CRIMINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 206 OF 2000

SAMUEL KABARU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. Mr. A. O. Muchelule C.M in Criminal Case No. 326 of 2000 delivered on 11th October 2000)

JUDGMENT

The appellant in this appeal was charged in the lower court along with another accused namely, Michael Miano Murithi with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. Particulars of that offence are as follows:-

"SAMWEL KABARU AND MICHAEL MIANO MURIITHI: On the 4th day of July 1999 at kwa Makara village, Kithitina sub-location, Kirimara Location in Meru Central District within Eastern Province jointly with others not before court unlawfully killed Jacob Kithinji Mputhia."

The lower court convicted the appellant and his co-accused as charged on 11th October 2000. The appellant was sentenced to four years imprisonment whilst his co-accused was sentenced to six years imprisonment. It is worthy to note that the appellant successfully applied before this court for bail pending appeal on 18th October 2000. On that date, he was therefore released by this court on a bond of

Kshs. 100,000/= and a surety of similar amount. This is the first appellant court. As such, this court should consider the evidence adduced in the lower court evaluate it itself and draw its own conclusion in deciding whether the judgment of the lower court can be upheld. This was the principle established in the case **Okeno Vs. Republic** [1972] E.A 32 as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

PW1 was the father of the deceased. He stated that the deceased was 18 years old. He recalled that on 4th July 1999 he found his wife PW2 not at home. At 2.30pm of the same day, he met her as he went looking for her. She informed him that their son, the deceased, was being beaten by the appellant and his co-accused. PW1 said that he knew both the appellant and his co-accused. In particular, the appellant is his neighbor. His wife informed him that the appellant were taking the deceased to the tarmac road. As they went towards that direction and before they reached the tarmac road, they found the deceased lying in the middle of a feeder road. He was still alive. He noted that he had been injured on his eyes and legs. He was unable to speak. He was shivering. He and his wife decided to take him home to place him near the fire side. At the gate to their home, they placed the deceased down so that they could rest. At that point, some greenish substance in liquid form was coming from the deceased nose. The deceased died there. He proceeded to record the matter at Timau police station. The body of the deceased was taken to Nanyuki District Hospital Mortuary. On 19th July 1999 he identified the deceased body for purposes of post mortem. On being cross examined by the appellant, he stated that there existed a grudge between him and the appellant following an incident where the appellant's cattle trespassed someone's land. PW1 said he removed the cattle on that land and thereafter the appellant came to his home and assaulted him. He however said that the charges that the appellant faced were not a fabrication. He further confirmed under cross examination that he was not present when the deceased was beaten. PW2, the mother of the deceased, stated that on 4th July 1999 at 8am the deceased who had not spent the night at home came to the home washed his face then left. It was a Sunday. At 10am, she was by the river washing clothes. Her son, Fredrick Mutuma PW3 came and called her. He was aged 7 years. PW3 informed her that the deceased was being beaten by the appellant and was being escorted by a large group of people. She left her clothes to go and see for herself. When she went, she found the appellant beating the deceased. He had a whip and stick and a knife. She however said that he kept the knife by his waist but was holding the whip and the stick. He was whipping and kicking the deceased who was on the ground. The people who were surrounding them were urging the appellant to take the deceased to the police station if he suspected that he was a thief. Instead however, the appellant chased these people away. PW2 heard the appellant saying that the deceased had stolen his things. She heard the deceased telling the appellant that the things he had stolen were at Ngenia Market. The appellant in the company of others took the deceased to Ngenia Market. At this point, PW2 rushed back to collect her clothes. As she returned to the scene, she met the appellant and the deceased and they stated that they had not recovered the stolen items. At this point, PW2 noted that the appellant had been joined by his co-accused. She did not know the appellant's co-accused. The deceased at this time had his hands tied but was walking. The appellant's co-accused on being told that the deceased had stolen some items started to beat the deceased using the whips he had taken from the appellant. He whipped him all over the body whilst the appellant was hitting the deceased with the stick. PW2 followed them for a while but later left them to go and look for her husband, PW1. She left them as they were taking the deceased to the river where they said the stolen goods had been hidden. She did not immediately find PW1 so she went to the river. She found that the appellant and Michael were beating the deceased and dipping him in water. This is what she stated:-

"They were beating deceased and dipping him in water and demanding that he produces the stolen goods. Kabaru (appellant) and Michael (his co-accused) were quite vicious. They would put him on stones and stepped on and beaten (sic)……. They dragged him to the road saying they were taking him to police."

It was at this point that PW2 met with her husband PW1 and reported to him what she had seen. They returned back to the scene and that was when they found the deceased lying on a road near their home. He had been abandoned there. She tried to lift the deceased but was unable. The deceased requested her to give him some water. She went to the house and got water and gave him. She and PW1 carried the deceased but when they reached near their gate, he begun to produce some greenish substance from the mouth and the nose. They put him down and he died there. She stated that she knew the appellant who was their neighbor. Following that incident, the appellant run away and was only traced by the military police who took him to the police station to record a statement. When PW2 was cross examined by the appellant, she stated that the incident was witnessed by many people but the appellant was chasing them away. She further stated that she knows that the appellant works in the Kenya Army. PW3 was a brother to the deceased and a son of PW1 and 2. Because of his age of 7 years, the learned trial magistrate carried out *voire dire* examination. The learned trial magistrate found that PW3 possessed sufficient intelligence to justify the court receiving his evidence but because of his age, he would not give his evidence under oath. PW3 stated that on the material day he was at home alone. The deceased who was his brother after taking tea bathed and left home. After sometime he saw people coming to their home amongst them was the appellant and the deceased. Some of those people were unknown to him. They asked him whether he had seen the deceased bringing a bag home. He told them that he had seen the deceased coming to their home with a paper bag. He was sent to go and call his mother which he did at the river. He stated that at the time when he went to call his mother, he had not seen these people beating Kithinji. At one point, he and his mother PW2 went to the place where the deceased had been taken by the appellant and he saw the appellant beating the deceased with a stick. He noted that the appellant was beating the deceased on his back and on his legs. He also noted that the deceased was being beaten with a walking stick by the appellant's co-accused. He said that they hit the deceased until the deceased fell down. This happened as the deceased was being escorted to Ngenia Market. PW2 was making noises when she saw the deceased being beaten but the appellant was chasing her away. PW3 returned home and the appellant in the company of others again brought the deceased back to the home. Although he noted that the deceased had been assaulted, he was however able to walk. He noted that the deceased was bleeding from his wounds. The appellant entered into the house with the deceased and begun again to beat the deceased thereby tearing his clothes. He saw the appellant in the company of his co-accused taking the deceased to the river where they alleged that stolen goods had been hidden. PW3 did not follow them. When however they returned from the river, he noted that the deceased clothes were wet. He saw the deceased being taken towards the road. The appellant tied the deceased saying that he would take the deceased to the police. Later, he saw his parents carrying the deceased towards their home but when they reached the gate, the deceased died. PW4 stated that he had been informed that the deceased had implicated him in the theft of the appellant's sheep. He met with one of the elders to whom this report had been made. As they talked with him, the deceased came. It was at this point that the elders sent for the appellant. He said that he knew the appellant and that the appellant lives about 1km away from him. When the appellant arrived, he held the hand of the deceased and ordered him to sit down. He ordered the deceased to repeat what he had told him the night before. The deceased said that the night before he was in the company of PW4 and another person called Kinyua. PW4 witnessed the appellant whipping the deceased as he asked the deceased to repeat what he had said the night before. The deceased at this point admitted having carried out a theft the night before. The appellant continued to beat the deceased until the deceased admitted he had stolen a TV and radio at Meru. He said that he had hidden those items in Ngenia. PW4 saw the appellant going towards Ngenia with the deceased to look for the properties. PW5 is a teacher of a primary school. He recalled that on 3rd July 1999 at about 9.30pm, he was called by the appellant who informed him that they had caught someone stealing their sheep. As they went towards the home of the appellant, they heard some people saying that he had run away. It was when they arrived at the appellant's home they were informed that the deceased had been apprehended as he tried to steal sheep of the appellant but he had run away. At 7am the following day, PW4 came to his house and denied any involvement in that theft. It is at the point when the deceased arrived that he sent for the appellant. When the appellant arrived, they agreed that the appellant would take the deceased to his parent to talk to the

deceased together with his parents. They left his home. PW6 Japhet Kinyua stated that he had been told that he had been implicated in the theft of the appellant's sheep. He was in the company of the appellant and the deceased when they went to look for the parents for the deceased. When they reached the home of the deceased, they sent PW3 to call PW2. In the presence of PW2, the deceased was asked whether he had stolen the appellant's sheep but he denied saying that he had gone to that place looking for a place to sleep. PW6 heard the appellant's co-accused accusing the deceased of having stolen his radio and TV. The co-accused began to beat the deceased demanding these items. PW6 was present at the river where the deceased had been taken to show where the stolen items were. He later left the company and went to church. In examination in chief, he stated that he did not see the appellant assault the deceased. PW7 is an owner of a property where the appellant in the company of his co-accused took the deceased in an attempt to recover stolen goods. No stolen goods were found. He saw the deceased lying down having been beaten. He was surrounded by a crowd of people. He was lifted and taken away. Amongst the crowd was the appellant. This witness stated that the appellant did not do anything whilst he was in his residence nor was he armed. PW8 was the police officer who received the report of the death of the deceased. The names of the appellant and his co-accused were given to him. He noted that the deceased body did not have visible injuries but the clothes were wet. He had recorded first the statement of the appellant's co-accused in which statement he accused the appellant of having assaulted the deceased. The police officer had with him the post mortem report. In response to the court's question, both the appellant and his co-accused did not object to the production of post mortem by the police. The post mortem showed that the deceased suffered injuries of depressed skull which had a fracture of the left temporal region. Death was due to brain damage due to head injury. The body had bruises all over the body. The court found the appellant had a case to answer and the appellant gave unsworn evidence. He stated that he works at the Kenya Army as a solder. He denied the charge before the court. On 3rd July 1999 he had arrested the deceased at his home at night while the deceased was in his goat's shed. It was 10pm. He was in the company of his wife. He sent his wife to call their neighbor. On interrogating the deceased, the deceased said that he was in the company of PW4 and 6. The deceased told him that they had come to his home to steal. The deceased managed to escape and run away. The next morning at 8am, he was woken up by PW5. The deceased was with PW5. He asked the deceased to repeat what he had said the night before. They later went to the deceased home and when the mother was called, they reported to her what had happened. As they were talking, a lot of people gathered who included his co-accused. His co-accused claimed that the deceased had stolen his TV, radio and chicken. His co-accused demanded that the deceased would show them where these items were. The deceased led them to the bush but they did not get them there. Later, they took the deceased to the home of PW7. At this point, the appellant said that he parted ways with them.

The appellant has appealed against conviction and sentence and has presented the following grounds for consideration by this court:-

1. ***The learned trial magistrate erred in law and fact in convicting the appellant on insufficient evidence.***

2. ***The learned trial magistrate erred in law and fact in not finding that the deceased was a victim of "mob justice."***

3. ***The learned trial magistrate erred in law and fact in convicting the appellant relying on uncorroborated evidence.***

4. ***The whole of the judgment is against the weight of evidence.***

5. ***The sentence is excessive in all the circumstances.***

Grounds one to five all relate to the prosecution's evidence. I have already analyzed that evidence above. Contrary to what the appellant submitted, the learned trial magistrate well considered the evidence adduced both by the prosecution and the appellant. Although the evidence of PW3 was not under oath, that evidence was corroborated by the evidence of PW2 in terms of sequences and the acts of the appellant in beating the deceased. It is clear that the appellant found the deceased in his compound the night before the deceased was assaulted. On interrogation of the deceased, the appellant stated that the deceased admitted he had gone to his residence to steal. The deceased is said to have escaped from the apprehension of the appellant. It was the following day that PW2 saw the appellant and his co-accused brutally attack the deceased. The deceased was paraded at different places where it was stated that he had hidden stolen goods. The evidence is very clear that the appellant with his co-accused attacked the deceased and soon thereafter the deceased died in the hands of both his parents. Both the appellant and his co-accused were in common intention to beat the deceased. In the case **Makario Nyanguono Nyaoga Vs.** Republic Criminal Appeal Case No. 383 of 2006 the court had this to say on the doctrine of common intention:-

