REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 4 of 1995

GEORGE KIMELI …….....…….APPELLANT

AND

REPUBLIC …….....…….……..RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Eldoret (Lady Justice R. N. Nambuye) Dated 21st October, 1994,

IN

H. C. CR. C. NO. 19 0F 1993)

****

JUDGMENT OF THE COURT

The appellant was convicted of the murder of Police Constable Abraham Wekesa Toywa, hereinafter called the deceased, by the High Court of Kenya at Eldoret (Lady Justice Nambuye) and was on 21st October, 1994 sentenced to suffer death in the manner authorized by law. In convicting the appellant, the learned trial judge inter alia relied on the evidence of the deceased's wife, Elizabeth Wekesa (P. W. 1), which evidence we too have found no cause to doubt. The learned trial judge also relied on the evidence of Dr. Brenda Makokha (P. W. 5) who conducted the post-mortem examination on the body of the deceased on 30th March, 1992 and concluded that the deceased's possible cause of death was severe anaemia and endotoxic shock following arrow poisoning together with dehydration.

According to P. W. 1, the deceased was on 9th February, 1992 at about 3.00 p. m. shot with an arrow on the abdomen by the appellant during a tribal clash at Murgus in the Uasin Gishu District of the Rift valley Province. The deceased plucked out the arrow that had embedded itself in his abdomen and in so doing his intestines came out. This notwithstanding, P. W. 1 and the deceased managed to run away from the scene of attack up to Lumakanda District Officer's office from where the deceased was rushed to Webuye Nursing Home. Immediately the deceased arrived at this Nursing Home, he was taken to the theatre for surgical treatment and thereafter remained admitted there until 25th March, 1992 when after his condition had deteriorated he was transferred to Kakamega Provincial General Hospital where he died on 27th March, 1992.

At the trial of the appellant in the superior court, no evidence was led in relation to the deceased's

surgical and medical treatment for the period between his admission at Webuye Nursing Home on 9th February, 1992 and his death on 27th March, 1992 at Kakamega Provincial General Hospital. The absence of such evidence rendered suspect, P. W. 5's opinion as to the deceased's cause of death. Notwithstanding other irregularities in the appellant's trial before the learned judge therefore, proof of the deceased's cause of the death was the gravamen of the appellant's appeal before us.

Under the provisions of section 213(a) of the Penal Code, a person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death:

"If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is in material whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill."

It follows that evidence of the surgical or medical treatment must in the circumstances set out above be led to establish that such treatment was employed in good faith and with common knowledge and skill. In the appeal before us, although the deceased was under surgical and medical treatment for a period of about 47 days, no evidence of such treatment was led at the trial of the appellant. Whether or not the deceased's surgical and medical treatment was the cause of his death is a matter of conjecture. The hiatus between the infliction of the injury on the deceased's abdomen and his death as is narrated above created a doubt as to his cause of death which doubt should have been resolved in favour of the appellant. This was not done by the learned trial judge and in not doing so, we think that she erred with the result that the appellant's conviction for the offence of murder contrary to section 204 of the Penal Code cannot stand.

However, from the evidence of P. W. 1 which was believed by the learned trial judge and which we have no reason to disbelieve, there can be no argument that the injury inflicted on the deceased by the appellant amounted to grievous harm. Although the appellant was charged with the murder of the deceased, from what we have attempted to outline above, the facts proved reduced that charge to the minor and cognate offence of causing grievous bodily harm to the deceased contrary to section 234 of the Penal Code. In the result, we quash the appellant's conviction for the murder of the deceased and set aside his death sentence and under section 179(2) of the Criminal Procedure Code, we substitute therefore his conviction for the offence of causing grievous bodily harm contrary to section 234 of the Penal Code and sentence him to 5 years imprisonment together with 2 strokes of corporal punishment. The term of 5 years imprisonment is to run from the date he was sentenced to death by the superior court - 21st October, 1994.

In the upshot, the appellant's appeal to this court succeeds to the extent set out above.

Dated and delivered at Nakuru this 1st day of March, 1996.

J. E. GICHERU

…….

JUDGE OF APPEAL

P. K. TUNOI

……..

JUDGE OF APPEAL

A. B. SHAH

…….

JUDGE OF APPEAL