IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Cockar & Omolo JJ A)

CRIMINAL APPEAL NO 52 OF 1991

JULIUS AMENA…….…….. APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

(Appeal from a conviction and sentence, of the High Court of Kenya

at Nairobi (Mango J) dated 29.5.91

in Criminal case No 43 of 1989)

JUDGMENT

The appellant Julius Amena was, on the 29th May, 1991, convicted on a charge of manslaughter contrary to section 202 as read with section 205 of the Penal Code. That conviction followed upon the appellant's trial in the High Court before Mango, J, sitting with assessors on a charge of murder contrary to section 203 of the Penal Code, the particulars of which had alleged that on the 31st December, 1988 at Makadara Estate in Nairobi, the appellant murdered Paul Maina Kanji, the deceased. At the end of the trial and after the judge's summing-up, the assessors were of the unanimous view that the appellant was guilty of murder. The learned trial judge was, however of a different view and convicted the appellant of the lesser charge of manslaughter and sentenced him to seven years' imprisonment. The appellant now appeals to this Court both against the conviction and sentence and his original memorandum of appeal contained a total of ten grounds. A day before the hearing of his appeal he filed a supplementary memorandum of appeal containing a total of twelve grounds and during the hearing of the appeal, he supplied us with his written submissions and addressed us at length on his grounds. Miss Ndungu who appeared on behalf of the respondent (Republic) opposed the appellant's appeal and supported his conviction and the sentence.

This is a first appeal to us and that being so the appellant is entitled to expect the Court:

"…… to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld" – see *Okeno v Republic* [1972] EA 32

The matters giving rise to this dispute arose when the appellant was a serving police officer. In the afternoon of 31st December, 1988, the appellant and another police officer, Constable Joseph Kirimi Kibera (PW2) were assigned to be on patrol duties within Uhuru estate in Nairobi. For that purpose the appellant and PW2 were each armed with a G3 rifle with 20 rounds of ammunition. The two went out for

duties at about 3.30 pm and were due to report off at about 10.00 pm. The deceased was a 19 year old boy and he lived with his sister Margaret Muthoni (PW3) at Maringo Estate. Mwangi Kanja (PW5), another brother of the deceased, was staying in Jericho Estate. On that day, PW3 had a birth-day party for her child, and PW3 sent the deceased to Jericho Estate to invite his friends to the party. PW5 was already in the house of PW3. The deceased never returned to the house of PW3; instead at around 7.30 pm PW3 and PW5 received a report that the deceased had been shot and when they proceeded to Makadara Estate, the two found their brother lying on the ground crying and complaining that he had been shot for nothing. According to PW5, the deceased was bleeding from his leg.

It was agreed on the evidence that the appellant and PW2 came upon the deceased, who, according to PW2, was with two other young men. George Mwangi (PW4) told the trial judge he was one of the young men with the deceased though the appellant contended that PW4 was not at the scene at all. It was, however, agreed on either side that, something did happen between the deceased and PW4 on the one hand, and the appellant and PW2, on the other hand, which led to the appellant shooting the deceased on the right leg. Various versions were given as to what led to the appellant thus shooting the deceased. According to PW2, while they were on their way to Makadara along Hamza Road, they met the three young men amongst whom was the deceased. The three young men were coming to meet PW2 and the appellant ordered them to stop. Two of them ran away but the deceased stopped as ordered. The appellant and PW2 then approached the deceased with PW2 leading the way. When PW2 was about to interrogate the deceased, he heard gun-fire on his left side and next saw the deceased fall down. The appellant told him he had fired the gun. That was the version given by PW2 and that witness denied that the deceased was found armed with any weapon either a gun or a Somali sword.

According to PW4, while he and the deceased were walking along Hamza Road, they first met two young men who passed them and went away. PW4 and the deceased then came upon two policemen each of whom had a gun. The policemen ordered PW4 and the deceased to stop and the two stopped. The policemen then started beating them without saying anything. One beat the two boys with the butt of his gun. The deceased asked why they were being beaten and according to PW4, one police officer retreated two steps and then fired. The deceased fell down and PW4 took his heels but not before hearing one officer shout “Happy birth-day, Happy birth-day”. That was the version given by PW4. The third version was given by the appellant himself. According to him, they stopped some young men in a car-park right within Uhuru Estate. The car park was along the road and the young men were moving from one car to the other. The appellant and PW suspected the young men were upto no good and they started to trail them. PW2 alleged in his evidence that they had left Uhuru Estate to go to Makadara Estate on some business of the appellant. Appellant’s version on this point was that he had no business of his own in Makadara estate and they went to that estate solely because they were trailing the young men. When the young men noticed the two officers trailing them, they (young men) started to run away and the appellant and PW2 pursued them. In the course of the pursuit the appellant saw the men draw some objects from their waists and he could not tell what the objects being drawn were. The objects were taken out at some dark corner near some building but the men then crossed to a place where there was light and the appellant saw one of them holding a sword. The appellant and PW2 went round the building so as to confront the men, but the men ran in different directions, one running towards the road. The appellant decided to stop the one running towards the road and he fired at that man. PW2 was then about ten metres from the appellant, and when he fired at the deceased, the latter was about 25 – 30 metres away and PW2 was following the deceased from another direction. The appellant had contended that he had not fired directly at the deceased but that the latter, for some reason had changed the direction of his flight, and, as it were, ran into the bullet.

Following the shooting, the deceased was taken to the Kenyatta National Hospital. The appellant contended before us that neither the Criminal Investigation Department (CID) officers who took the deceased to the hospital from the scene of the shooting, nor the staff of the hospital who received him at the hospital were called to testify on the condition of the deceased the appellant asserted that the deceased could have been killed on the way by the police officers who took him to hospital, the reason for those officers doing so being to please the officer-in-charge (OCS) of the appellant’s police station whom the appellant alleged was bent on getting rid of him from the police force. We asked the appellant if he himself, as a police officer, would kill another person merely to please his superior and while his answer

was that he himself would not do such a thing, he contended other officers would do so. We reject that contention out of hand.

The evidence available on the record clearly shows that the deceased died on the 1st January, 1989, while he was at hospital and there is absolutely no evidence to show that the deceased was already dead when he arrived at the hospital. The appellant's other contention was that if the deceased was not killed on the way to the hospital, then, the injuries which caused his death must have been inflicted during the trip to the hospital, either by being mishandled while in the vehicle or through deliberate torture. Apart from the bullet wound the deceased had other injuries as we shall show herein. We shall deal with this point in due course.

Dr Samuel Odero Ywaya (PW13) performed the post-mortem examination on the body of the deceased on 13th January, 1989, some twelve days after death. According to that doctor apart from the bullet wound on the right leg, the deceased had blood on both sides, of the chest cavity with a bruise on the right side of the lung and the doctor put the cause of death as due to bleeding from both sides of the chest cavity and of course bleeding from the bullet wound. The appellant told us there was no evidence that the deceased bled from the bullet wound. That contention is clearly wrong. PW5 said in his evidence that when he found his brother by the road side he was bleeding from the leg and PW5 did first aid on him. The appellant himself said in his sworn evidence and we can do no better than to quote him:-

> "The suspect did not fall down he sat down. I went to him and I noticed he was bleeding. PC Kirimi and I tried to control the bleeding by a piece of cloth we tore from him……."

There was abundant evidence that the deceased bled from the bullet wound. PW13 stated the bleeding from the leg would contribute to the deceased dying.

Before we deal with the appellant's main complaints, we wish to dispose of the issue to which we referred earlier, namely that the prosecution failed to call certain CID officers who would have given material evidence and that no explanation was given from the failure to call those witnesses. The appellant asked us to make the usual inference that had such witnesses been called, they would have given evidence unfavorable to the prosecution but favourable to him. We would agree with the appellant on this general proposition of law but we doubt its actual applicability to the case of the appellant. The appellant's contention before us was that the CID officers might have mishandled the deceased, if not actually tortured and killed him, on the way to the hospital. Looking at the matter from a common sense point of view, what material evidence could the said officers have given to the Court? Is it likely that they would have come before the learned trial judge and admitted that it was they who mishandled the deceased on the way to the hospital and thus caused him the injuries to which he subsequently succumbed? We are ourselves satisfied that the CID officers had no material evidence which they would have given to the trial court and the prosecution was accordingly under no obligation to call them. In any case the appellant himself could have called the alleged witnesses. Nor was there any point in calling the hospital staff who received the deceased at the hospital.

As we have already said there was evidence on record that the deceased in fact died on the 1st January, 1989 and no hospital staff was with the deceased in the police vehicle to enable him to know how the deceased sustained his injuries. There is accordingly, no substance in the appellant's contention that the prosecution kept back material witnesses who could have supported his case.

We now come to the appellant's gravamen of the appeal which was that the bullet wound he inflicted on the deceased was not the cause of death and in this connection, the appellant took us through the evidence of the doctor (PW13), particularly in cross – examination where the witnesses stated:-

> "…….. The immediate cause of death was bleeding into the lung. I do not know the cause of the bruise on the lung. No injury on the ribs. Lung is placed below the ribs……
>
> The bullet wound on the leg could not have caused bleeding into the chest cavity. The bruise on

the lung was a recent injury a day a week or so."

Dealing with this aspect of the case the trial judge found as follows:-

> "The finding of the pathologist has given me a lot of concern. He did quite a slovenly job but this slovenliness doesn't bind the Court. The Court is entitled to look at the evidence and the circumstances in totality. The totality of such evidence and circumstances persuades me to hold that the deceased though said to have been of poor nutrition, was healthy and fit before the shooting incident. He would not have been walking along chatting with a friend with a bruised and bleeding lung in his chest. He was shot with a very big gun and the impact felled him to the ground. There is no evidence that would lead me to the suggestion that was the handling after the injury that resulted in that bruise of the lung. I find no doubt, everything considered that the falling from the impact of the …….. firing caused the injury. I therefore reject the suggestion from the defence that rough handling existed at all. The firing
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> by the accused caused the death of the deceased ....."

The appellant contested these findings on several fronts. As regards the learned judge's finding that it was the bullet wound which caused the death, the appellant submitted before us that is not supported by the medical evidence in which PW13 stated that the immediate cause of death was bleeding into the chest cavity from the bruised lungs, and that the bullet wound on the leg could not have caused bleeding into the cavity. As regards the finding that the bruising of the lung must have been caused by the appellant falling down due to the impact of the bullet hitting him with force, the appellant submitted that, the finding was too speculative and there was no evidence to support it. We think there is force in these arguments and we must closely consider them. We, however, agree with the learned judge that some aspects of the doctor's evidence did not make much sense and he was right in being critical of the doctor.

We know for a fact that the deceased died on 1st January, 1989 and that PW13 carried out his examination on the body on 13th January, 1989. Yet PW13 was prepared to say that injury to the lung was between one day and seven days old at the time of his examination. That would mean that the deceased had died long before the lung injury had been inflicted on him and yet PW13 was swearing it was the lung injury which was the immediate cause of death. The trial judge was not bound to agree with such senseless evidence and while we, like the learned judge, agree with PW13 that the immediate cause of death was the lung injury, that injury must have been inflicted on the deceased on the 31st December, 1988. But we agree with the appellant that the trial judge's finding that the lung injury was caused by impact consequent on the fall of the deceased was too speculative and was not supported by any evidence.

If the appellant's conviction can be sustained only upon that basis, then this appeal must succeed. There was, however, evidence which if the learned judge had properly directed himself on, he would no doubt have found the explanation for the cause of the lung injury.

That evidence was given by PW4 who swore he was with the deceased when the incident took place. The trial judge obviously believed the evidence of PW4. The appellant submitted before us that PW2 was not a wholly disinterested party and he must have been covering-up his role in the whole affair. But PW4 had no interest at all in the matter and he was, throughout his evidence, very fair. He never pin-pointed the appellant as being the officer who used the gun-butt to hit the deceased. He did not even alleged that it was the appellant who retreated a few steps before firing at the deceased. If for some reason of his own PW4 had been malicious towards the appellant it would have been very easy and tempting for the witness to have sworn that it was the appellant who did all these things. And if he was not even at the scene as the appellant submitted before us, where did he pick the whole story from? Like the trial judge, we are in no doubt that PW4 was an honest witness and the explanation for the injury to the lung of the deceased was to be found in the evidence of this witness. If his evidence was believed, as we now do, and as the trial judge must have done, then that evidence shows that PW2 must have also been involved in the assault upon the deceased and he (PW2) should have been charged together with the appellant. We do not know why he was treated differently from the appellant, but whatever might have been the reason, the failure to charge him could not provide the appellant with a defence.

In the end we are satisfied that inspite of the misdirections by the learned judge there was abundant evidence from which this appellant could and was, in our view, rightly convicted of the offence of manslaughter. The appellant was, we think, lucky to be convicted of the lesser offence instead of murder of which the assessors thought he was guilty. His appeal against conviction must accordingly fail.

The sentence of seven years imprisonment imposed on him cannot, in the circumstances of the case, be said to be harsh and unreasonable. As we have said we think the appellant was lucky to have escaped the charge of murder and we accordingly see no reason for interfering with the sentence.

In the event this appeal fails in *toto* and we order it to be dismissed. That shall be the order of the Court.

Dated and Delivered at Nairobi this 3rd day of October, 1993

J.E. GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

R.S.C OMOLO

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JUDGE OF APPEAL