



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NAMBUYE, MWILU & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 197 OF 2011

ROBERT KIPLIMO MALAKWEN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Conviction, Judgment, Decree, Order or as the case may be of the

High Court of Kenya at Nakuru (Hon. Mr. Justice Ouko) dated 14th July 2011

in

H.C.CR.C. NO. 117 OF 2011)

JUDGMENT OF THE COURT

1. **BERNARD KIPLIMO LELE** (deceased), died on the 7th day of November, 2008 following head injuries he sustained on the 5th November, 2008 at Salгаа Trading Centre. In the Information dated the 20th day of November, 2008, **ROBERT KIPLIMO MALAKWEN** (appellant), stood charged of murder, the particulars of the offence being that with another not before court they murdered the deceased herein. The appellant denied the charge. At the close of the prosecution's case consisting of the evidence of nine (9) prosecution witnesses, the appellant was found to have a case to answer, but at the end of the defence case the trial court found that a case of manslaughter, not murder, had been made out, and convicted the appellant and sentenced him to serve a prison term of eight (8) years. Being aggrieved by that decision the appellant preferred this appeal.

2. The appellant attacks his conviction in the grounds to be found in the Supplementary Memorandum of Appeal and they are, that the learned trial judge erred in law and in fact in failing to note that the prosecution had not discharged its burden of proof under the **Evidence Act**; failed to note that the eye witness evidence of PW1 and PW2 was contradictory; thereby creating a doubt whose benefit should have been given to the appellant; failed to consider to the benefit of the appellant the evidence of PW3 and PW6 which cast doubt as to the participation of the appellant in the commission of the offence; failed to find that the evidence of PW1 was contradicted by that of PW7 and PW9, and in dwelling only on the incriminating evidence to the exclusion of the exonerating evidence; and finally the appellant pleaded that the sentence imposed was excessive in the circumstances of the case.

3. In support of those grounds, learned counsel Mr. Maragia Ogaro submitted that there were material contradictions in the evidence of what he called alleged eye witnesses. He submitted that PW1 gave evidence that two people entered the bar whereas the evidence of PW4 was that it was five people who entered and that it was not clear who started the fight. Counsel added that the evidence of PW1 to the effect that the deceased was beaten all over the body was not credible because PW7 the doctor found injuries in only one place. Further submission was that the deceased never told PW3 and PW6 the person who had hit him or that it was the appellant who inflicted injuries on him. Counsel submitted that the postmortem report did not corroborate the evidence by PW1 that the deceased was injured on the chest and that whereas PW9 said that the fight was outside the bar, PW1 and PW4 said the fight was inside. Submitting that it was not clear who between PW1 and PW4 identified the offending stone, Mr. Maragia said that in any event PW4 exonerated the accused from the incident that led to the deceased's demise and that common intent was not proved.

4. Mr. Maragia added that the court below failed to analyse the evidence of PW1 and PW4 and only relied on the evidence of PW1 saying that it corroborated that of PW4 whilst the truth was that those pieces of evidence were contradictory of each other. Counsel's further submission, which he described as being made without prejudice, was that the sentence of eight (8) years imprisonment meted out to the appellant was harsh considering that the incident was in a bar and all the parties were drunk. Counsel lamented that the trial court overlooked the fact that the appellant had been in custody since 2008 and sentence was passed three years later in 2011. Counsel then urged us to allow the appeal, quash the conviction and set the appellant at liberty, adding that in the alternative we should sentence the appellant to probation.

5. Learned Senior Assistant Director of Public Prosecutions Mr. J. Omutelema vehemently opposed the appeal on conviction, stating that the evidence of PW1 and PW4 was not contradictory, only that each focused on certain aspects. Counsel admitted that indeed the appellant did not administer the fatal blow, a fact counsel said was taken into account by the trial court, and concluded that the trial court was right in its finding that the case was one of common intent.

6. On sentence Mr. Omutelema was of the view that the trial court appeared not to have considered the period of three years that the appellant had been in custody prior to sentence being passed and an imprisonment term of eight years being imposed on him. Counsel then invited us to exercise our powers and interfere with the sentence downwards.

7. This is a first appeal. This court is enjoined to re-evaluate the evidence presented before the trial court and re-assess the same so as to reach its own decision. The only limitation in that exercise of re-appraising the evidence is that the trial court had the benefit of hearing and seeing the witnesses as they gave evidence and that court therefore had a better opportunity to assess the demeanour of the witnesses see **OKENO V R [1972] E.A. 32**.

A first appeal therefore is in the nature of a retrial, so to say, save for the caution on the demeanor of witnesses.

8. What then was the evidence before the trial court? PW1, **Florida Kipchirchir** was selling beer at her bar on 5th November 2008. Her customer, one Bernard was having his pilsner when two people entered the bar. PW1 knew one of the two as Robert the appellant herein. The other she only knew by appearance. The other person snatched Bernard's beer and when Bernard stood to confront him, the appellant herein pushed Bernard and a fight broke out. The person who had accompanied the appellant to the bar, who also grabbed Bernard's beer, then walked out of the bar and returned with a stone. Bernard was lying on the appellant on the ground as the fight progressed. Bernard then turned the appellant over. It was when Bernard was on top of the appellant that he was hit with a stone on the head. The appellant on his part, kicked Bernard. Bernard is the deceased in this case. By the time the trio stopped the fight, the deceased was bleeding from his head. His sweater was so soaked in blood that he had to buy another one. PW1 called the deceased's telephone later but it was picked by someone who informed PW1 that the deceased was injured. PW1's further evidence was that on 7th November 2008, the deceased's brother and friends went to her seeking to know who had injured the deceased, PW1 took the police, who later went to her, to the appellant's house. PW1 later learned that the deceased died.

9. PW1 told court in cross-examination that she knew both the deceased and the appellant, who was a “*manamba*” – matatu tout/conductor. That the deceased was seated near PW1 when the appellant and the other man walked in. PW1 was categorical that it was this other man who began the fight, even without talking to the deceased. All the deceased did was to reclaim his beer and it was then that the appellant pushed the deceased. When the deceased asked the man whether he was drunk or wanted the deceased to buy him beer, the appellant at this point attacked the deceased. All this happened inside the bar. The appellant and the deceased were separated by Joseph Langat (PW4) but not before the deceased was hit with a stone by the third man. PW1 insisted that the fight was inside the bar which is where there was blood after the fight that PW1 later cleaned up. PW1’s further evidence was that when she asked the appellant why they had attacked the deceased, the appellant answered that the deceased got what he had sought.

10. PW2 merely identified the deceased’s body for postmortem, as did PW8, John Kosgey, the deceased’s father. **PW3 David Kiprono Chepkwony** found the deceased bleeding from the head at about 6.30 p.m. on 5th November 2008 outside the bar. The deceased washed his hands and left. PW2 later heard that the deceased, who was his cousin, had died.

11. **Joseph Langat**, who ran a bar business known as Trans-Highway at Salgaa gave evidence as PW4. On the material date of 5th November 2008 at about 6 p.m., this witness was unable to reach his bar as it was raining and so he sheltered at PW1’s bar. While inside he saw five men enter. He knew four by appearance but Robert, a neighbor, he knew well. Robert is the appellant herein. The men were in some argument. One of these men got into a fight with the appellant whilst another went out of the bar and returned with ½ kg stone with which he hit the man fighting with the appellant on his head. The man who was hit fell down. The man who hit him took the stone outside and then returned to the bar. The one who had been hit got up, bleeding on the head, washed his head and sat down. He did not respond when the appellant spoke to him. He left the bar alone while the appellant left with those that he had come in with. PW4 later heard that the man who had been hit on the head had died. He identified a stone shown to him in court as that used to injure the deceased inside the bar on 5th November, 2008. He said that the man who hit the deceased held the stone while inflicting the injury on him and did not throw it at him.

12. PW5, **David Ngeno**, a nurse at Sobea Ngata was called at about 8.30 p.m on 5th November, 2008 to attend to the deceased at his home. He found him bleeding from the head and he managed to stop the bleeding. The deceased was not talking. PW5 could not administer drugs to him as the deceased was drunk. The brain was oozing out of his head and so he advised his family to rush him to hospital. On 7th November 2008 at about 4 p.m PW5 heard that the deceased had passed on.

13. PW6’s evidence was that she was asked by the deceased to wash his blood soaked sweater after he walked out of the bar where he said he had been beaten.

14. The postmortem report on the body of the deceased was done by Dr. Mbithi who found a right head side laceration above the ear measuring 6x2 cms, a depressed skull fracture measuring 4x4 cm and a huge subdural hematoma between the brain and the side hemisphere. He formed the opinion that the cause of death was severe head injury due to blunt force trauma to the head. The report was produced in evidence by Dr. Titus Ngulungu, PW7, as the marker had since left public service. He also produced the report on the mental status of the appellant who was found fit to stand trial.

15. The last prosecution witness was PW9, number 232645 Inspector of Police **Peter Kaburu** who arrested the appellant on 7th November 2008 after receiving the report of the incident at the bar.

He got details of what happened from Florida (PW1) and recovered the offending stone from her which he produced in evidence.

16. The Defence evidence was that the appellant was, on 5th November 2008 at about 5 p.m at Salgaa Trading Centre when he decided to have a drink at village bar. He went there alone. He had taken two bottles of beer when five people entered the bar and ordered him to leave. One of the five hit the appellant

with his head. The five were strangers to the appellant. As the floor was wet the person who had hit the appellant with his head fell down. The appellant moved to a different spot in the bar and took his third beer after which he left for home.

The appellant's further evidence was that there were about ten people in the bar when he got there. The five who came in after him were drunk. After being hit with the head, the appellant together with his assailant both fell on the floor with the assailant atop the appellant. The appellant did not see anyone hit the assailant and he did not know what happened to him thereafter.

17. The above is the totality of the evidence the assessment of which led the trial court to convict the appellant for manslaughter and sentence him to serve eight years imprisonment.

We have assessed and analysed that evidence and on the issue of the evidence of PW1 and PW4 being contradictory we find that the two were agreed that there was a fight, a fact admitted even by the appellant. The two are agreed that the injury on the deceased was caused by a stone and was inflicted not by the appellant but by a person who was with the appellant. The point of departure is the number of persons who went into the bar immediately preceding the fight. But what is the effect of that anomaly if any? PW1, PW4 and indeed the appellant were all agreed that the fight involved not more than three people. PW1 and PW4 in particular were agreed that the deceased, the appellant and a third person not before court were involved in a fight and the deceased had serious head injuries inflicted with a stone on his head by this third person. In these circumstances therefore, absolutely nothing turns on the number of persons who entered the bar. There was no denial that the appellant and the deceased were present at the same time at the bar where they both fought and a third person, in the process of that fight, inflicted the fatal injury on the deceased. Any alleged inconsistencies in evidence are so minor and immaterial that they do not shake the availed evidence.

18. The submission that the deceased never said who it was that had injured him does not alter the end result, that the deceased was hit with a stone by a man who was with the appellant. Strong evidence on the point was provided by PW1 and PW4 who were eye witnesses and whose eye-witness accounts agreed on all relevant material factors. We have been unable to find any contradictory evidence that could aid the appellant.

19. The attack on failure by the trial judge to analyse the evidence is not merited. On the contrary, we find that the said judge properly discharged his mandate. Sample this extensive part of the judgment by the trial judge;

***“It is also common ground that the accused person was in village bar on the day in question and was involved in a fight, according to him, with unknown persons. The only question for determination is whether it was the accused who inflicted the fatal injuries on the deceased and whether he intended to cause the death of the deceased or do grievous harm to him.*”**

According to the eye witnesses, Florida Kipchirchir and Joseph Langat, the fight was about 5 p.m. or 6 p.m. Florida knew the accused well as he was a matatu tout (manamba) in the area. The deceased was seated near where Florida was. She watched the fight at a close range and gave a graphic account of what part was played by the accused and by his friend. In particular, it was her evidence that it was the accused person's friend who was the aggressor. Upon entering the bar he snatched the deceased's beer. When the deceased rose to reclaim his bottle, he was pushed by the accused. It is at this stage that a fight broke out. The deceased overpowered and floored the accused. While the two were struggling on the floor, the accused person's friend went outside and returned with a stone with which he hit the deceased on the head. The latter let go of the accused who turned on him with kicks.

Joseph Langat, on his part testified that he knew the accused person well as a neighbor but did not know his accomplice by name. The evidence of Langat, also as graphic, supports that of Florida. He was near the spot where the fight was taking place – about 5m away.

From the totality of this evidence, I am persuaded that the conditions for positive identification (sic) was favourable and both Florida and Langat witnessed the fight involving the deceased, the accused and a third person. The deceased was hit by the third person on the head with a stone.

Although from that evidence it is apparent that the fatal blow was inflicted by the third person, the accused cannot escape criminal liability for sharing a common intent with him. Section 21 of the Penal Code provides that,

“21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

It was the accused who first attacked the deceased. It is because he had been floored that his confederate resorted to a stone. After he was rescued, he kicked the deceased three times. Clearly the death of the deceased in the circumstances was a probable consequence of the prosecution of the common unlawful purpose. See Solomon Munga v. Republic (1965) EA 363.

Having found the accused inflicted the fatal head injuries, the next question is whether he did so with malice aforethought. The fight was in a bar. The deceased had been drinking when he was interrupted by the accused and his friend. Langat noted that the accused and his group were drunk. That observation is buttressed by the conduct of the accused and his friend. Without provocation, the accused person’s friend snatched the deceased person’s beer. Again without provocation the accused attacked the deceased. The accused himself admitted that he was drinking when the fight broke out.”

In light of the above, we dismiss the allegation of the trial court’s failure to analyse evidence as hollow and empty. We add that we totally agree with the trial judge’s assessment and evaluation of the evidence as is set out in the judgment.

20. Having found that there was no malice aforethought and therefore murder was not proved, was the trial judge right to convict the appellant for manslaughter? We are sure that the answer to that question is in the affirmative. There was sufficient evidence to prove the appellant’s involvement in the commission of the proved offence and his denials amounted to nought. We find therefore that the conviction for manslaughter was rightful.

21. What about the sentence, was the same excessive as alleged? The appellant was in custody from 7th November, 2008 when he was arrested until 7th July 2011, a period of two years and eight months, when he was convicted of manslaughter and sent to prison for a term of 8 years. A court is obliged to take that period of custody into account when passing sentence as per the provisions of the proviso to **section 333** of the **Criminal Procedure Code** which reads,

333(1) “A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison, and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.” (emphasis provided).

22. In our view the trial judge carefully considered the mitigation given on behalf of the appellant. He considered the age of the appellant, his family and the circumstances leading to the death of the deceased, and noted that an innocent life was lost, and a young one at that, we might add, and so passed sentence. There is no indication that the trial judge ignored the fact that the appellant had been in custody. The deceased was himself aged only 23 years when his life was recklessly brought to an abrupt end. The penalty for manslaughter is life imprisonment. Eight years that the appellant got as a first offender, and even considering the period he had spent in custody cannot be described as harsh or excessive. We think that the trial court took all relevant factors into consideration when passing sentence and no valid basis has been laid for our interference.

In the result the appeal is found lacking in merit and is dismissed in its entirety. It is so ordered.

Delivered and Dated at Nakuru this 26th day of March, 2015.

R. NAMBUYE

.....

JUDGE OF APPEAL

P. M. MWILU

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR