



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 81 OF 2013

GEORGE OCHIENG' OLAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of R.M Oanda (Ag.PM) in Ukwala Criminal Case No.27 of 2011)

J U D G M E N T

The appellant herein was charged with manslaughter contrary to section 202 as read with section 205 of the penal code. The particulars of the charge were that on the 30th day of May, 2010 at Ngunya Sub-location, in Ugenya District, within Nyanza Province, unlawfully killed Margaret Atieno Olaka (hereinafter referred to as the deceased).

It was the prosecution's case that on 30th May 2010 at about 1.00pm, the appellant herein went home with some meat. There was a quarrel between the appellant and the deceased who was his step-mother about food, as a result the deceased cut the appellant with a panga and the appellant retaliated with a jembe. She sustained injuries on her face and head, was rushed to hospital, treated and discharged, but later passed on.

The prosecution called four witnesses in support of its case. At the close of the prosecution case, the appellant was placed on his defence. He chose to give sworn evidence and did not call witnesses.

The trial court after analyzing all the evidence tendered before it found the appellant guilty as charged and sentenced him to 15years imprisonment. Being aggrieved by the judgement and sentence, he filed this appeal on the following grounds;-

1. that the learned trial magistrate erred in both law and facts by failing to take into account that no eye witness was availed to affirm the prosecution;
2. that the learned trial magistrate erred in both law and facts by reaching a verdict without exhibits being presented before the honourable court; and
3. that the trial magistrate failed to properly evaluate the entire evidence presented in court.

Being a first appeal, this court is mandated to analyse, reconsider and re-evaluate the evidence tendered before the trial court and arrive at its own independent conclusion while keeping in mind that the trial court had the advantage of hearing the witnesses and assessing their demeanour (**OKENO –VS- REPUBLIC (1972) EA 32**) .

PW1 (Vitalis Olaka Omondi) is the father to the appellant and the deceased's husband. He testified that on the material day at about 11.00 am as he was having a meal inside his house the appellant came home from church with some pork which he begun to prepare. The appellant and the deceased then differed over food, whereupon the deceased picked a panga and cut the appellant on the head. The appellant retaliated with a jembe and hit her on the face near her nose. The deceased fell and the appellant disappeared. The deceased was taken to hospital and discharged. She passed on later that night.

PW3 (Peter Musinga Olego) is the brother to the appellant. He testified that on the material day he got back home from church at about 4.00pm when he found both his mother (the deceased) and his brother (appellant). His mother had been cut on the right side of her face. He gave the appellant money to go for treatment and took the deceased to hospital where she was treated and discharged. She later died at home after about 20 minutes.

PW4 (Annette Metho) is the medical officer who conducted the post mortem on the deceased at Siaya District hospital. She testified that the deceased had cut wound on the face, extending from the nose to the right cheek, which was about 15cm in length. There was another cut on the forehead about 3cm. After the examination, she concluded that the cause of death was as a result of massive bleeding following the assault.

It was evident that the deceased died from massive bleeding from the injuries she had sustained. PW1's testimony was that he was present when the appellant caused the injuries to the deceased. The deceased was the appellant's step-mother and wife to PW1. PW3 was the appellant's brother. He came home to find both the deceased and the appellant here. Each had injuries. He gave money to the appellant to go for treatment as he took the deceased to hospital. The deceased died on the same day. PW1 and PW3 were related to the appellant and had no reason to frame the appellant. The trial court accepted their evidence. It meant that the claim by the appellant that he was not at the scene at the time of the injury was not true.

According to PW1, it was the deceased who first attacked the appellant by cutting her with a panga. He reacted by hitting her with a jembe. The act of retaliation was unlawful. The deceased died from the injuries sustained in the attack. The trial court was right in finding that the appellant was guilty of manslaughter as charged under sections 202 and 205 of the Penal Code. The appeal against conviction is not allowed.

The appellant was sentenced to serve 15 years in jail. The offence attracted a maximum penalty of life imprisonment. This court can only interfere with the sentence if it is evident that the trial court acted upon some wrong principle or overlooked some material facts or if the sentence was manifestly harsh or excessive in the circumstances (**WAGUDE .V. REPUBLIC [1993] KLR 569**).

The disclosed facts were that the deceased and the appellant disagreed over food. The appellant was complaining that the deceased, his step-mother, was mistreating him. The deceased took a panga and cut him on the head. This is when he picked a jembe and struck her. This was a family dispute in which the deceased was the aggressor. That was 16/12/10 and sentence was on 13/6/13. All that time the appellant was in custody. The trial court indicated that it had taken that period in consideration. However, given all these facts the sentence of 15 years was still excessive. I reduce it to a period of seven (7) years in jail.

Dated, signed and delivered this 10th March, 2014.

A. O. MUCHELULE

J U D G E