IN THE COURT OF APPEAL
AT KISUMU

(CORAM: WAKI, ONYANGO OTIENO & KANTAI. JJ.A)

CRIMINAL APPEAL NO. 272 OF 2009

BETWEEN

DOMINIC OMORO OBARA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kisumu (Aroni, J.)

dated 6th November, 2012

in

H.C.CR.C. NO. 28 OF 2009)

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JUDGMENT OF THE COURT

This is a straight forward and non intricate case.The deceased ***Mary Auma Oduor*** was the wife of ***Richard Obara Obara (PW6) (Richard*)** who in tum was the brother of the appellant ***Dominic Omoro Obara***. Thus the deceased was the appellant's sister in law. Her husband Richard was at the relevant time living in **Tana River** in ***Bura Irrigation on Settlement Scheme*** as a farmer. The deceased lived at their matrimonial home at ***Nyadorera 'B' Sub-location*** in the then ***Siaya District*** now ***Siaya County***. Although ***Daniel Okoth Ochieng*** (PW1) ***(Daniel), Hendrika Obare*** (PW3) ***(Hendrika)*** and ***George Omondi*** (PW9) told the court in their evidence that the deceased was not mentally stable, her husband Richard maintained that she was not mentally ill. Whatever was her mental condition, Daniel, **Michael Odhiambo** (PW2)and Hendrika stated, and were supported by the appellant, that on the night of 16th July, 2009, between 9.00 pm and 10.00 pm there were altercations between the deceased and the appellant. There was physical confrontation between the two before Daniel and Michael separated them. Daniel put it more succinctly. He stated that on that day just before 9.00 pm, he went to take his phone from the appellant who is his cousin. He met the appellant at his door as the appellant was about to leave for some place. The appellant looked angry. Daniel returned home without accomplishing his mission. When he got home, he heard screams at about 10.00 pm. The person screaming asked one ***Olima*** for help, but that Olima was not around. Daniel and Michael Odhiambo ran towards the appellant's house. On reaching there they found the appellant beating the deceased. The appellant was however not armed and was hitting the deceased with his hands. Daniel got to the scene first and got hold of the appellant's left hand, but the appellant was too strong for him. At that juncture Michael also arrived at the scene. Michael was Daniel's friend. He *(Michael)* held the appellant's right hand and that

gave the deceased a chance to run away. She did so. The appellant thereafter entered his house while Daniel and Michael followed the deceased where they found her lying in a plantation crying and saying she was dying. ***George Omondi (PW4)*** also heard screams and went out. He found the deceased lying in the shamba near his house. She told him Omoro had beaten her. George knew Omoro as the appellant. They took her to one ***Okumu***, who was the village elder, but the village elder told Daniel and Michael to take her back to her house. At that time Daniel observed that the deceased could not walk. It was decided that she would be taken to hospital the next day. However, this was not to be. Hendrika who was a co-wife to the mother of the appellant and who had heard the commotion that night and had also been visited by the village elder over the matter that night, was woken up at about 3.30 am by the deceased's mother in law (i. e the appellant's mother). She told Hendrika to take her to the deceased's house. They went, opened the deceased's door, lit a lamp and on looking at the deceased, she was already dead and the body was yellow. This witness said she had earlier heard the appellant ask the deceased why the deceased had showed him her buttock. In cross-examination, she said the deceased was quarrelsome and sometimes had mental problems. ***Felix Dan Odongo, (PW5)*** was the Assistant Chief of Nyadorera B Sub location. At about 11.00 pm, he was asleep in his home when George and others went to his home and told him that the deceased had been beaten by an in-law. He advised them to take her to the hospital but they did not. Later a report was made to him that the deceased was not taken to hospital and had died.He went to the scene about 9.00 am the next day and confirmed she was dead. He reported the incident to ***Sergeant James Muchiri (PW8)*** of Nyadorera Police Base who in tum contacted Siaya Police Station. Siaya Police took the deceased's body to Siaya mortuary. On 18th July, 2009, he got information that the appellant was to relocate to Usenge. He waylaid him and arrested him and contacted Sergeant James Muchiri (PW8) who went to the sub-chief and rearrested the appellant. On 24th July, 2009, the body was identified to ***Doctor Esiaba*** then of Siaya District Hospital by Richard and ***Joanes Oduor (PW7)*** for purposes of postmortem examination. Doctor Esiaba's postmortem report was produced in court by ***Dr. Rapenda Kennedy (PW9)*** who had worked with him and was familiar with him and his handwriting. The cause of death was severe internal haemorrhage from rapture of spleen.

The appellant was charged in court and after the learned Judge had found a prima facie case made out and put him on his defence, the appellant in a sworn statement stated that he was a fisherman, but on that fateful day 16th July, 2009, he did not go fishing. He went to the garden and returned home at 9.00 am, had a bath and then left for Odundo Centre near his home. On his return from the centre at about 9.00 pm, he learnt that the deceased had fought his wife. His mother told him that the deceased was sick and had assaulted his wife as a result of that sickness. The deceased was mentally ill. He left his mother's house and went to his house but the deceased approached him at his house and started fighting him. The deceased caught him by the shirt, but he restrained himself. He eventually got provoked and slapped her on the cheek. She then took off and ran outside but the appellant did not follow her. He remained at home and slept. Later on 17th July, 2009 he heard the deceased had died. He saw the body and the deceased appeared to have been beaten and the body was yellowish. Apart from the slap, the appellant denied hitting the deceased on any part of her body. He denied the offence.

The above is the evidence, advanced both by the Prosecution and by the appellant.The learned trial Judge *(Ali Aroni, J.)* considered it and the law as no submissions were made either written or oral before the court, and after considering it, in a judgment dated and delivered on 6th day of November, 2012, convicted the appellant of the lesser offence of manslaughter contrary to Sections 202 as read with ***Sections 205*** of the ***Penal Code***. After considering mitigating circumstances, the trial court sentenced the appellant to serve an imprisonment term of 15 years. In doing so, the learned Judge had the following to say:

"There is overwhelming evidence including the postmortem report and the statements of PW1 and PW2 that the accused hit the deceased. The postmortem report showed injuries causing death as internal bleeding and a raptured spleen. The relatives of the accused who happened to be relatives of the deceased as well pointed an accusing finger against the accused. The accused admits beating the deceased but does not admit the severity of the beating.The evidence against the accused in my view is overwhelming. He beat the deceased, she had to be rescued that he cannot escape. I find that he indeed beat up and gave the last blow to the deceased.

The accused testified that the deceased had angered him, that may be so; however he ought not to have taken the Law into his hands, especially against the knowledge that the deceased was mentally ill. He may have been provoked, he may have had no intentions of killing but nevertheless he killed the deceased and must face the wrath of the Law. I take into account the provocation alluded to by the accused and I accordingly find the accused guilty of the lesser charge of manslaughter. I convict him accordingly."

The appellant felt dissatisfied with that judgment and sentence which, as we have stated, was imprisonment for fifteen years. He moved to this Court on appeal citing four grounds of appeal namely: ·

> **"1. That the superior court erred in giving undue regard and emphasis on the evidence against the Appellant and disregarded the evidence in his favour.**
>
> **2. The superior court erred in failing to consider fully the defence of provocation that the Appellant had raised before the superior court.**
>
> **3. The superior court erred in failing to consider the all (sic) factors and the evidence in this matter when convicting and sentencing the Appellant herein.**
>
> **4. The conviction and sentence is manifestly harsh and excessive in the circumstances."**

In his address to us, Mr. Indimuli, the learned counsel for the appellant submitted that the evidence was full of inconsistencies giving as an example that whereas one witness said there was moonlight on the material night the other witness said the night was dark to the extent that he needed a torch. He further contended that as the appellant was not armed during his physical confrontation with the deceased, the injury, such as a raptured spleen, could not have been inflicted by the appellant who only slapped the deceased. He ended his submissions by saying the sentence was harsh and excessive.

In response, Mr. Mongare, Senior Prosecuting Counsel who supported both conviction and sentence submitted that two witnesses, Daniel and Michael were eye witnesses to the incident, but they reached the scene after the appellant had started beating the deceased and thus by the time they reached the scene the appellant had been beating the deceased and the injuries causing death must have been inflicted by the appellant. He argued that a hit by the fist could have caused the fatal injuries. In his view, the circumstances obtaining on that night put the appellant and none other as the person who inflicted the injuries that led to the appellant's death. Lastly he submitted that the sentence of 15 years imprisonment in the circumstances of this case was fair.

As we have stated above, this case presented no difficulties at all as in our minds the facts are straight and clear. That the appellant beat the deceased on the night of 16th July, 2009, is not in doubt. The appellant admits that he had altercations with the deceased and he slapped her. He said that the deceased approached him and started fighting him, but he did not state that the deceased had any weapon neither did he state how the deceased fought him nor which parts of his body were hit by the deceased. Defence of self defence was therefore not available to him. He however stated that when he slapped the deceased, the deceased ran away and he did not follow her. He did not mention Daniel who arrived at the scene while he was still beating the deceased and who tried to get hold of his left hand but for whom he was too strong meaning that even as Daniel tried to hold him and stop him from beating the deceased, Daniel's efforts were in vain, he continued assaulting the deceased. He did not state that it was until Michael arrived at the scene and held his right hand that the "battle" cooled down and the deceased got an opportunity to escape and run away. This must have been a vicious attack upon an unarmed woman, for it took the effort of two men to stop it. We entertain no doubt in our minds that before Daniel and Michael came to the aid of the deceased, the appellant had inflicted the injuries that caused the rapture of the spleen and other injuries that resulted into the death of the deceased. This is further buttressed by the evidence of Daniel who said he followed the deceased after she ran away and found-her-lying in a plantation crying and saying she was dying, which is a dying declaration. When Daniel and George took her to the Village Elder and they were told to take her back home, she could not walk. And as if that was

not enough, that same night at about 11.00 p.m Hendrika was visited by the village Elder who was enquiring about the fight and condition of the deceased. They went and saw the deceased, but at 3.00 am, she was dead. There was no evidence that between 9.00 pm the time the appellant says she approached him and attacked him, which means she must have been physically well, and the time she died at 3.30 am, any other person had assaulted her other than the appellant. The appellant was the only person who had assaulted her and none other. The appellant admits seeing the dead body of the deceased on 17th July, 2009, one day after he beat her and on observing the body he stated on oath:

> *"I remained home and slept later at on (sic) 17th when I returned home from work I learnt of her death. I saw the body.* ***She appeared to have been beaten*** *.The body was yellowish."*
>
> *(underlining supplied).*

As we have stated, there was no evidence that between the time the deceased was assaulted by the appellant at about 9.00 pm on 16th July, 2009 and the time of her being found dead by Hendrika at 3.30 am that night any other person had beaten her, apart from the appellant. The appellant used fists. This was blunt object which could have easily inflicted and in our finding did inflict the fatal injuries. In our minds, the appellant was not candid with the court. He did not simply slap her. He beat her viciously. We attach no importance to the claim of contradiction between whether the night was dark or not as the issue of the appellant's identity as the offender was not in dispute.

The learned trial Judge, in her judgment clearly considered all the above. We have reproduced above, the main part of her judgment and it is clear to us that she considered the appellant's defence and it is that consideration that made her settle for manslaughter on grounds that the appellant could have been provoked. We think she was plainly right in observing that the appellant, having known that the accused was not mentally balanced, should have put into consideration that aspect before inflicting such fatal injuries for the deceased deserved sympathy rather than physical punishment. We see no merit in the first and second grounds of appeal in the light of what we have stated above resulting from our own independent analysis and evaluation as a first Appellate Court. As to sentence, the appellant was lucky to have escaped with such a light sentence for having taken away a life of a fellow human being.

In conclusion, we are far from being satisfied that the appeal before us has any merit both on conviction and on sentence. It must be and is hereby dismissed.

Dated and Delivered this 4th day of April 2014.

P. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR