2012 the appellant had

no lessons in class 7. He did not know the attendance of the deceased in school between 5th and 19th of July 2012.

DW3 was Josephat Ngui Musili who was also a teacher at the school. He stated that on 5th July 2012 he was with the appellant and that no canning took place as that punishment had been outlawed.

DW4 was Stanley Maina Kiema the new Headmaster of Kyethani Primary School since May 2013. He testified regarding the log book entries in the school. He stated that there was no record about the canning in that log book. He also stated that the school punishment was through guidance and counseling.

Faced with the above evidence, the trial court found that the prosecution had proved their case against the appellant beyond reasonable doubt. He was thus convicted and sentenced.

This is a first appeal. As a first appellate court I am duty bound to evaluate all the evidence on record and come to my own conclusion and inferences. I have to take in mind that I did not see witnesses testify to determine their demeanor.See the case of Okeno –vs- Republic (1972) EA 32.

I have re-evaluated the evidence on record both for the prosecution and the defence. The prosecution version is that the appellant canned some students including the deceased. The defence version is that no such canning did occur. The corporal punishment in school had been banned. The defence also said that the pupils who testified about the canning were bribed by the parents of the deceased to testify against the

appellant. That it was the chief who had a grudge against the appellant and wanted to fix him.

Having considered all the evidence on record, I find no reason why school children aged 13 years would gang up to lie against their school teacher. Their evidence does not seem to be connected at all with any grudge that might exist between the appellant and the chief. One might ask why these children will just implicate the appellant and not any other teacher in their school. In my view other than minor differences of details, the evidence of the school children was consistent and corroborative. They tendered evidence on oath and were cross examined. In my view though corporal punishment might have been banned in school, the evidence on record shows that the appellant actually canned some students including the deceased for talking in vernacular language. I agree with the finding of the trial magistrate on the canning.

The appellant was convicted of the offence of manslaughter. The conviction means that the death of the deceased was traceable to his assault on the deceased. The medical evidence is to the effect that the cause of death was internal bleeding in the head. Such bleeding, according to the medical evidence occurred within 3 days before the death. In my view the death of the deceased cannot be traced or connected with the canning. The doctor's evidence was clear that the assault or injuries found on the buttocks could not have caused the death. There is no evidence that the appellant pushed the deceased and caused him to knock any blunt object with his head. There is no evidence that the deceased fell and injured his head when he was being caned. In my view what the appellant committed was an offence of simple assault causing actual bodily harm contrary to Section 251 of the Penal Code. That is what the prosecution managed to prove with the evidence they tendered. I will thus quash the conviction for manslaughter and substitute therefore a conviction for the offence of assault causing actual bodily harm.

As for sentence, the offence of manslaughter has a maximum sentence of life imprisonment. The offence of assault causing actual bodily harm has a maximum sentence of five years imprisonment. The appellant was sentenced to serve 4 years imprisonment for manslaughter. This was after a probation report was tendered in court. In my view since the appellant has already served the sentence imprisonment, I will order that the sentence be that already served by him.

Consequently, I quash the conviction for manslaughter and substitute therefore a conviction for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. I set aside the sentence imposed and order that the appellant do serve the sentence already served at the date of this judgment. In effect the appellant will be released from custody forthwith unless otherwise lawfully held. Orders accordingly.

Dated and signed at Garissa this 14th July 2015.

GEORGE DULU

JUDGE