REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

Criminal Appeal 12 of 1991

FRED OKOTH OPIYO ……....APPELLANT

AND

REPUBLIC …….…….. RESPONDENT

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

(Mr Justice D.K. Aganyanya) dated 28th November, 1990, In H.C.CR.C. No.14 of 1989)

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JUDGMENT OF THE COURT

The appellant was charged jointly with two others with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was, however, found guilty of the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code and convicted accordingly and sentenced to imprisonment for a period of 5 years. His two co-accused were acquitted. The appellant filed 8 grounds of appeal and on the day of the hearing of the appeal he submitted supplementary grounds consisiting of two paragraphs divided into numerous sub-paragraphs. All the grounds of appeal are directed against the evidence of the sole eye-witness for the prosecution, P.W.1, and the evidence of the two co-accused. It is also claimed that the evidence of P.W.1, was uncorroborated.

Briefly according to P.W.1, Mr David Musa Mokua, on 7th March, 1988, at about 8.00p.m he and the deceased had gone to the house of the 2nd accused where busaa as well as changaa liquors were being sold. In the 2nd accused's house in addition to the 2nd accused there were present four other men including the appellant and the 3rd accused. P.W.1 and the deceased bought busaa for Shs 3.00. That appeared to annoy the appellant who expected them to buy liquor for all of them. A slight argument arose whereupon the appellant first slapped P.W.1. and then he slapped the deceased. The deceased became annoyed and abusive towards the appellant but on P.W.1's persuasion they both decided to leave the place. As they moved out the appellant and the two accused followed them outside. The appellant held the deceased by the throat as if to strangle him. The deceased then hit him with the stick that he had. Before any further damage could be done P.W.1. managed to persuade the appellant and the two co-accused to leave the deceased. It was now the appellant who was crying for vengeance as the three of them went back to the house of the 2nd accused. P.W.1 and the deceased once again started on their way. They had walked about 70 paces when they heard people talking behind them and then saw the appellant and the 2nd accused running after them. The appellant passed P.W.1 and got hold of the deceased and a struggle ensued between them. The 2nd accused pounced on P.W.1 telling him that they would both die. A brief struggle followed but P.W.1 managed to free himself and although the 2nd accused chased him he escaped

leaving the deceased struggling with the appellant. Early next morning the 2nd accused came to P.W.1's house and asked him if he was still alive. P.W.1 asked him about the deceased. The 2nd accused expressed his ignorance about him. Then they both together went to the appellant's house. The appellant also expressed ignorance over the deceased's whereabouts. He showed P.W.1 his blood stained clothes complaining that that was the way he was beaten by them. P.W.1 then reported the matter to the farm manager. The dead body of the deceased was eventually discovered in the cattle grass to which place it had been dragged from the site where P.W.1 had left the deceased fighting with the appellant.

In his unsworn statement in court the appellant admitted that they were all drinking in 2nd accused's house. Later P.W.1 and the deceased appeared to have an argument. The deceased then gave some money to the 2nd accused. After that the two left. About half an hour later at about 8.00 p.m. the appellant also left. He had gone about 20 yards only when he felt hit by a rungu. He grabbed the assailant and screamed for help. The 2nd and 3rd accused came with a torch and he then recognized the assailant as the deceased. He was surprised that half an hour after the deceased had left the house he was still there. The deceased told him that he did not know that it was he, the appellant, whom he had hit. The appellant, however, decided to close the matter and, leaving the deceased with his two co-accused, he came home.

The 2nd accused in his sworn evidence also referred to the quarrel between P.W.1 and the deceased with one accusing the other for not buying the changaa. However, when he told them to stop quarrelling they obeyed. Later as the two were leaving for home the appellant went up to them and pushed them out. Fearing that they might start fighting inside the house he chased the three of them out. Outside they started fighting. So he and the 3rd accused went outside and saw the appellant and the deceased grappling with each other. P.W.1 was no where in sight. They separated the two. After the appellant sped home both he and the 3rd accused also left for their respective homes. He had not seen the appellant slap the deceased or P.W.1 inside the house.

The 3rd accused in his sworn evidence said that at one point he had left the home of the 2nd accused. When he came back he found some noise inside and then he heard the 2nd accused asking everyone to leave the house. The appellant, the deceased and P.W.1 then left. After 5 or 10 minutes he heard cries outside and he came out with the 2nd accused. His account of what he saw and what followed thereafter is similar to what the 2nd accused had said.

That was all the evidence that the learned trial judge had before him. He accepted the evidence of P.W.1 and rejected the evidence of the appellant and the two accused. In his grounds of appeal, as we stated earlier, the appellant has confined his criticism to the acceptance of P.W1's evidence despite the same having been contradicted by the evidence of his two co-accused. We have carefully perused the evidence of P.W.1. and also the whole of the evidence produced on behalf of the appellant and the two co-accused. The learned trial judge has given sound reasons why he had accepted P.W.1's evidence as a reliable and truthful account of the events as they happened that night. We fully concur with his findings relating to the events of that night.

As regards the issue of lack of corroboration raised by the appellant there is the evidence of presence of blood belonging to the deceased's blood group on the appellant's gum-boots. To this we shall revert later. At this stage we shall refer to the following significant statement made by P.W.1 in his evidence relating to the conversation between the appellant and the 2nd accused when the latter with P.W.1 had gone to the appellant's house the following morning enquiring about the deceased. This is what P.W.1 said:

"1st accused (appellant) asked the 2nd accused why he was fighting him again that night. 2nd accused told him he was trying to stop him as the deceased was dying (or going to die)."

This evidence clearly shows that the 2nd accused had forcibly attempted to stop the appellant from continuing to beat the deceased even when the latter was dying. This statement by P.W.1 was never challenged during his cross-examination. It was never suggested to him that no such conversation had taken place between the appellant and the 2nd accused. Nor did either the appellant or the 2nd accused

specifically deny this conversation between them. This unchallenged evidence of conversation between the appellant and the 2nd accused provides a useful corroboration.

As regards the presence of blood stains on the appellant's gum boots the evidence of the Government Analyst Mr James Mariaria Rungu (P.W.11) was that the gum boots and human blood stains of group B. The appellant's blood sample belonged to group O but the deceased's blood sample belonged to group B. In Mr Rung's opinion the gum boots had come into contact with human blood of group B which could not be that of the deceased.

The appellant had queried that the medical evidence had not indicated that the deceased had bled externally. So how could his blood have dropped on his gum-boots. Unfortunately the doctor who performed the post-mortem did not give evidence. The post-mortem report prepared by him was not objected to by the defence and so the same was produced in evidence (section 33 of The Evidence Act (Cap 80). The cause of death was given as intracranial bleeding. Injuries were described as a large left subdural haemorrhage in the head with the brain compressed under the hemorrhage. But there is plenty of other evidence to show that the deceased had actually bled externally. P.W.1 said near the end of his cross-examination that when he saw the body of the deceased the next morning his face and mouth were swollen and bloody and his clothes were bloodstained. P.W.2., the farm-foreman, to whom P.W.1. had reported had gone to the scene wit P.W.1 and the farm secretary, Mr Isaac Ontiri Ayibhi (P.W.3). Both P.W.2 and P.W.3 said that at the scene they had seen blood and from there they had followed the trail of blood and the path made by dragging of someone on the ground. So the evidence was there that the deceased had bled externally also and that accounted for the presence of blood belonging to group B on the appellant's gum boots. That provided a strong corroboration. On our own evaluation of the evidence as a whole we are satisfied, as was the learned trial judge, that it was the appellant who unlawfully killed the deceased.

The learned trial judge found the appellant guilty of manslaughter because in his view the appellant had acted in the heat of passion which had not cooled after he himself had been attacked and injured seriously. With respect we do not agree that on the facts that emerged from the evidence the defence of acting under the heat of passion was available to the appellant. On each of the three occasions of physical confrontation and assault it was the appellant who was the aggressor and had commenced the act of assault. Inside the 2nd accused's house he had slapped P.W.1 and the deceased without any provocation. At the persuasion of P.W.1 the deceased had not only not retaliated but had allowed himself to be led outside the house. The appellant with both the accused followed them outside where the appellant held the deceased by the throat and tried to strangle him. It was then that the deceased struck him on the head with a stick. That clearly was an act done in self-defence. P.W.1 again separated them and persuaded the deceased to go home with him. It was now an anger which must have been generated in the appellant on this occasion. But this cannot give rise to a defence based on heat of passion. It was appellant who had assaulted first and was trying to choke the deceased. The deceased's act was in self-defence. An act done in self-defence may severely annoy or anger the aggressor but it cannot afford a defence to the aggressor's violent re-action (Refer to sections 207 and 208(4) of the Penal Code).

P.W.1's evidence was that after the second incident they had walked about 70 paces when the appellant and the 2nd accused came running after them. This clearly was a planned and deliberate act and not an act being done in the heat of passion. The appellant passed him and started fighting the deceased. This was again an unprovoked attack by the appellant. In our view the learned judge erred in allowing the appellant the defence of having acted during the heat of passion. The chain of events clearly show that the deceased was trying to avoid a confrontation even though he was doing so at the persuasion of P.W.1. On the other hand if the learned trial judge had investigated more thoroughly into the appellant's probable state of intoxication then perhaps he may have found valid grounds to reduce the killings to manslaughter.

However, the appellant was found guilty of manslaughter and we can do nothing as far as the conviction is concerned. As far as the sentence is concerned we are satisfied that the period of 5 year's imprisonment ordered by the learned judge is not by any means harsh. If at all it is on the lenient side but we do not propose to interfere with that. The upshot is that the appeal against both the conviction and the sentence is dismissed.

Orders accordingly.

Dated and delivered at Nakuru this 25th day of September, 1992.

J.E. GICHERU

JUDGE OF APPEAL

A.M. COCKAR

JUDGE OF APPEAL

M.G. MULI

JUDGE OF APPEAL