



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MAKHANDIA, M'INOTI & ODEK, J.J.A)

CRIMINAL APPEAL NO. 3 OF 2016

BETWEEN

KENNEDY OCHIENG ONGINDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Migori (Majanja, J.) dated 22nd October 2015

in

H.C. CR. C. No. 110 of 2010)

JUDGMENT OF THE COURT

The appellant, Kennedy Ochieng Ongindo, and Patrobas Machage Mauko (PW2) were neighbours at Sori Township, in Migori County. Their houses were barely 10 to 15 meters apart and they had lived as neighbours for a period of about two years. The appellant was living with his wife, Milda Achieng (the deceased). On 7th November 2010, at about 8.00 pm, PW2 was returning home from his shop when he encountered the appellant beating the deceased. The deceased was screaming for help and PW2 went to her assistance. He entered the appellant's house and found him beating the deceased with a piece of timber all over the body, the back, chest ribs and stomach. He pleaded with the appellant to stop beating the deceased, which he did for a moment. PW2 then proceeded to his house and all was quiet for about two hours, until 10.00 pm when the deceased started screaming for help again. Because it was late, PW2 did not go back to the appellant's house.

Early the next morning, PW2 went to the shop and returned to his house at about 8.00 a.m. for breakfast. He found the deceased crying, complaining of being in great pain. Her body was bare from the waist up and very swollen. The appellant was not present and after she asked for and took some water, the deceased died. A group of neighbours, who included PW2, went looking for the appellant and found him at the lakeshore. They lured him back to the house and locked him in to forestall his escape. Then they called the police, who upon arrival found that the appellant had stabbed himself on the neck with a knife and was bleeding profusely. He was rushed to **Karungu Hospital** and subsequently to **St. Camillus Mission Hospital** where he was admitted for four days, whilst the body of the deceased was taken to **St. Camillus Mission Hospital Mortuary**.

Pursuant to information dated 17th November 2010, the appellant was charged with the murder of the deceased, contrary to **section 203** as read with **section 204** of the **Penal Code**. **Dr. Gordon Odhiambo Okongo (PW1)**, a senior medical officer performed the postmortem examination of the body of the deceased after her mother, **Domtila Akumu Ogada (PW3)**, identified it. He testified that the deceased had suffered a ruptured spleen leading to bleeding into the stomach, where he found about 400 milliliters of blood. Her 7th cervical vertebra was also broken. He formed the opinion that the cause of death was shock due to massive splenic rupture and excessive bleeding. He opined that the splenic rupture was due to a fall from a high height or due a weight at force from a blunt object.

When the appellant was put on his defence, he gave a sworn statement but called no witness. The substance of his defence was that he was a fisherman and that the deceased was his wife, with whom he was living in a rental house at Sori Township. On the material day he came home from fishing at about 10.00 pm. As he waited for the deceased to prepare dinner, her phone, which was on the bed, received a text message. Upon checking the phone, he noticed that it was a love message from a man called **Victor** who he believed wanted to have sexual intercourse with the deceased, urging her to meet him at **Bongo** as earlier planned.

When he confronted the deceased with the message, she insulted him and he slapped her twice on the cheek and on the abdomen. She jumped on him and slashed him on the neck with the knife she was using to cut some tomatoes. He called his brother, **Fredrick Otieno Ondingo** who

took him to **Okeyo Dispensary** where he was treated at about 3.00 am. That brother died subsequently and was not available as a witness. The appellant also did not have any documents from the Dispensary because he claimed that the police confiscated them. In the morning he went back home and encountered many people who wanted to beat him up. They removed the bandage on his neck and locked him up in his house, where he found that the deceased had died.

Subsequently the police arrested him and charged him with the murder of the deceased. He denied that his injuries were self-inflicted. It was also his evidence that he did not know PW2 and that PW2 never visited his house on the material day.

The appellant's trial started before **Sitati, J.** who heard the evidence of PW1 and PW2. Subsequently **Majanja J.**, after complying with **section 200** of the **Criminal Procedure Code**, completed the trial and wrote the judgment. Satisfied that the prosecution had proved its case beyond reasonable doubt, he convicted the appellant for the offence of murder and sentenced him to death. The appellant was aggrieved and preferred this appeal, which is based on five grounds in which he faults the learned judge for holding that he was the one who inflicted the injuries from which the deceased died; for finding malice aforethought on his part; for making findings that were not supported by the evidence; for convicting him on weak and contradictory evidence; and for imposing an undeserved sentence that was manifestly harsh and excessive.

Urging the appeal, the appellant's learned counsel, **Mr. Onsongo** submitted that the learned judge erred by holding that the death of the deceased resulted from the appellant's actions. He contended that a ruptured spleen may result from many factors, other than physical trauma such as malaria, infectious mononucleosis and blood diseases such as hemolytic anemia or certain types of lymphoma. He relied on the decision in **Kihara v. Republic [1986] eKLR** where this Court found death from a ruptured spleen to have been insufficiently explained. He further contended that the trial court had misapprehended the evidence of PW1 because that witness never said that the cause of the ruptured spleen was the assault on the deceased by the appellant. We were therefore urged to rule out the assault as the cause of the ruptured spleen because PW1 did not observe any external injuries on the body of the deceased.

Counsel further submitted that the prosecution case was riddled with contradictions, with PW2 testifying that the appellant beat the deceased with a piece of timber whilst the investigating officer, **Wilfred Kigen (PW4)**, suggested that he had used an oar.

As regards sentence, counsel submitted that the learned judge erred by sentencing the appellant to death on grounds that the death sentence was the only sentence prescribed for the offence of murder. He relied on decisions from other jurisdictions indicating that sentencing is a function of the Judiciary and that the legislature cannot tie its hands.

Ms. Lubanga, learned counsel for the respondent, in a short response, opposed the appeal. She submitted that there was direct evidence from PW2 of the appellant assaulting the deceased, which ruled out any other cause of the ruptured spleen that caused the death of the deceased. She urged us to affirm the trial court's conclusion that the prosecution proved its case beyond reasonable doubt. The respondent did not address the appeal against sentence. As this is a first appeal, we are obliged to reappraise and re-evaluate the evidence and come to our own independent findings. (See **Kiilu & Another v Republic [2005] KLR 174**). We however, must bear in mind the advantage of the trial court, which we do not have, of having seen and heard the witnesses as they testified.

The critical issue in this appeal, other than the question of sentence, is whether the prosecution proved beyond reasonable doubt that the appellant, with malice aforethought, caused the death of the deceased. There is no dispute that the deceased died from a ruptured spleen. The prosecution evidence was that PW2 witnessed the appellant beating the deceased all over her body with a piece of timber. On his intervention, the appellant stopped beating the deceased, only to resume after about two hours. The next morning shortly before she died, PW1 saw the deceased, whose body was all swollen, crying in pain.

The evidence of PW1, the pathologist, was that he did not observe any external injuries on the body of the deceased. He however of the opinion that that the splenic rupture and excessive bleeding, which caused the death, was due to a fall from a high height or due a weight at force from a blunt object. There was no evidence of the deceased having fallen from any significant height, which we think the learned judge was entitled to eliminate as a cause of the ruptured spleen. There was however evidence of the deceased having assaulted the deceased with a piece of timber for a considerable period of time. **Sitati, J.** who saw and heard PW1 as he testified was impressed by him as a witness and specifically noted in the record that he was a witness of truth. With respect, we do not see how the judicial and medical authorities that the appellant has relied upon can lead to a different conclusion. The article by **E.**

Gedik, S. Girgin, M. Aldemir, C. Keles, M. C. Tuncer and A. Aktas, titled, "**Non-traumatic Splenic Rupture: Report of Seven Cases and Review of Literature**", **World Journal of Gastroenterology, 2008 November, 21** which the appellant's counsel cited, addresses non-traumatic causes of splenic rupture. It is not in dispute that splenic rupture may occur as a result of non- traumatic causes. In this appeal however, the prosecution case is that the deceased's ruptured spleen was traumatic, caused by the appellant's assault on the deceased. There was no evidence of the deceased having had any disease that could have caused the ruptured spleen. To accede the appellant's submission, is to literally agree to be led down the garden and to ignore the evidence on record in favour of speculation. On the same vein the decision in **Kihara v. Republic** (supra), is easily distinguishable from this appeal. First, the Court observed that "*from the evidence there is no eye witness who saw the appellant kick the deceased on the stomach.*" Secondly, there was medical evidence that the deceased's spleen was double the normal size due to previous infection. In those circumstances this Court rightly concluded that the cause of the splenic rupture in **Kihara v. Republic** (supra) was not proved beyond reasonable doubt. That is not the case in this appeal.

We agree with the appellant that the learned judge misapprehended the evidence when he stated that PW1 testified that the deceased died as a result of assault. PW1 never adduced any such evidence. He merely expressed the professional opinion that a weight at force from a blunt object could have caused the rupture of the spleen. Having carefully re-evaluated the evidence, as

we are duty bound to do, we would arrive at the same conclusion as the learned judge that the deceased died of a splenic rupture and excessive bleeding arising from the assault that she suffered at the hands of the appellant. That conclusion flows from the combined evidence

of PW1 and PW2, and not PW1 alone as the learned judge concluded.

Regarding the alleged contradictions in the evidence of the prosecution, it is based on the insignificant distinction between a piece of timber and an oar. As we have already stated, Sitati J. specifically found PW1 to be a witness of true and believed him when he said among other things, that the appellant was beating the deceased with a piece of timber. We would add, as this Court stated in **Joseph Maina Mwangi v. Republic, CR, App. No. 73 of 1993:**

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

We would add too that the appellant’s conduct after the commission of the offence is not consistent with his innocence. There is on record cogent evidence that when his neighbours arrested him at the lakeshore the morning that the deceased died, the appellant had no injuries. He injured himself when the neighbours locked him in the house to call the police. His claim that it was the deceased who injured him the previous night cannot stand in light of the evidence on record. As this Court stated in **Stephen Njenga Wanjiru v**

Republic, Cr. App. No. 108 of 2013, lying to the court by and of itself alone is not necessarily evidence of guilt on the part of an accused person. However, the court is entitled to take into account the conduct of the accused, such as fleeing, which unless cogently explained, is normally not consistent with innocence. In this case, it is obvious that the appellant had deliberately attempted to take his own life after he found that the deceased had died.

Lastly, as regards the sentence of death, which the learned imposed because he found to be the only prescribed sentence for the offence of murder, the Supreme Court held in **Karioko Muruatetu & Another v. Republic**

[2015] eKLR that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court stated:

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right.”

In this case, the appellant was a first offender, who did not have a previous criminal record. There are children born of the union between him and the deceased who have no one else to rely on. Considering all the circumstances of the case, and in accordance with the proviso to section 333 of the Criminal Procedure Code, we allow the appeal against sentence, set aside the sentence of death and substitute therefor a sentence of 30 years imprisonment with effect from the date of the appellant’s arrest, because he has been incarcerated since then. It is so ordered.

Dated and delivered at Kisumu this 21st day of November, 2019

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

J. O. ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR