REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 244 OF 1992

PHILIP ODHIAMBO MASESE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No 156 of 1991 of the Chief Magistrate's Court at Kisumu: C O Ong'udi, Esq, C M)

JUDGMENT

This is an appeal by Philip Odhiambo Masese against his conviction and sentence in Criminal Case No 156 of 1991 by Mr C O Ong'udi, then acting Chief Magistrate.

The appellant faced a charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code namely that on the 26th June, 1990 at Esso depot within Kisumu District he unlawfully caused the death of James Aboke Mabao.

The deceased and Oluoch, (PW2), Olango (PW3), Opoinya (PW4), Osango (PW5) and Otieno (PW6) were fishing at the Esso depot at the jetty when the appellant and a colleague of his (DW1) in civilian clothes went to the scene. All the fishermen knew the appellant before. The appellant was keen to have some fish from the fishermen for his consumption and he went round getting one or two from the fishermen. When he reached the deceased, the deceased declined parting with any fish as he said that he had visitors at home. The appellant could not listen to that and when he decided to take the fish by himself, the deceased got hold of one side of the string on which the fish was so that as the appellant held the other side there ensued a tag of war between them. In the process the string got cut somewhere between the two men and as a result the deceased fell into the lake and died.

From the evidence, I rule out the possibility that the appellant pushed the deceased into the water. I also rule out the possibility that the deceased himself deliberately went into the water in an attempt to escape arrest. From the evidence as a whole, the appellant and his colleague were not attempting to arrest any of the fishermen. There was therefore no question of taking the fish as exhibits. Those were possibilities put forth by the learned counsel for the appellant, Mr Orengo.

The defence of the appellant lent no support to any of the above possibilities put forth by Mr Orengo. The defence was that when the appellant and his colleague PC Patrick Wandera (DW1) were on duty and were walking along, somebody called them saying he wanted help as a person had drowned into the lake. The two policemen went to the scene. They could not see the person who had drowned.

However they saw some fish with hooks. They took them to the Officer in Charge Railway Police Station who instructed them to go and report to Kisumu Police Station where they found people who had gone to report the incident.

From the evidence as a whole including the defence, it would appear the two policemen were referred to Kisumu Police Station as criminal suspects in the drowning of the deceased and not as mere policemen on duty. PW2, PW3, PW4, PW5, PW6 and several other fishermen had rushed to both police stations earlier and reported the appellant as a suspect in this matter. The two policemen went to the police stations later. That is why in the defence they talk as if the fishermen went away leaving the policemen behind still looking for the person who had been reported to have drowned. They then found some fish and hooks left there they took them.

While they do not specify the duty they were performing while out in civilian clothes, what they say, the impression they give is that they were not out to arrest the fishermen. They were only called by one of the fishermen to assist. This is where I think they are not saying the truth because if they were called by the fishermen to help, the fishermen could not have gone away leaving the policemen behind as if in protest against the presence of the very people the fishermen had called to retrieve the body of another fisherman who had drowned. What should have happened is that the fishermen could have remained around to see the outcome of the effort of the policemen. Moreover, I do not think the fishermen could have rushed to a police station to report the incident to another police officer, if the defence is to be believed. What the fishermen could have done would have been to co-operate with the police looking for the body of the deceased and later to accompany the two policemen to Railway Police Station for any statements they would have wished to record from the fishermen.

It be noted that while the appellant said that the person who called them for assistance accompanied them to and showed them, the place where the person who had drowned had fallen, the other policemen DW1 said that instead that person joined the rest of the fishermen and they run away before the policemen reached them. From what the appellant said, as they were being led to the place, they met the rest of the fishermen going away. After the person who had called them had shown them the place, he also went away.

The question is why is the story given by the appellant different from the story given by his witness DW1 as to what the behaviour of the fishermen was after one of the fishermen had called the police. The answer, in my view, is that those two stories are both lies. They were properly rejected by the learned trial magistrate. The true story is that which was told by PW2, PW3, PW4, PW5, and PW6 and there is no truth in the defence story that one of the fishermen called the policemen for assistance to retrieve the body of a person who had drowned. The appellant and DW1 were saying what they said only to try and distance themselves from an incident which occurred in their presence, in their sight and involving the appellant. That defence was properly rejected. These policemen may not even have been on duty. Even DW2 did not say he had sent them out on duty. But let me assume they were.

The question now is whether what the appellant did amounted to manslaughter.

In the case of *R v Sharmpal Singh s/o Pritam Singh Sharmpal Singh s/o Pritam Singh* [1962] EA 13. It was held:

> "the inability of the medical evidence to speak with precision about the degree of force used together with other circumstances, such as the complete absence of motive or extreme violence, opened up both manslaughter and accident as alternative possibilities requiring consideration."

The case was found to be one of manslaughter. In that case the accused and his wife had been happily married for less than a year. The wife died during sexual intercourse with her husband, the accused, due to asphyxia caused by pressure on the neck and throat. There were no signs of bruising or any other external marks but there were signs of internal injury in both the neck and chest of which the simplest explanation was that they were caused by a hand or hands on the throat and a knee or elbow on the chest. The defence was that the accused had killed his wife during a sexual embrace.

The East African Court of Appeal had quashed the accused's conviction of murder and substituted it with a conviction of manslaughter holding that the evidence did not eliminate as a reasonable hypothesis that the accused had killed his wife by unlawful assault but without the intent necessary to constitute legal malice.

The Crown appealed to the Privy Council seeking restoration of the conviction of murder while the accused appealed seeking an acquittal.

In upholding the conviction of manslaughter, the Privy Council said, among other things that in the circumstances of the case the Crown was not obliged to prove motive. There was a complete absence of motive. But since there was an act done by the accused, such as the squeezing of the neck, the only question was whether that act was lawful. If death had been caused solely by pressure on the chest, it would have been quite consistent with accident and the contact would obviously have been within the permitted limits. A plausible explanation was to be found for the handling of the neck. It was the court's view that the accused had gone beyond the limits. He had pressed much too hard. It was presumed, because there was nothing to suggest the contrary, that the accused intended the consequences that would naturally follow from the exercise of the degree of force proved.

Although the facts of the case of *Sharmpal Singh* are different from the facts of the case before me, the circumstances are similar and therefore what was said in that case and the decision thereon is relevant in the case before me. The principle in that case is applicable here.

In the instant case, like the case of *Sharmpal Singh*, the evidence did not speak with precision about the degree of force used when the deceased and the appellant were pulling the string, on which fish was, on opposite directions thereby making the string snap. It got cut into two pieces one remaining in the hand of the deceased and the other remaining with the appellant. Like in the case of *Sharmpal Singh* there was no evidence of a motive to kill or even to do grevious harm. There was no intent necessary to constitute legal malice.

Like in the case of *Sharmpal Singh*, I think the only question in the instant case is whether the act the appellant did, the pulling of the string in order to take for, the appellant's consumption, the deceased's fish which were on the string, was lawful. Was it lawful for the appellant to take the deceased's fish in that manner? The appellant was a police officer on duty, but did his duty include demanding fish from the deceased and taking the fish in the manner the appellant did?

My answer to these questions is negative. The appellant acted beyond boundary of his duty as a police officer on patrol. What he did was therefore unlawful. It caused the deceased to fall into the lake and drown. It must therefore be presumed, because there was nothing to suggest the contrary, that the appellant intended the consequences that would naturally follow from his action as the deceased stood at the edge of the jetty with a possibility of falling into the water if the string got cut.

In my view therefore, the appellant was properly convicted. The sentence of three and a half years imprisonment was not harsh in the circumstances of this case.

Accordingly, the appellant's appeal is dismissed.

Dated and delivered at Kisumu this 9th day of October 1992.

J.M KHAMONI

JUDGE