



REPUBLIC OF KENYA
HIGH COURT AT MOMBASA

Criminal Appeal 117 of 1998

ONESMUS MUSA SINGI..... APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No.2 of 1995 of the Senior Resident Magistrate's Court at Kilifi -P.M.Ndungu, Esq. S.R.M.)

JUDGMENT

The Appellant was employed as a security guard at Lesolel Beach Hotel in Kikambala, Kilifi. On 8.1.95 he reported on duty at 5.30 p.m. and joined another security guard on duty. Both were assigned to guard the area of the Hotel fronting the Beach. Hotel guests had taken sun beds onto the beach and some had left their T-shirts on them. There were many other people along the Beach.

Among them was a group of four boys playing Beach Football. As they played football one tourist from the Hotel gave one of the boys two T-shirts. The boy put on one T-shirt and held onto the other. Just then the Appellant came running from the Hotel direction. According to one of the other boys, John Fundi (PW.4):-2

"The accused came running. Accused came and threw a "gongo" and hit Salim Kahindi with it. He hit him with it while holding the "gongo". He did not throw it. Accused hit Salim once on the right side of the abdomen. Salim started crying. We took him home."

According to another boy who was present however, Kenga Fundi

(PW.6):-"The Mzungu gave Salim Kahindi two white T-shirts. The Mzungu then went away. Then an askari came. He is the accused in the dock. He came from the hotel. The accused then threw a 'gongo' at Salim Kahindi. The 'gongo' hit Salim on the ribs. The 'gongo' then fell down. Salim then started crying..."

The version by PW.6 appears to agree with that of the Appellant in his statement submitted through IP Henry Macharia Mwangi (PW.3). He stated:-

"There were many beach boys. There were many visitors in number and they had taken the sunbeds to the beach and on them were T-shirts. Many of the boys left and about four small boys remained. One of them took two T-shirts and started running away. Because I was near I ran after him and I threw my club to him which hit him at the back on the waist. He dropped the T-shirts and ran away".

There is contradiction on the prosecution evidence as to whether or not the Appellant threw the club from a distance. There is also contradiction as to whether the deceased was running away when he was hit or

was stationery. PW. 4 John Fundi said:- "Salim ran away after he was hit by the Accused."

The same question was not put to the other eye witness Kenga Fundu. There was no consistency, on where the deceased was hit. PW.4 said it was "the right side of the abdomen", PW.6 said it was "on the ribs", while PW.3 says it was "at the back above the waist". I have not found on record the post-mortem report referred to by PW.8. Such contradictions and inconsistencies would of course be resolved in favour of the Appellant.

Whatever happened on that day however, there was no doubt that the object thrown at the young boy caught him with enough force to rupture his spleen and within a few hours he succumbed to that injury. He died at 1 a.m. on 9.1.95 before he was taken to hospital. The post-mortem report confirmed the injury as the cause of death.

At first the Appellant was charged with the offence of murder but the charge was substituted with manslaughter. He was tried before Kilifi Senior Resident Magistrate, P.M. Ndungu and on conviction he was sentenced to serve 5 years imprisonment. The learned trial Magistrate was of the view that the Appellant used excessive force in the circumstances, even assuming that he was justified in defending the property of his employer.

On appeal the Appellant did not challenge the conviction. He would not have succeeded if he did, at any rate, because there was sufficient evidence to establish that his actions were the direct cause of the deceased's death. He rather dwelt in his appeal on the extenuating circumstances surrounding such actions. He argued the appeal in person.

He submitted that he believed the deceased had stolen the property of hotel guests and it was his duty to protect such property. He saw the deceased running away with such property and his intention in throwing the 'rungu' was to immobilise him aiming at the legs after he had disobeyed the order to stop. It was unfortunate that the deceased was hit on a sensitive part of his waist. It was purely an accident which would not have occurred if he was not on duty. He submitted that he recovered the stolen T-shirts and returned them to the owner and no complaint was raised with the Hotel.

In mitigation of his sentence, he submitted that he had already lost his employment and had stayed in custody from his arrest on 9.1.95 up to his conviction on 30.9.97. As soon as he was arrested his own wife left home to visit him in custody but was killed in a road traffic accident leaving their four children without a parent to care for them. The long sentence meted out would therefore not only ruin his life but also that of those children.

Mrs. Mwangi, State Counsel, supported both the conviction and sentence. She was of the view that the sentence was commensurate with the offence since the Appellant hit the deceased with the 'rungu' and did not throw it while the deceased was running away, as he claimed. I have, evaluated the evidence on record and concur with the learned trial Magistrate that the action of the Appellant was the direct cause of the deceased's death. I have however considered carefully the extenuating circumstances pleaded by the Appellant and found them meritorious. There is evidence that the Appellant was on duty on the date in question and part of that duty was to protect the property of his employer and those of the Hotel guests. He was in uniform and there was no suggestion that the object he held which inflicted the fatal blow, was anything other than that lawfully issued to him by his employer. The incident occurred within the beach area used by the Hotel's guests. In the words of PW.6 Kenga Fundi:-

"When the deceased was hit he was outside the Hotel compound".

I have already stated above that the benefit of doubt as to whether the deceased was running when he was hit and whether he was hit on his front side or at the back, would be resolved in favour of the

Appellant. There is evidence that the deceased had two T-shirts which did not belong to him. His companions testified that the T-shirts had been given to the deceased by one of the Hotel guests.

It is not in evidence that the Appellant witnessed such donation.

From where he was, which he says was a distance and he was switching on the security lights as it was getting dark at 6.30 p.m., he saw and believed that the deceased was stealing the T-shirts. Then followed the chase and the fateful blow. There is no evidence that the Appellant set upon the deceased and assaulted him severally. On the contrary the prosecution evidence is that there was only the one blow caused by the object thrown at the deceased which the eye-witnesses themselves did not at first think caused serious injury.

Section 17 of the Penal Code provides that:-

" .. .criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Common Law."

There is justification under English Common Law using reasonable force, to resist or restrain the unlawful taking or destruction of one's property or the property of his employer. The only issue to consider is therefore whether reasonable force was used.

In all the circumstances of this case I consider the injury caused as most unfortunate and the ensuing death most accidental - almost a misadventure. Nevertheless the life of another person was lost. I have also considered the other mitigating factors advanced by the Appellant which do not appear to have been taken into account by the learned trial Magistrate. The Appellant spent 22 months in custody before conviction. He has served more than one year in prison since.

In all these circumstances I would allow the appeal on sentence. I set it aside and substitute therefore a sentence of two years effective from the date of conviction.

Dated at Mombasa this 13th day of November 1998.

P.N. WAKI

JUDGE