"In Wanjiro D/O Wamerio alias Wanjiro D/O Marie & Another Vs. Republic [1955] 22 EACA 521 it was held that for the doctrine of common intention to apply, it must be shown that an accused person shared with the actual perpetrators of the crime a specific unlawful purpose which led to the commission of the offence charged."

The doctrine of common intention therefore applies in this case. It is submitted on behalf of the appellant that the evidence of PW1, 2 and 3 was tainted with a grudge against the appellant. The learned trial magistrate quite rightly considered that alleged grudge and stated thus:-

"PW2 said 1st and 2nd accused beat her son (the deceased). It is noteworthy that PW2 agreed that she had a grudge with 1st accused who had sometimes back when 1st accused had bewitched her saying she had bewitched his cattle. That grudge can make her be against the accused but it can also make accused beat the deceased. I bear this in mind. However, it is not in dispute that on this day accused brought deceased to her home alleging theft against him. There were other people along and they went around with deceased looking for alleged stolen property."

The other witness who saw the appellant in the presence of the deceased whom they were taking from place to place in such of stolen goods is PW4 and 7. The evidence, I believe, presented by the prosecution defeats the argument that the evidence of PW1, 2 and 3 was actuated by malice or grudge. There was also no evidence that PW3 was couched in the evidence he gave before court. The appellant in cross examination of PW1 and 2 did not put to them such a question whether they couched PW3. It follows therefore that the submissions by the appellant that there was couching of PW3 is an afterthought and has no basis. The appellant submitted that the production of the post mortem by police officer adversely affected the prosecution's case. PW1 and 2 the parents of the deceased stated that the appellant and his co-accused left the deceased lying in the middle of a feeder road. When PW 1 and 2 approached the deceased, he found him alive but he had been injured and was shivering. As they carried him home, he died at their gate. It therefore follows that the death of the deceased followed the attack on him by the appellant and his co-accused. Court of Appeal in the case **Columbus Lekikunit Vs. Republic** Criminal Appeal No. 27 of 2006 stated in respect of a murder trial where a post mortem was not produced as follows:-

"The postmortem report was not produced, however its production might not, in the circumstances, have added anything of value to the prosecution case as the deceased died instantly."

In this case too, I find that there was no intervening act and that death of the deceased followed the unlawful attack on him by the appellant and his co-accused. The fact that the post mortem report was produced by a police officer did not add or subtract from the prosecution's case. It should however be noted that when the appellant was asked to respond to the request of the police officer producing he post mortem report he responded:-

"I will not cross examine doctor who did post mortem (sic)."

There is therefore no basis for the submissions made on behalf of the appellant. I therefore make a finding that the appellant's appeal against conviction is without merit. The appellant in ground number 5 of his appeal stated that the sentence of the lower court was excessive. A court sitting in his appellant's jurisdiction would only interfere in the trial court's sentence if there was breach of the law or the principles of sentencing. In considering sentence, the court should bear in mind that it is the discretion of the trial court to assess the appropriate sentence in all circumstances of the case. The appellant caused the death of the deceased. On a charge of manslaughter, when one is convicted, he is liable to be sentenced to life imprisonment. The sentence of four years against the appellant is in my view not excessive to cause this court to interfere with that sentence. That sentence should be considered in the background that the deceased was taken to various areas where it was alleged that the stolen goods had been hidden. At no time did the appellant consider surrendering the deceased to the police to give the police the opportunity to carry out the investigation in respect of those alleged stolen items. He failed to do so even though the crowd that had gathered around was urging him to take the deceased to the police station. The appellant's appeal against sentence is therefore rejected. It is ordered that the appellant be taken immediately into custody to complete his sentence.

Dated, signed and delivered at Meru this 3rd day of March 2011.

MARY KASANGO
JUDGE