



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Criminal Appeal 468 of 1996**

**(From Original Conviction and Sentence in Criminal Case No. 1094 of 1996  
of the Principal Magistrate's Court at Malindi- J.R. Raranja, Esq., PM)**

**ENOCK MOTARI KIBOMA..... APPELLANT**

**VERSUS**

**REPUBLIC .. ..... RESPONDENT**

**JUDGEMENT**

Appellant was charged with the offence of manslaughter contrary to section 202 of the Penal Code as read with S.205 of the Penal Code. It was stated on 28-2-96 at Timboni Village Gede Location within Kilifi he unlawfully killed ORIPHA KERUDU. On 26-9-96 he was convicted of the same offence and sentenced to 14 years imprisonment. In Court was evidence of PW.3 NTHENYA MUNOTI who testified that he worked at a ration kiosk where on 28-2-96 at about 6 p.m. the appellant gave him a bag to keep for him. He returned at 7 p.m. to collect it. He was in the presence of the deceased who grabbed the bag, opened it and found some wood carvings in it. He said the deceased started quarrelling with the appellant and threw stones at him, but they left for their home in the neighbourhood but next day the children of the deceased informed PW.3 that their mother had died. He reported to the police, PW.5 Evelyn Kimondo Enock a 10 year old daughter of the deceased gave evidence saying the appellant quarrelled with the deceased their mother outside the house. They fought and the appellant hit the deceased's head on a wall and even after felling him down continued to hit her. He hit her head on a stone and then took her into the house where the deceased lay in bed groaning. The witness and her sister ran away but when they came back they found the accused who changed her clothes, he kept the children in their room and locked the deceased in her room, and went away. Next morning when her mother did not wake up she touched her but she was cold. She reported to a nearby kiosk and then to the police.

PW.6 P.C. Jared Ndege was informed by the three children of their mother's death. He went and found traces of blood outside the house. The room was locked but he saw a body on the bed. They later broke the door and retrieved the body. It had injury on the head. PW.4 took the body to the hospital and obtained post mortem report Ex.6. PW.1 deceased's brother came from Kisii and identified the body of the deceased. In his defence the appellant gave an unsworn statement saying that the deceased was his wife but that he was having an affair with PW. 6 and that his late wife also accused him of having an affair with a Giriama girl. They quarrelled on the first day appellant slept away from home then when he came he found his children outside and on being told that PW.6 had been in his home he went to the police station to report when he was arrested.

The Court accepted this evidence and convicted the accused of manslaughter, Now he has appealed on 9 grounds saying -

1. That the conviction was based on mere suspicion and presumption.
2. No prima facie case was made out.
3. Circumstantial evidence relied on was not consistent with his guilt.
4. That cause of death was not established as postmortem report was not produced by the doctor who prepared it.
5. That the Learned Principal Magistrate erred in basing conviction on evidence of a child PW.5 and failed to distinguish whether a 12 year old should be compellable or competent witness.
6. That evidence of PW.5 lacked corroboration and that of PW.6 was hearsay.
7. PW.3's evidence was not given weight.
8. Prosecution did not challenge Alibi presented.
9. Sentence was excessive.

First he argued grounds 1 and 3 together. He challenged the blood evidence and queried why the bloody clothes were not photographed nor was the injured head photographed nor the wall where blood was supposed to be. Then he argued ground 5 and 7 together saying evidence of PW.5 should never have been relied on as it was never corroborated. PW.3's evidence did not support that of PW.5. She was couched. She called him step-father and if the room was locked he wondered how she got inside for the police officers broke the door. Of ground 8 he said the deceased might have fallen on the stones and on ground 9, he said sentence was excessive.

Mr. Bwonwonga Principal State Counsel supported the conviction. He had no opinion on sentence.

The guilt of the appellant depends on circumstantial evidence drawn from the fight the stall-owner PW.3 saw and the fight PW.5 saw when considered severally or jointly. PW.3 saw appellant and deceased disagree over a bag in which were some carvings. According to PW.3 the deceased was the one who started quarrelling with appellant and threw stone at him. Then they went home. Next day it was reported to him that the deceased was dead. Could the death of the deceased be ascribed to that quarrel? I think not. The circumstances do not show that death ensued from that quarrel.

Post mortem produced Ex.6 was produced by PW.6 a police officer and not the maker. It can be admissible under S.77 of Evidence Act Cap.80 because the person who signed it had described himself as medical doctor. It is not produced under S.33 of the said Act and would otherwise be barred by ruling of the court of Appeal in Cr. Appeal No.86 of 1997 RAJAB SAID

ABDALLA V. REPUBLIC but I think if accepted in evidence under S.77 of Cap 80 it should be admissible. I think the Learned Magistrate was right in accepting the post mortem report in evidence. CIRCUMSTANTIAL EVIDENCE requires that:-

"In order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypotheses than that of guilty." R. V. KIPKERING ARAP KUJKE & AN. [1949] 16 EACA 135.

The Court has to direct himself as such.

The other line of evidence is also circumstantial. It is given by PW.5 a ten year old daughter of the

deceased she said:

"The accused is my step father. The deceased Oripa Kerubo was my mother. I was living with her and the accused in Timboni Watamu. On 28-2-96 I was home in Timboni when the deceased arrived from the shops with my young sister. The accused was following them behind. While outside the house the accused and deceased quarrelled and fought. The deceased's head was hit against the wall by the accused. She fell down and the accused continued hitting her he hit her head against a stone and then took her into the house where she lay on the bed groaning. My sister and I ran away and went to a nearby kiosk. We returned home later and found the accused. He changed his clothes and kept us in our room and locked our mother in her room. He went away"

In Law a child is a competent witness in practice it is not unusual for courts to admit evidence of young children of 8 or 9 years of age when they appear to possess sufficient understanding, but as a matter of prudence Courts are generally chary of acting or putting absolute reliance on the evidence of a solitary child witness and look for corroboration of the same from other circumstances of the case. It therefore requires great caution, but where it is immediately available and tendered before any time has lapsed for possible coaching it is unsafe to rely on the evidence of a child provided there is corroboration. In this evidence the child's testimony has been corroborated first about the fight, it would appear that the fight PW.3 saw that started at the kiosk continued to the house. The appellant himself spoke of accusations and counter accusations between himself and deceased of infidelity when he says:-

"I went to my house at about 7 p.m. and after a few minutes the deceased arrived and picked up a quarrel with me. She created fracas and attacked me using stones."

To me the child's testimony about the fight is fully corroborated by the appellant's own statement.

About the appellant changing his clothes, locking the door and going, this is also corroborated by the appellant himself when he says:-

"I ran out of my homestead and went to sleep elsewhere in Watamu Township"

About the appellant hitting the deceased's head on the stone and on the wall, this was also corroborated by PW.6 who saw blood outside the house and on the wall and also PW.4 when he collected bloodstained stone. Appellant's trouser and T shirt were also collected with blood stains on them. Ex.7 Report of Government Analyst dated 4-4-96 and signed by Government analyst is admissible under S.77 of Evidence Act Cap. 80 and it says the blood stains on T shirt of the deceased, stone and T shirt of the accused (appellant) was found to be of type Group "AB" the blood group of the deceased. Whereas blood stain on trouser of appellant is "A" It corroborates PW.5's evidence in showing that it is probable that the blood of deceased was the one staining the stone as a result of having been hit on it as 'PW.5 said.

The Learned Magistrate warned himself about the evidence of PW.5 and I agree he was right in admitting it and accepting it as true. The version of the appellant is twisted for self-preservation. He talks of deceased throwing stones at him hitting him with a piece of wood yet there is no evidence of injury to show bleeding from him and deceased bled most probably from these fracas, the appellant only alludes to this fracas but fails to describe fully. He leaves the deceased to go and sleep in town but locks the door, why? If he was running away so as to leave the home for the deceased then why lock her in and why not speak of changing clothes which the child saw? For really if they quarrelled and there was fracas changing clothes was a very consistent occurrence.

The story of PW.3 combined with that of PW.5 and appellant himself shows that the appellant when they got home was now the one that called the shots and beat deceased to death and either left her dead or about to die when he went to sleep in Watamu town.

The child touching her mother's body could have been that the appellant came back to lock the door after knowing the woman had died and the children had known of it.

The last question what did deceased die of? That is the question. The beatings and savage beating by appellant should relate to the cause of death.

Post mortem report Ex.7 says death was due to head injury and this is consistent with the evidence of the fight.

I find that the magistrate' was right in convicting the appellant of Manslaughter.

As for sentence the State did not support the sentence of 14 years. Indeed I find that this was a domestic quarrel, the man is young 23 years with 4 children. I think 14 years imprisonment was so excessive as to be wrong in principle. In the circumstances, although it is legal sentence as the statutory maximum is life imprisonment still I believe a lowersentence of 7 years would suffice.

I therefore dismiss appeal against conviction and allow appeal against sentence. The sentence of 14 years is therefore quashed and set aside. There will be sentence of 7years imprisonment substituted.

Dated at Mombasa this 23rd Day of October, 1998.

A.I. HAYANGA

JUDGE

Read to Appellant in person Mr. Ng'eno - State Counsel

A.I. HAYANGA

JUDGE