



IN THE COURT OF APPEAL
AT NYERI

CORAM: OMOLO, GITHINJI & NYAMU, JJA.

CRIMINAL APPEAL NO. 130 OF 2010

BETWEEN

LUKA KINGORI KITHINJI
MARTIN MUREITHI KARIUKI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Meru (Kasango, J) dated 19th March, 2010

in

H.C.CR.C. NO. 14 OF 2009)

JUDGMENT OF THE COURT

The two appellants were the 1st and 2nd accused respectively at the trial. The appellants and four other co-accused at the trial, namely, **JOHN GITONGA MWANGI** (3rd accused) **DANIEL KIMANI NDERITU** (4th accused), **JOHN GITONGA MAMBO** (5th accused) and **MICHAEL MUTHEE NYARWAL** (6th accused) (co-accused) were tried in the High Court on an Information charging them with the offence of murder contrary to **Section 203** as read with section 204 of the Penal Code. The particulars of the charge alleged that on 19th January, 2009 the two appellants jointly with the four co-accused murdered **David Nguhe Mwangi**. The appellants and the co-accused were all convicted after trial and thereafter the two appellants were sentenced to death while the four co-accused who were all under the age of majority, that is, 18 years, were each committed to *Shimo la Tewa Borstal Institution* for a period of three years. This appeal is filed by the two appellants. Apparently the other four co-accused have not appealed.

The prosecution case against the appellant and the co-accused was briefly as follows:-

The deceased who was aged about 18 years at the material time was circumcised together with the four co-accused in December, 2008. The 2nd appellant was the guardian of the deceased during circumcision. The deceased was living with his parents but in a separate house from the house of his parents.

On 19th January, 2009 at about 12.30 p.m. one of the co-accused, **Daniel Kimani Nderitu** (accused 4) went to the house of the deceased. He was seen entering into the deceased's house by **Susan**

Wangui Mwangi (PW1) the mother of the deceased (Susan). He was also seen by **Patrick Mwangi (PW2)** the father of the deceased (Patrick). Thereafter the 4th co-accused shortly left the deceased's house. The deceased later told his mother Susan, that the 4th accused wanted him to accompany the 4th accused but deceased refused. At about 5.30 p.m., the 4th co-accused returned to the house of deceased accompanied by 3rd, 5th and 6th co-accused. The four wanted the deceased to go with them but the deceased declined. According to Susan, the four attacked the deceased kicking him and the deceased screamed calling out his father. Patrick, the father of the deceased intervened and asked the four co-accused to leave the deceased alone and chased them away.

Later at about 8 p.m. the four co-accused returned this time accompanied by the 2nd appellant. According to the evidence of Patrick, the three of the co-accused went to the house of the deceased while the 2nd appellant went to his house. The 2nd appellant told the deceased's parents that the boys had complained to him that they had been insulted, chased away and threatened. He did not however identify the person the boys were complaining against and Patrick told him to go and find out and report to him. The 2nd appellant did not go back to Patrick but instead, he and the boys took the deceased away. At about 9.30 p.m. Susan found that the deceased was not in his house and called her husband who in turn called **Joseph Kirimi Rukunga (PW3)**, a neighbour (Joseph) and the three went to search for the deceased. They first went to the home of 2nd appellant about 2 kilometers away but they did not find the 2nd appellant or the deceased. The mother of the 2nd appellant however gave the 2nd appellant's telephone (mobile) number to the parents of the deceased. The three next went to the home of the 4th accused about 2 kilometers away from the home of 2nd appellant. They did not find the deceased, 4th accused or the 2nd appellant. However, Nderitu the father of the 4th accused, (Nderitu) rang the 2nd appellant, who confirmed that he was with the deceased. Thereupon, Nderitu told the 2nd appellant to take the deceased to his home. After about one hour the deceased was taken to the home of Nderitu by 1st appellant, 2nd appellant and fourth co-accused. There was a hurricane lamp and Susan and Patrick noticed that the deceased was limping as he entered into the house. They did not explain where they were but the deceased complained that he had been viciously attacked and complained of pain all over the body, leg and hand. He however had no visible injuries. As Susan, Patrick and Joseph were taking the deceased home he collapsed at the gate of Nderitu's home and could no longer be able to walk. He was carried to his house and he did not walk again. On 20th January, 2009, **Simon Ngunjiri (PW6)** (Simon), the brother of deceased went to see the deceased in his house upon receiving a report of assault. The deceased reported to him that he was beaten by boys he was initiated with on the previous day. Susan reported the incident to **David Kaaria (PW5)** a village elder and on the following day the incident was reported to **John Kairu Gakuo (PW4)** the Assistant Chief who was in the company of the village elder (PW5) and the names of the appellants and the co-accused given to them.

The deceased was taken to hospital on 23rd January, 2009 where he was treated and discharged. On the same day, the deceased reported the assault at Nanyuki police station. He died three days later on 26th January, 2009.

The postmortem done on the body of the deceased by **Dr. Kurgat** at Nanyuki District Hospital on 3rd February, 2009 revealed that the body had fracture of forearm and fibia and fibula, dislocation of the cervical spine, and blood in pleural space. The Doctor formed the opinion that the cause of death was haemorrhage and dislocation of cervical spine.

The death was reported at Nanyuki police station and on 27th January, 2009 **Corporal Mohamed Usuf Haji (PW8) (Cpl. Mohamed)** of Timau Police station arrested the appellants and the co-accused at about 11 pm whom he found in the house of the 4th co-accused.

The first appellant gave detailed evidence at the trial. He testified among other things, that, deceased was his friend; that on 19th January, 2009, he arrived at his home at Mathagiroti Timau, that at about 8 p.m. all the five co-accused went to his house in the company of the deceased; that the deceased explained to him that he had not left his home for the last three days because he had been assaulted by his

father, that after about 5 minutes, Nderitu, the father of 4th co-accused called the 2nd appellant on phone and then called him and inquired whether all the accused and the deceased were with him; that after confirming to Nderitu that they were in his house, Nderitu told him to take all of them to his house; that on arrival at Nderitu's house they found him in the company of the deceased's parents; that the deceased was asked where he had been; that deceased said that he was at the first appellant's house; that he (first appellant) asked the deceased's father why he had assaulted the deceased; that the deceased mother told him (first appellant) to keep quiet; that the mother of the deceased accused all the accused persons of assaulting the deceased; that as they were all leaving Nderitu's house Patrick slapped the deceased; that the deceased fell down; that on 23rd January, 2009 he and the co-accused were called at the Chief's office and informed that they had assaulted and injured the deceased; that he was arrested in the house of 4th co-accused on 27th January, 2009; that he did not beat deceased and was not there when the deceased was said to have been beaten and, lastly, that, he was implicated because he had asked Patrick why he had beaten the deceased.

Similarly, the second appellant gave lengthy evidence at the trial in brief, he testified that he was a guardian of the deceased during circumcision; that on 19th January, 2009 the co-accused Nos. 3,4,5 and 6 went to his house at 6 pm and told him that the deceased was in pains and wanted to see him; that they all went to the home of the deceased; that on arrival, he went straight to the house of the deceased's parents while the co-accused went straight to the deceased's house; that he told the deceased's parents the that deceased was unwell; that after discussion with the deceased's parents Susan told him to implicate the 4th co-accused for assault of deceased because 4th accused's father, (Nderitu) owed deceased some money; that the 2nd appellant refused; that thereafter he went to the deceased's house and the deceased told him that he was injured on his leg by his father and that he had pains in the chest; that the deceased's leg was swollen; that after discussions the deceased decided to escort them; that they all left towards 1st appellant's house; that later on the way they entered into the house of the first appellant at about 8 p.m.; that later they were called to the home of Nderitu; that they found the deceased's parents with Nderitu, that Nderitu told them that the deceased's parents had complained that they had assaulted the deceased; that deceased denied that he had been assaulted; that after they left Nderitu's house Patrick slapped the deceased; that deceased fell down; that he intervened; that Patrick went to his house on the following morning and again asked him to implicate 4th co-accused with assaulting the deceased; that he and the co-accused were summoned to sub-chiefs office on 24th January, 2009 where they were told that deceased's mother had complained they had assaulted the deceased demanding chicken; that they were arrested on 27th January, 2009 and that he did not beat the deceased.

The trial Judge evaluated the evidence and made findings of fact, among other things, that; the defence of all the accused persons that deceased was assaulted by his father was an afterthought, that deceased was very seriously attacked on 19th January, 2009, that the injuries were so severe that a person causing them must have known or ought to have known that they would, in the very least, cause grievous harm to the deceased, that the appellants and co-accused never used to visit deceased before 19th January, 2009, that there was a lot of activity on 19th January, 2009, that 3rd-6th co-accused visited the deceased twice on that day and that the prosecution evidence was circumstantial.

The trial Judge concluded:-

“In our case the evidence point irresistibly to the guilt of the accused excluding any other reasonable hypothesis than that of the guilt of the accused. The deceased was taken from his house by accused on 19th January, 2009. He was taken to the 1st accused's house. Both first accused and 2nd accused confirmed this to Nderitu. PW6 said that he had noted the deceased was in good health on 19th. The deceased was attacked by his co-initiates together with first and 2nd accused. When the deceased arrived at Nderitu's house he was limping and it was very obvious that he was seriously injured. The presumption that I make is that the accused persons who confirmed they were in the company of deceased viciously attacked him and the injuries were noticeable when they arrived at Nderitu's house. Those injuries caused the death of the deceased.”

The seven grounds of appeal are in fact compressed in grounds 4 and 6 of the memorandum of appeal thus:-

“4. The trial Judge erred in law in failing to take the totality of the evidence which would have lead to the incurable (sic) conclusion that there was no sufficient circumstantial evidence to return a conviction on the charge of murder.

6. The trial Judge failed to come to the inevitable conclusion that there was more than one hypothesis as to how the deceased got injuries and the sour hypothesis as to how the deceased got the injuries and sour (sic) hypothesis pointed to more than the appellant and therefore come to the wrong conclusion as to the causing of the death of the deceased.”

Mr. Ndirangu, the learned counsel for the appellants submitted, among other things, that the conviction was based on totally insufficient evidence; that the only evidence against appellants is that they associated with the four co-accused; that the appellants were not present during the first attack; that there was no evidence that appellants were part of a scheme to discipline the deceased; that there were more than one hypothesis – firstly, that deceased was attacked by his father, secondly, that deceased was attacked by the co-accused at 6.30 p.m.; and that the adverse inference should be made on the failure to call Nderitu – the father of 4th co-accused as witness.

Mr. Kaigai learned State Counsel, on his part, submitted, among other things, that the evidence disclosed manslaughter and not murder; that deceased told his father that he was attacked by all the six accused persons; that there was evidence of mother of the deceased that the deceased was brought back limping; that the defence of all the accused persons were contradictory as each gave a different reason why they went to the house of the deceased, and, that, the totality of the evidence indicated that this was a cultural discipline of the deceased for allegedly being rude.

The trial Judge made a finding that the deceased was viciously assaulted on 19th January, 2009 and that the injuries caused the death of the deceased. The 1st appellant denied assaulting the deceased and said that he was not present when the deceased was assaulted. Similarly, the 2nd appellant denied assaulting the deceased. They however testified that the deceased complained of being beaten by his father Patrick and that they witnessed Patrick slap the deceased as they were leaving Nderitu’s home. Both Susan and Patrick did not witness the assault of the deceased but testified that when the deceased was taken to the home of Nderitu on the night of 19th January, 2009, he was limping and complained that he was assaulted by all the six accused. There was also evidence from Susan, Patrick and Joseph that the deceased fell down at the gate of the home of Nderitu, that he was carried to his house and that he was unable to walk from that time. The evidence, including the postmortem report show that the deceased died six days later on 26th January, 2009 at 9 p.m. The postmortem report further shows that the deceased had suffered a fracture of the forearm; fibia and tibula; dislocation of cervical spine; bruising on the front part of the abdomen and bleeding in the pleural space (chest). *Dr Kurgat*, who performed the postmortem formed the opinion that the cause of death was bleeding and dislocation of the cervical spine.

There was therefore ample evidence which proved to the required degree that the deceased died as a result of the injuries that he suffered on 19th January, 2009. The question is who caused the fatal injuries.

Firstly, the appellants claimed that the deceased had been beaten by his father. According to the 1st appellant the deceased said that the deceased was beaten by his father since he had wanted to sell his father’s sheep and that he was injured on the leg. According to the 2nd appellant, the deceased said that he was beaten by his father on 17th January, 2009 and was injured on the leg and that the quarrel was about a sheep that the deceased wanted to sell. The 2nd appellant also testified that the father of deceased persuaded him to falsely implicate the 4th co-accused in the assault of the deceased. Susan testified that the deceased was at one time employed by Nderitu, the father of the 4th co-accused, and, that he had

bought a sheep from his salary.

The trial Judge evaluated the evidence and observed that neither Patrick nor Susan were cross-examined about the alleged assault of the deceased by the deceased's father or on the request to fabricate the evidence. The trial Judge ultimately concluded that that line of defence was an afterthought.

The 1st and 2nd appellants did not witness the alleged assault of the deceased by his father. Further, it is improbable that Patrick could have beaten his son who was recently circumcised merely because he intended to sell his own sheep. Moreover, it is improbable that an injury to the leg or the slapping of the deceased could have caused the fatal injuries. Indeed, the postmortem shows otherwise. On our own appraisal of the evidence we are satisfied that the trial Judge reached the correct finding.

Secondly, it was submitted on behalf of the appellants that the deceased could have been assaulted by the co-accused in the absence of the appellants. There was evidence from Susan that on the material day at about 5.30 pm the four co-accused went to the house of the appellant and beat the deceased. Similarly, Patrick testified that after the four co-accused went to the appellant's house, he heard deceased screaming and that he chased them away. However, it is clear that if there was any assault it was in the deceased's house and that Susan and Patrick did not witness the assault. Both Susan and Patrick testified that the deceased told them later that the four co-accused wanted the deceased to go with them. Further, according to Patrick the deceased complained that the four co-accused had kicked him on the left hand and left leg. Lastly, Susan testified that after this incident the deceased was well and she even saw him go out for a call.

The second appellant testified that after visiting the deceased on the material day at 6 pm they left the deceased's home in the company of the deceased and that the deceased walked slowly. Similarly, the first appellant testified that the deceased walked without being aided from his house to Nderitu's house - about 1½ Kms away. There was evidence from Susan that the house of the second appellant is about 2 Kms from her home. There was further evidence from Joseph that the distance from the second appellant's home to Nderitu's home is about 2 Kms.

From the evidence it is clear that although the deceased may have been beaten by 3rd, 4th, 5th and 6th co-accused at about 6 pm, he did not sustain any serious injuries. He merely complained that he was kicked on the hand and leg. He talked with his parents after the four co-accused had left. His mother saw him go for a short call. Later when the second appellant and the four-accused returned, the deceased talked to them freely and thereafter walked on his own to the house of the 1st appellant – a relatively long distance. In the circumstances it is improbable that the co-accused caused the fatal injuries.

The finding of the trial Judge was that the deceased sustained fatal injuries after he was taken from his house by the second appellant and the four co-accused. The 2nd appellant testified that they visited the deceased because the four co-accused reported to him that the deceased was unwell. However, both Susan and Patrick testified that 2nd appellant informed them that the co-accused had complained to him as a guardian of the deceased that, they had been insulted, abused and threatened after which Patrick told him to go and investigate who had insulted, threatened and chased them. *Cpl. Mohamed* who investigated the case found that the deceased was assaulted as punishment for breaching a custom relating to circumcision by abusing those who got circumcised with him. There was evidence that the appellants and co-accused did not visit the deceased before the material day and, as the trial Judge found, there was a lot of activity on this day. There was evidence from Susan and Patrick that the co-accused had attempted to take the deceased away. This was before they called the 2nd appellant. In the circumstances, the evidence of the appellant that the deceased accompanied them on his own volition was not credible. Both Susan and Patrick had gone to the house of the 2nd appellant in search of the deceased and thereafter proceeded to the home of the 4th co-accused whose father traced the two appellants by phone and instructed them to take the deceased to his home. From the evidence, the finding of the trial Judge that the deceased was taken away from his house to the house of the 1st appellant cannot be faulted.

The deceased was in the company of the appellants and co-accused from about 8 pm to 11 pm

when they took him to Nderitu's house. From the evidence of Susan and Patrick the deceased was limping and shortly after leaving Nderitu's home he said that he wanted to sit down and immediately fell down. He was not able to walk again and died six days later. That was, as the trial Judge correctly found, strong circumstantial evidence against the appellants and the four co-accused.

Secondly, there was evidence from Susan and Patrick that the deceased said that he was beaten by appellants and co-accused. According to evidence of Susan, when deceased was brought to the house of Nderitu he noticed that he was limping and upon asking him what had happened the deceased told her that:-

“he had been beaten severely. He explained that he was feeling pain all over the body – in the hand and inside his body”.

On his part Patrick testified:-

“I noticed the deceased was limping as he entered the house. The boys also entered. They did not explain where they had been. The deceased complained that he had been viciously attacked. He complained of pains all over the body, on the leg and hand.”

The deceased's brother *Simon Ngunjiri* testified that he was with the deceased the whole day on 19th January, 2009 and that the deceased was well and that when he went to see the deceased again on 20th January, 2009 at 8 a.m. the deceased told him that he was assaulted on the previous day and gave him the name of the assailants. He also noticed that deceased's leg and hand were swollen. There was also evidence from *Cpl. Mohamed* that deceased had reported the assault at Nanyuki police station on 23rd January, 2009.

The evidence of Susan and Patrick regarding the events of 19th January, 2009 is broadly consistent. Further, their evidence regarding the events after 5.30 p.m. up to the time that the deceased was taken to the home of Nderitu was admitted by the appellants. Their evidence was credible and the trial Judge properly believed it.

The statement of the deceased as to circumstances of the transaction which resulted in his death was admissible under **Section 33(a)** of the **Evidence Act**. The statement was a dying declaration which was corroborated by the circumstantial evidence referred to above. The appellant merely denied assaulting the deceased and the knowledge of the assault. They did not dissociate themselves either by conduct or otherwise from the action of the co-accused.

In the final analysis, we are satisfied, like the trial Judge, that there was strong circumstantial evidence which irresistibly pointed to the guilt of the appellants to the exclusion of any other reasonable hypothesis. In addition, the deceased made a dying declaration which was amply corroborated by the circumstantial evidence.

Finally, we agree with Mr. Kaigai that malice aforethought was not proved. There was ample evidence that the appellants and the co-accused were friends of the deceased. There was also credible evidence that the intention of the appellants and the co-accused was to discipline him as his peers for violating a customary code of conduct relating to circumcision. Thus, the evidence proved the lesser offence of manslaughter.

On sentence, we appreciate that, in principle there should be no disparity of sentences imposed on co-accused who have been convicted of same offence except for a good reason. In ***MARANDO V THE REPUBLIC (1980) KLR 114*** this Court said at page 115 para E that:-

“when two or more people are convicted of the same offence it is wrong in principle to impose different sentences except for good reason”.

In this case, the co-accused were committed to a Borstal Institution for 3 years for the reason that they were child offenders. The two appellants were adults. The 2nd appellant as guardian of the deceased during circumcision should have protected the deceased. The two being adults should have protected the deceased and also dissuaded the co-accused from assaulting the deceased. In our view, a slight disparity in sentencing is for that reason, justified. The appellants were in custody for one year before they were sentenced.

In the result, we allow the appeal of each appellant to the extent that the conviction for murder and the sentence of death are set aside. We substitute therefore a conviction for manslaughter contrary to **Section 202 (1)** as read with **Section 205** of the Penal Code and sentence each appellant to five (5) years imprisonment with effect from 10th May, 2010 when they were sentenced. Similarly, in the interest of justice, we set aside the conviction for murder in respect of each of the four co-accused namely, John Gitonga Mwangi, Daniel Kimani Nderitu, John Gitonga Mambo and Michael Muthee Nyarwal and substitute therefore a conviction for manslaughter contrary to **Section 202(1)** as read with **Section 205** of the Penal Code. For avoidance of doubt the order of committal for 3 years to *Shimo la Tewa Prison* shall remain intact.

Orders accordingly.

DATED and DELIVERED at NYERI this 1st day of

DECEMBER, 2011.

R.S.C. OMOLO

.....
JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR