IN THE COURT OF APPEAL

AT MALINDI

CORAM: MAKHANDIA, OUKO & M'INOTI JJ.A.

CRIMINAL APPEAL NO. 117 OF 2014

BETWEEN

ABDALLA HASSAN HIYESA……..……..APPELLANT

AND

REPUBLIC……..……..……RESPONDENT

(Appeal from the conviction and sentence of the High Court of Kenya at Malindi, (Meoli, J.) dated 28th July 2014

in

H.C.CR.A. NO. 42 OF 2013)

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JUDGMENT OF THE COURT

The appellant, ***Abdalla Hassan Hiyesa*** was on 10th March 2013, convicted by the ***Principal Magistrate's Court, Garsen***, of the offences of manslaughter contrary to ***section 202*** as read with ***section 205*** of the ***Penal Code***, and assault causing actual bodily harm contrary to ***section 251*** of the same Code. He was sentenced to 30 years and 1 year imprisonment, respectively, with the sentences to run concurrently.

Dissatisfied with the conviction of and sentence for manslaughter, he lodged an appeal in the High Court, Malindi. His appeal against conviction was dismissed, but that against the sentence was partially successful and the sentence was reduced from 30 years to 15 years imprisonment.

The appellant is now before this Court for his second appeal, still challenging both his conviction and sentence. It cannot be gainsaid that a second appeal to this Court is limited to consideration of questions of law only. (See ***section 361, Criminal Procedure Code*** and ***CHEMAGONG V. REPUBLIC [1984] KLR 213).***

The short background to the appeal is as follows. The appellant, an Imam, and the deceased, ***Hassan Iyesa Abdalla*** (whom the appellant was accused of unlawfully killing), were brothers. They both lived with their families at ***Harura Village, Tana River County***. The relationship between the two brothers was neither fraternal nor cordial; members of the two families were accusing each other of all manner of ills, including threats to kill, which were reported at the local police station. In the fullness of time the

deceased lost his life over nothing more than everyday trifles and squabbles.

On 27th February 2012, the deceased and his wife, ***Fatuma Nassir (PW1),*** together with other neighbours, went out to work for the Red Cross in return for food rations. In their absence, the appellant and his daughter, ***Zulea***, visited and searched the deceased's home for a jerrycan that Zulea had allegedly lost earlier in the day.

Upon returning home, PW1 was informed by her daughter, ***Fatuma Hiyesa***, of the visit by her uncle and cousin. PW1 called Zulea to inquire why the visit to her house was made in her absence, but sooner the conversation degenerated into an altercation, which was joined by the appellant's wife, who had just arrived home. Shortly thereafter the appellant himself arrived and found the quarrel ongoing. He joined the fray, inciting his wife to attack PW1. When the wife hesitated, the appellant grabbed a piece of wood, which he used to assault PW1.

At that point, the deceased arrived home and upon inquiring about the commotion, the appellant turned upon him, leading to a struggle between the two brothers, which was joined by their wives. In the course of the fight with the deceased, the appellant drew a knife and stabbed him. By the time the melee ended, the deceased, PW1, the accused and his wife had all sustained various injuries. The deceased was rushed to ***Malindi Hospital*** but was later transferred to the ***Tawfiq Hospital*** Intensive Care Unit, where he eventually succumbed to his injuries on 8th March 2012.

At the trial of the appellant the prosecution called 9 witnesses who included three eyewitnesses to the stabbing of the deceased (PW1, ***Mwanajuma Omar (PW2)*** and ***Riziki Mohammed (PW5))*** and a medical practitioner ***(Dr. Mohammed Hassan Mohammed, PW7)*** who produced a postmortem report showing that the deceased sustained stab wounds to the stomach and the back. The opinion of the pathologist was that the cause of death was cardiorespiratory arrest consequent on perforation of the small and large intestines.

In his unworn defence the appellant denied stabbing the deceased and attributed his prosecution to family disputes and disagreements over their local mosque. Regarding events in which the deceased sustained his injuries, the appellants version was that it was PW1, PW2 and the deceased who attacked his wife, but fled immediately the police appeared at the scene.

The appellant filed a memorandum of appeal on 28th August 2014 and supplementary grounds of appeal on 9th July 2015. In all, his appeal is based on the following six grounds:

> ***i. The language of the trial court, the name of the interpreter and the nature of the interpretation were not indicated in the record;***
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> ***ii. Important exhibits were not produced in court;***
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> ***iii. The appellant's defence and the existing bad blood and feuds between the parties were not considered;***
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> ***iv. The prosecution case was not proved beyond reasonable doubt;***
>
> ***v. Alleged violation of Article 50(2)(c) and (j) of the Constitution;***
>
> ***vi. Alleged violation of Section 354(2) of the Criminal Procedure Code;***

At the hearing of the appeal, the appellant elected to rely on written submissions, in which he expounded and elaborated on some of the above grounds. The gist of his submissions is that his right to adequate time and facilities for preparation of his defence guaranteed under ***Art 50(2)(c)*** of the ***Constitution***, and his right under ***Article 50(2)(j)*** of the Constitution to be informed in advance of the prosecution evidence and to have reasonable access thereto, were violated. He submitted that although he applied for witness

statements and the trial court ordered the same to be supplied to him, the order was not complied with.

The appellant further submitted that the decision of the first appellate court was a nullity for non-compliance with ***section 354(2)*** of the ***Criminal Procedure Code*** because he was not invited to make a final reply once the respondent had made its submissions opposing the appeal.

Mr. Monda, learned ***Assistant Director of Public Prosecutions*** opposed the appeal and submitted that the same had no merit. On the first ground of appeal, it was submitted that the entire record was clear that the proceedings were conducted in English but translated into Kiswahili. On the exhibits, Mr. Monda submitted that the non-production of the knife, the piece of wood and the jerrycan was not fatal to the conviction because there was other overwhelming evidence proving the appellant's guilt.

It was further contended for the respondent that the High Court had thoroughly re-evaluated the evidence and satisfied itself that the case against the appellant was proved beyond reasonable doubt. The appellant's defence too, it was submitted, was adequately considered and found not to be credible. As regards the alleged violation of the appellant's constitutional rights, it was contended that the court had ordered witness statements to be supplied to the appellant and thereafter he had conducted his defence without raising any other compliant. It was also submitted that the issue had not been raised in the two courts below and was being raised for the first time in a second appeal. Lastly it was contended that any failure to call upon the appellant to make a final reply did not occasion him any prejudice and cannot be a ground for nullifying the judgment of the High Court.

Article 50(2) (m) guarantees every accused person the assistance of an interpreter without payment ***if he does not understand the language used at the trial.*** In ***KYALO KALANI V. REPUBLIC, CR. APP. NO. 586 OF 2010***, this Court emphasized the importance of that guarantee as follows:

> ***"The importance of the right to an interpreter in a criminal trial cannot be gainsaid. It is an integral part a fair trial and is intended to ensure that an accused person, who risks life and liberty, fully understands the case against him and is able to defend himself adequately. It was a right guaranteed under Section 77(2) (f) of the former Constitution and is currently guaranteed under Article 50 (2) (m) of the Constitution of Kenya, 2010. So important is the right to fair trial that it is one of the few rights and fundamental freedoms that cannot be limited under Article 25."***

(See also ***section 198***, ***Criminal Procedure Code).***

The record of the trial court indicates that the appellant took plea on 29th February 2012. The charge was read over and explained to him in Kiswahili, to which he duly responded. The record for that day, and faithfully for each other succeeding day of his trial until the delivery of the judgment, indicates that interpretation was from English to Kiswahili. The appellant has not asserted that he did not understand Kiswahili. He could not possibly have made such a claim because he cross examined all the witness and applied for recall of three of them, who he subjected to further lengthy cross examination.

We are satisfied that this ground of appeal has no merit because Article 50 (2) (m) of the Constitution and section 198 of the Criminal Procedure Code guarantee an accused person the services of an interpreter if he does not understand the language of the Court, which evidently was not the case here.

The next ground is the effect of the failure by the prosecution to produce the knife, the piece of wood and the jerrycan as exhibits. As we understand from the record, the knife is what the appellant used to stab the deceased, the wood to assault PW1 and some of the other witnesses and the jerrycan, the cause of the conflict resulting in the charges against the appellant. It is common ground that these items were not produced as exhibits before the trial court. In our view, the important exhibit, as far as this appeal is concerned, is the knife. What is the effect of failure to produce those exhibits on the appellant's conviction?

This Court had occasion to address the question in ***EKAI V. REPUBLIC (1981) KLR 569*** where it held

that failure to produce the murder weapon of itself was not fatal to a conviction. The Court found that even in the absence of the murder weapon, the post mortem report had established beyond reasonable doubt that the injury from which the deceased died had been caused by a sharp bladed weapon.

The Court took the same approach in ***KARANI V. REPUBLIC (2010) 1 KLR 73***. At page 79, the Court delivered itself as follows:

> ***"The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit".***

(See also ***RAMADHAN KOMBE V. REPUBLIC, CR. APP. NO. 168 OF 2002 (MOMBASA)***

We are satisfied that this ground of appeal also is not meritorious, and we accordingly reject the same.

On the violation of the appellant's right to access the prosecution evidence, we agree with the respondent that this issue was not raised before the first appellate court and we therefore suffer from the disadvantage of not having the benefit of the opinion of the High Court on the issue. The record however does indicate that when the applicant applied for witness statements, on 28th March 2012, and 23rd April 2012, the trial court on both occasions made an order that the same be supplied to him. The reason why the appellant applied for the statement twice appears to be that on the former date he had only been charged with assault, but by the latter date, the deceased had passed on and the charge had been upgraded to manslaughter. There is no record of the appellant subsequently complaining of non-compliance with the court order for the supply of the statements. Indeed when the appellant cross-examined PW2 and ***Omar Zaburi (PW3)*** on 15th May 2012, he confronted them with their statements and put to them questions relating to those statement.

The only other time the issue of a witness statement was raised before the trial court was before ***Said Abdalla Galone (PW6)*** and ***Corporal Erastus Njonjo (PW8)*** testified. It was explained that their statements were recorded late after which the court made an order for the appellant to be availed those statements and adjourned the trial. On the resumed hearing, the appellant cross-examined the witness without any complaint regarding availability of their statements.

In these circumstances there is no basis for the invitation extended to us to find that the appellant's constitutional right to access prosecution evidence was violated. The record shows that on the days that the appellant stated that he had not received copies of witness statements, the trial court adjourned the hearing to enable the appellant get the statements and subsequently the appellant conducted his defence without raising any further complaints. We are therefore satisfied that beyond the issue being raised too late in the day, there is no evidence on record upon which we can conclude that the appellant's constitutional right was violated.

As regards the alleged violation of the appellant's right to make a final reply before the High Court, the record indicates that the appellant elected to prosecute his appeal by written submissions whilst counsel for the respondent opted to make oral submissions in reply. While its true that the first appellate court did not call upon the appellant to make a final reply, we do not think that, in view of the appellant's written submissions and the restricted nature of the response by counsel for the respondent, it was absolutely necessary for the court to call upon the respondent to make a further reply. The appellant has not identified any aspect of the respondent's submissions that he wished to respond to and lost the opportunity to do so. We are not satisfied that in the circumstances of this case the appellant was occasioned any prejudice.

Lastly on the issues of whether the appellant's defence was considered and whether the prosecution case was proved beyond reasonable doubt, we agree with the concurrent findings of the trial court and the first appellate court regarding who was responsible for the act which caused the death of the deceased.

Consistent eyewitness testimony, which the two courts believed, was adduced and backed up by medical evidence. The heart of the appellant's defence was a bare denial that he had caused the abdominal stab wound from which the deceased died. The evidence adduced by the prosecution completely displaced that appellant's defence.

We find that the appellant was properly convicted of manslaughter. The sentence of 15 years imprisonment imposed by the High Court has not been shown to be illegal. In the circumstances, this appeal has no merit and is hereby dismissed. It is so ordered.

Dated and delivered at Mombasa this16th day of October, 2015

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR