



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT EMBU**  
**CRIMINAL APPEAL NO. 81 OF 2013**

**BETWEEN**

**DAVID KIAMATI JESSE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 1343 at Chief Magistrate Court at Embu, Hon. M. Wachira, CM delivered on 11<sup>th</sup> December 2013)*

**JUDGMENT**

1. The appellant was one of the two people charged with unlawfully causing the death of Jamleck Njiru (“the deceased”) on 11<sup>th</sup> August 2009 at Nguru Village Gachoka Sub Location within Mbeere District contrary to **section 202** as read with **section 205** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The appellant was convicted of manslaughter while the 2<sup>nd</sup> accused was found guilty of the lesser offence of assault contrary to **section 251** of the ***Penal Code***. The appellant was sentenced to 10 years imprisonment and his co-accused sentenced to 2 years imprisonment. The appellant appeals against the conviction and sentence.
2. The State has conceded the appeal on the ground that there was insufficient evidence to sustain the conviction against the appellant. Ms Ing’ahidzu pointed to the fact that there were contradictions in the evidence of the principal witnesses who witnessed the felonious act. She also drew the court’s attention to the medical evidence of the pathologist whose testimony did not clearly establish the cause of death. Thirdly, she submitted that the trial Magistrate relied on hearsay to convict the appellant.
3. The duty of the first appellate court is to examine the evidence afresh and re-evaluate it and come to an independent conclusion bearing in mind that it did not see or hear the witnesses (See ***Okeno v Republic [1972] EA 32***).
4. The prosecution called ten witnesses to prove its case. The evidence of the eye witnesses PW 1 and PW 2 was as follows. PW 1 testified that on 9<sup>th</sup> August 2009 at about 8.00 pm, there was a fight between the 2<sup>nd</sup> accused and the deceased in which he intervened and separated the two. He testified that they were struggling over a whip. PW 1 then tried to persuade the deceased to go home but the deceased threatened to beat him too. PW 1 then left and went to the appellant’s home where they started drinking traditional brew. The deceased came and started abusing the appellant and threw stones at him. PW 1 stated the appellant took a burning piece of wood from the fire place and hit the deceased with it causing him to fall. He stated that the appellant then

- dragged the deceased to the road which was about 15 metres away. PW1 then left and the next time he saw the deceased was on 10<sup>th</sup> August 2009 at his home where the deceased looked unwell.
5. PW 2 testified that on 11<sup>th</sup> August 2009, he was at Iringa Dam when the deceased arrived and started beating and attacking people. He also attacked the 2<sup>nd</sup> accused. PW 2 was at scene at the appellant's home when the deceased appeared naked and started abusing the appellant. He saw the appellant hit the deceased with the log.
  6. PW 3, the deceased's wife, testified that on 11<sup>th</sup> August 2009, the deceased came home drunk with a burn on his neck and he told her he had been beaten by the appellant and his co-accused. On 18<sup>th</sup> August 2010, she accompanied him to the Police Patrol Base on account of summons issued as a result of a complaint filed by the appellant. During this period the deceased was unwell. He was admitted to Embu Provincial Hospital on 25<sup>th</sup> August 2010 and he passed away on 26<sup>th</sup> August 2010.
  7. PW 10, the pathologist who conducted the post-mortem, identified the "*extensive abrasion on the upper back*" as one of the injuries the deceased suffered. He however found the cause of death to be chronic subdural haemorrhage, which was an injury to the head compressing the brain.
  8. The learned trial magistrate concluded that the deceased was beaten in a fight with the appellant at the appellant's home and in another fight with the 2<sup>nd</sup> accused and that the deceased in those fights sustained injuries that led to his death. As regards the medical evidence the Learned Magistrate stated as follows; "*From evidence of doctor, whip marks/abrasions were in process of healing. The whip marks were not a direct cause of death. Doctor opened the deceased's skull and found he died of chronic subdural haemorrhage. I find this was caused by the impact of the 1<sup>st</sup> accused hitting deceased's head with a piece of firewood. Even though the defence contention is that haemorrhage may take long to show there is no evidence from defence that deceased suffered head injuries before 11<sup>th</sup> August 2009 when he was beaten by the accused persons. The evidence of PW 1 that accused 1 hit deceased with the wood on the head is uncontroversial.*"
  9. The main issue for determination in this appeal is whether the appellant's unlawful act caused the death of the deceased. The medical evidence was crucial in proving the prosecution case because the evidence of PW 1 and PW 2 confirmed that the deceased had been involved in several fights prior to his death and it was necessary to connect the act of the appellant to the death. The post-mortem report confirmed that the deceased had multiple healing external injuries which led to confirm that the deceased had been involved in various fights. The Learned Magistrate concluded that the appellant hit the deceased on the head. However neither PW 1 nor PW 2 testified that the deceased was hit on the head. The post mortem report did not disclose any external injuries or scalp injuries or skull borne fractures. The doctor concluded that the cause of death was "*chronic subdural haemorrhage*". PW 10 testified that a chronic subdural is a slow leakage of blood which can take up to a month before someone complains.
  10. The evidence of the prosecution established that in fact, the deceased had been involved in several fights prior to his death. There was no evidence that the deceased was hit on the head as a result of which he died as the Learned Magistrate concluded. Moreover, the deceased may have died as result of a chronic condition which pre-dated the incident the appellant was accused of. In light of the evidence and taking into account the time the deceased died after the injuries were inflicted, it is not possible to conclude beyond reasonable doubt that the appellant was guilty of manslaughter.
  11. The appellant's conviction cannot be sustained. The appeal is allowed and consequently the conviction and sentence is quashed.

**SIGNED at NAIROBI**

**D.S.MAJANJA**

**JUDGE**

**DATED and DELIVERED at EMBU this 9<sup>th</sup> day of May 2014.**

**H. ONG'UDI**

**JUDGE**