REPUBLIC OF KENYA

COURT OF APPEAL AT NAKURU

Civil Appeal 172 of 89

HILLARY BWIRE WAFULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (Tanui J) dated 13th November, 1995)

JUDGMENT OF THE COURT

The appellant, HILLARY BWIRE WAFULA , was charged with and convicted of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code. The appellant and the deceased Leonida Bigeti, were at the home of Jared Bwire Oroto where traditional liquor (busaa) had been brewed. Oroto was Wafula's father. There was evidence that Bigeti took some busaa and she became a nuisance. She quarrelled with both Oroto and Wafula who each was said to have pushed her and she fell down. Wafula was alleged to have kicked her when she fell down. Bigeti died a day later and Oroto and Wafula were charged as we have stated above. Oroto died during the trial leaving Wafula as the only accused.

The doctor who carried out the autopsy on the body of Bigeti said in his written report that he found a fracture on the left side of the temporal region of the head and there was subdural haematoma on the same side. The doctor concluded that the cause of Bigeti's death was "cardiorespiratory arrest due to su bdural haematoma causing space occupying concussion" . The doctor's report was produced in court by a police officer, PC Edward Mugasia, who arrested the appellant. It would appear the report was produced under section 77 (1) of the Evidence Act which provides that:-

"In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner ... upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."

The appellant made an unsworn statement in court and denied causing the death of Bigeti. Nevertheless, the trial magistrate (Ndeda) found Wafula guilty as charged, convicted and placed him on probation for three years. The superior court (Tanui, J.) dismissed the appellant's appeal against conviction, because according to the learned Judge's written word the evidence that the appellant assaulted the deceased before she died was overwhelming. This is a second appeal and the appellant has listed three grounds of appeal which his counsel, Mr. Wanga, summarised as follows:-

1.The appellant was not present at the hearing of his appeal in the superior court so he was denied the right to be heard;

2.There was not sufficient evidence in support of the conviction; and

3.The failure by the prosecution to call the doctor who performed post mortem on the deceased's body to testify was fatal to the prosecution's case as it left the cause of death unclear.

This being a second appeal we could entertain only points of law and Mr. Wanga submitted that all the three grounds of appeal raised errors on points of law.

Mr. Karanja, for the Republic supported the conviction on the grounds that the appellant did not have to be present at the hearing of his appeal. On the second and third grounds, Mr. Karanja submitted that the post mortem report was properly produced and the doctor did not have to testify. He urged us to dismiss the appeal.

In an appeal it is necessary for the appellant to be heard unless he informs the court that he does not desire to be present or to be heard during the hearing of his/her appeal. Nevertheless in the instant case the appellant's counsel informed us that he was aware of the hearing of the appeal and it appears no attempt was made either by him or the appellant, who was free on probation, to attend the court during the hearing of the appeal. It cannot, therefore, be said that any injustice was done by the appeal being heard in the absence of the appellant. What we have just said disposes of the first ground of appeal. As for the second ground of appeal, whether or not there was sufficient evidence is a matter of fact and as no point of law is involved this ground fails.

During the hearing of the appeal in the superior court, Mr. Kirui for the State submitted:-

"The failure to call the doctor left the cause of death unclear."

The appellant's complaint was not that the post mortem report was not properly produced. The contention was that the doctor was neither called to testify nor made available for the defence to cross-examine him if they so wished. In a criminal case as a rule the prosecution must take all reasonable steps to secure the attendance of any of their witnesses whom the defence might reasonably expect to be present. In a murder trial the defence expects the doctor who performed autopsy on the body of the deceased to be present. The prosecution might not have intended to call the doctor. However, where the prosecution does not intend to call a witness whose evidence is material at a trial they (prosecution) nonetheless have a duty to ensure that that witness is present in court during the trial so that should the defence wish, they may call the witness. The only exception to this rule as to attendance of witnesses is if the witness is absent for reasons beyond the prosecution's control.

Having said what we have said above and counsel for the State having admitted that the failure to call the doctor left the cause of death unclear, it could not be said that there was no reasonable doubt as to whether it was the appellant's assault on the deceased that caused her death. The benefit of that doubt should go to the appellant. The conviction in this case is unsafe and cannot stand.

Consequently we allow the appeal, quash the conviction and set aside the probation order. Those shall be the orders of the Court.

Dated and delivered at Kisumu this 18th day of March, 1999.

Z. R. CHESONI

CHIEF JUSTICE

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR