REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 70 of 1994

JAMES KUNGU MWARAGE…….....…….APPELLANT

AND

REPUBLIC…….....……..RESPONDENT

(Appeal from a conviction of the High Court of Kenya at Nairobi (Justice V. V. Patel) dated 7th June, 1994

IN

H.C.CR.C. NO. 13 OF 1994)

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JUDGMENT OF THE COURT

JAMES KUNGU MWARAGE, the appellant, was charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap.63) in that on the night of 27th and 28th January, 1993 at Ting'ang'a Village in Kiambu District of the Central Province he murdered **MARY WAMAITHA MWATHI**. He was tried with the aid of assessors by the superior court (Patel, J.) and was, on the 7th June, 1994, convicted of manslaughter contrary to section 202 of the Penal Code and sentenced to five years' imprisonment. He has appealed against conviction and sentence to this Court.

Briefly, the facts found by the superior court were that on the night in question the accused and the deceased who were close friends went to the house of **SUSAN WAIRIMU MUYA** (PW8) together and drank "Muratina". The son of the deceased called Mwathi (PW4) was also there drinking. The deceased and the accused left the house together. Later that night, the accused and the deceased were heard shouting, quarrelling and fighting soon after the accused tried to gain forceful entry into the deceased's house and all was quiet after the incident. This was founded on the evidence of **MARGARET MUTHINI NDONGA** (PW5) and **SUSAN WAIRIMU MUYA** (PW8). Margaret's house was next to that of the deceased separated only by an iron sheets wall. The next morning the body of the deceased was found dumped in the borehole with the mouth of the hole covered.

In considering the evidence of PW5 and PW8 the superior court delivered itself as follows:-

" I find the evidence of Margaret and Susan most coherent and cogent. I observed them carefully. They impressed me as honest and truthful. There exists no reason for them to lie. I am contended that they

spoke the truth and I accept their evidence. I reject the accused's defence as false."

At the trial the accused gave evidence on oath and denied killing the deceased. But the learned trial judge reviewed the evidence and concluded that in all the circumstances taking the evidence as a whole, the inference was irresistible that the deceased was killed by the accused and he so found.

The main ground on which the Conviction was attacked on behalf of the appellant was that the learned judge should not have accepted the evidence of Margaret and Susan (PW5 and PW8). It was said that those witnesses were asleep and had not come out of their houses. It is true that they did not come out of their houses, but the learned judge directed himself fully and, as already mentioned, the learned judge believed these witnesses. It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that an appellate court might itself have come to a different conclusion. We take as a guide to the exercise of this jurisdiction the following extract from the opinion of their Lordships in the House of Lords in Watt V. Thomas (1947) A.C. 484

VISCOUNT SIMON, L.C. said at p. 485:

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

LORD THANKERTON said at p. 487:

"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

LORD MACMILLAN said at p. 491:

"So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccurancies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

In the instant case, we have carefully considered all the material before us and are not persuaded that the learned judge erred in principle or otherwise in any way. We find no ground to interfere with his findings.

The learned judge reduced the charge from murder to manslaughter as he was unable to exclude the possibility that during the fight the accused might well have hit the deceased without intending to kill her. We find no misdirection on his part in so doing.

A submission was made on behalf of the appellant as to how the mouth of the borehole came to be covered. In our judgment, this is quite peripheral. Once the evidence of Margaret and Susan (PW5 and PW5) was accepted that was decisive of the prosecution case. On our part, we have subjected the whole of the evidence to a close scrutiny and reviewed it carefully. Like the learned judge we have come to a clear conclusion that the appellant was properly convicted on a charge that had been proved beyond any reasonable doubt.

Accordingly and, for the reasons above stated, this appeal is dismissed both as against Conviction and sentence.

Dated and delivered at Nairobi this 17th day of July, 1998.

J. E GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR