



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 561 of 2011

SEBASTIAN OGANDA ARUM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Criminal Case number 374 of 2010 of the Senior Principal Magistrate's Court at Ukwala)

### J U D G M E N T

The appellant herein was charged with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal code. On 26-8-2010. The particulars are that on the 5<sup>th</sup> day of August 2010 at Anyiko sub location, East Ugenya location in Ugenya district within Nyanza province unlawfully killed **Kevin Oduma Okulo**.

The appellant was convicted and sentenced to life imprisonment. He has appealed citing 14 grounds as per his supplementary petition of appeal namely:-

- 1. That the learned trial magistrate failed to appreciate each of the elements of the charge facing the applicant and therefore reached a bad and unreasoned decision by convicting the accused when the accused was arrested on 30<sup>th</sup> July 2010 and charged on 2<sup>nd</sup> August 2010, three days before the offence which was allegedly committed on 5<sup>th</sup> August 2010.**
- 2. That the learned honourable magistrate erred in law and fact by convicting the appellant on finding fact which were distorted and misconstrued in that they were based on no evidence on record tendered by any of the prosecution witnesses.**
- 3. That the learned honourable magistrate erred in law and fact in dismissing the defence offered by the appellant as an after thought and failing to consider the evidence of DW2 at all.**
- 4. That the learned trial magistrate erred in his evaluation of the probative value of the evidence before him by giving undue weight to some facts which were adequately traversed by the accused while ignoring other important and potent facts which were not traversed at all and which**

**exonerated the applicant from the said charge.**

- 5. That in the premises the finding of facts by the honourable learned magistrate were based on a misapprehension of the evidence.**
- 6. That the learned honourable magistrate erred in fact and law by failing to appreciate and hold that the inconsistencies, flaws, contradictions and gaps in the testimony/evidence of the prosecution witnesses raised more than reasonable doubt that the appellant was never involved in the commission of the offence.**
- 7. That the learned honourable magistrate erred in law and fact by failing to appreciate that given the numerous factual evidential misconstructions the appellant was never accorded a fair trial and therefore the decision of the honourable court was not tenable.**
- 8. That the learned honourable magistrate erred in law and fact by failing to find that the prosecution had failed to call critical/crucial competent and compellable witnesses such as Osolo, who PW1 said saw everything.**
- 9. That the learned honourable magistrate erred in law and fact by failing to resolve the numerous material contradictions and inconsistencies in the prosecution evidence in favour of the appellant.**
- 10. That in the premises, the honourable learned magistrate erred by treating the appellant and his case with a bias skewed mind.**
- 11. That judgment was contrary to the weight of the evidence before the learned magistrate.**
- 12. That the learned magistrate erred in law by convicting the accused when his rights to be presented before court within 24 hours was violated.**
- 13. That the sentence is harsh, vindictive and excessive given the nature of the offence and charge and given the fact that the accused was a first offender.**
- 14. That the decision by the honourable court is not supported by evidence and is incurably defective.**

This being the first appeal this court is bound to look carefully on the

evidence adduced at the trial in the lower court with a view of coming into a fresh and independent finding.

**PW1 Auma Ayieko Okweyu** told the court that on 5-8-2010 at around 1 p.m. she was at home. Some young girls came to collect firewood. The deceased was also present. In the course of time a dispute regarding firewood ensued between the deceased and a lady called Jane. Within a short time the accused according to PW1 came with a jembe and a rungu he hit the head of the deceased with the rungu as well as the chest. The accused then ran away.

They then went to Segwa police. Jane was also present. The police advised them to take the deceased to hospital. They went to a provincial hospital. Later they took the deceased to Busia hospital but died the next day. This was on 11-8-2010.

**PW2, Dr. Simon Kapchanga** did the postmortem on the deceased body. According to him the cause of injury was a blunt object.

**PW3 P.C Enock Kosgei** recorded the report from the deceased of having been assaulted by Sebastian. He advised him to seek treatment. At the same time a lady by the name Jennifer reported that he had been assaulted by Kevin. He also advised her to go and seek treatment.

He later went to the scene where the two had either fought, that is the deceased and Jennifer.

**PW4 Sarah Anyango Asango** and **PW5 Colleta Akinyi Okwara** are the two girls who were fetching firewood. Of great significance in that evidence is that there was a quarrel between the deceased and Jennifer. They left when the quarrel had just started. They however, did not see the deceased fighting with the appellant.

**PW6 Stephen Omondi Onyango** is a neighbour of the deceased. He witnessed the postmortem being done on 16-8-2010.

When put on his defence, the appellant gave unsworn evidence. He denied the charge and said that Kevin the deceased gathered the firewood from the two children. His argument was that he has been framed. They intended to take his land. He further contended that the key witnesses have not been called.

His witness **DW2 APC Emmanuel Korir** testified having recorded information for one Jennifer on 5-8-2010 of having been assaulted by the deceased. She was with two young girls. At the same time the deceased with her mother complaining also that he has been assaulted. Later he testified that the appellant brought a complaint of his trees being cut on his land. They planned to arrest the deceased but unfortunately he succumbed to the injuries.

The appellant's counsel argued that there was a mistrial. The appellant was not provided with the witness statements and the relevant exhibits to be relied on by the prosecution. I have perused the entire proceedings and indeed there was no such request by the accused person.

On this ground the state conceded. Before commencing on this there is need to analyze the evidence on record. PW1's evidence I am afraid does not come out very clearly to implicate the appellant.

I am unable to comprehend the sequence between the girls fetching firewood, the coming in of Jane whom I suppose is Jennifer and the appellant.

The question that did not come out very well and the prosecution failed to address is at what point did the appellant hit the deceased? Who was the deceased quarrelling with?

From the evidence of PW3, PW4 and PW5 there seemed to have been a quarrel between Jennifer and the deceased.

Further, PW3's evidence states that he received the complaint on 7-8-2012 at 9.45 hours yet the n it appears that PW1 made the report on 5-8-2010. DW2 equally recorded the report on 5-8-2010 and not 7-8-2010.

I do therefore find that there is material contradiction on the part of the prosecution case. The evidence adduced are totally inconsistent. It is not the duty of the appellant or defence to add value to the prosecution's case. Criminal cases as they are, must be proved beyond any shadow of doubt.

Turning now to the issue raised by the appellant and conceded to by the state, it is true that the appellant was not accorded the statements as required now in all criminal trials. I am fortified by Article 50 of the Constitution which demands a fair hearing to all the parties that are brought before court or any kind of tribunal. Section 50 (2) (c) thereof states:-

**“(2) Every accused person has a right to a fair trial which includes the right:-**

**(c) To have adequate time and facilities to prepare a defence”.**

As much as the appellant was unrepresented the trial court's duty by all means has to provide the statements and any other items to be relied upon by the prosecution so as to avoid any element of surprise to the accused person. The intention of the legislature was to ensure a fair trial and to put both parties on

equal footing despite the adversarial nature of our system.

I would have been persuaded though to order a retrial if the only reason was the last one state above. I am not inclined to order a retrial despite the nature of the charge against the appellant. There is no sufficient evidence in my considered opinion to convict the appellant. The prosecution evidence remained inconsistent all through. There seems bad blood exists between the parties in regard to some land issue.

Consequently, and for the above reason I shall allow the appeal by setting aside the conviction and sentence. The appellant is hereby set free unless lawfully held.

Orders accordingly.

**Dated, signed and delivered at Kisumu this 2<sup>nd</sup> day of July, 2012.**

**H.K. CHEMITEI  
JUDGE**

In the presence of:

.....for state

.....for the appellant

HKV/va