IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 478 OF 2007

SHERIGHAM ELISHA ODHIAMBO …....….........……………..APPELLANT

AND

REPUBLIC ……………..……………………………………RESPONDENT

(An appeal from a conviction and sentence of the High Court of Kenya at Nairobi

(Apondi, J.) dated 15th May, 2007

in

H.C.CR.C. NO. 90 OF 2005)

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JUDGMENT OF THE COURT

This is a first and last appeal. As the first Appellate Court we are enjoined to revisit the evidence that was presented to the superior court which was the trial court, analyse it, evaluate it, and come to our own independent conclusion but always bearing in mind that the trial court had the advantage of hearing and seeing the demeanour of witnesses and giving allowance for that – see ***Okeno v. Republic* (1972) EA 32.**

The appellant ***Sherigham Elisha Odhiambo***, was arraigned in the superior court on information dated 16th August 2005 in which he was charged with the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code Chapter 63 Laws of Kenya. The particulars of the offence were that:-

"On the 15th day of May, 2005 at Mathare North Area 11 in Nairobi within the Nairobi area jointly with others not before court murdered Gerald Odhiambo."

He pleaded not guilty to the charge and the trial proceeded with the aid of assessors. After hearing three witnesses called by the prosecution, the appellant's unsworn statement in defence together with submissions by the defence counsel and state counsel, the learned Judge of the superior court made a summary of the case to the assessors each of whom, on being asked for their opinions returned a verdict of not guilty. The learned Judge, in his judgment, however, found the appellant guilty as charged, convicted him and sentenced him to suffer death as by law prescribed. That is what prompted this appeal based on six grounds filed by the appellant in person upon which Mr. Kanyangi, the learned counsel for

the appellant relied in his address to us, having abandoned the supplementary memorandum of appeal filed by him after he took over the conduct of this appeal. These grounds are, in a summary; that the constitutional rights of the appellant as provided under ***section 72 (3) (b)*** of the Constitution were violated as he was produced in Court after the fourteen days allowed by the Constitution; that the trial court failed to analyse and evaluate the evidence that was before it; that the trial court failed to consider that the prosecutions case was riddled with discrepancies, contradictions and inconsistencies; that the conviction was based upon hearsay evidence; that the learned Judge failed to consider the defence case, and that the learned Judge failed to consider that the prosecution failed to call essential witnesses such as the investigation officer to testify at the trial.

The brief facts of the case were that as on 15th May 2005, David Odhiambo (PW1) was living with the deceased who was his uncle and was known to him as Edwin Odhiambo. They lived in Mathare North, in Nairobi. On that particular day, at 9.00 p.m., David was with his uncle in his (uncle's) house. There was also his uncle's girlfriend called Jesca or Jessica. Seven young men went into that house, and took away the deceased. David claimed to have known all the seven young men and he gave their names as Shee, Otieno, Alfred, Tom, Dan, Consic, and Elisha. Those young men were using a lantern which had sufficient light. David did not talk to them and they did not talk to Jessica. At midnight, the deceased was returned to the house by Otieno and Elisha. When he was returned, the deceased complained that he was feeling bad due to beatings and he could not undress on his own. David helped him to undress. Those who brought him back carried him as they were returning him. After, the deceased was undressed, David noted that his body was swollen. The deceased also complained of chest pain. David helped him to lie on the bed but at 7.00 a.m. the next morning he passed on. According to David, the young men, who included the appellant assaulted the deceased on the false allegation that he was an idler as he was not working. David claimed in his evidence that the young men were not armed when they took him away the deceased. His further evidence was that he had known the appellant for 8 months as he had been seeing him in that area for that time. On the material night, the appellant was wearing blue jeans and a blue shirt. Immediately after the deceased's demise, David called the deceased's brother who informed Huruma Police Post but as that police post did not have a vehicle, Muthaiga Police Station was contacted by the deceased's older brother – John. PC John Muiruri (PW2) of Muthaiga Police Station received report from the deceased's brother. He, together with PC Busuru responded and visited the house of the deceased where they found the body of the deceased and took it to City Mortuary in the Police Land Cruiser GK 404G. On 6th June 2005, Dr. Jane Wasike Simiyu (PW3) performed post mortem on the deceased's body. The body was identified to him by one Peter Owino and Elisha Awuor in the presence of PC Mutunga, (none of whom were called as witnesses). The body had multiple extensive bruises of the upper and lower limbs and back. It also had subcutaneous haemorrhage of both upper limbs and bruises on the scalp. Dr. Simiyu formed the opinion that the cause of death was multiple extensive bruising following blunt trauma. On 7th June 2005, the appellant was arrested by members of the public and was handed over to the assistant chief who handed him over to PC Muiruri and his team that day.

In his defence, the appellant stated in an unsworn statement that he was at the relevant time a Community Health Worker at Mathare North Health Centre. On 15th May 2005, the Centre had organized joint activities at Kariobangi grounds and they went to the venue. That event continued from 11.00 a.m. upto 5.00 p.m. After that event he went together with the centre co-ordinator to the co-ordinator's house to type the minutes of the events in the co-ordinator's computer. That exercise went on till 10.00 p.m. He was escorted to his house by the coordinator. His wife told him that about half an hour back a man was beaten thoroughly nearby after being caught having stolen a mobile phone. He slept and thereafter continued with his normal chores until 7th June 2005, when he was arrested by members of the public who handed him over to the assistant chief of the area, who in turn handed him to police officers from Muthaiga Police Station. He was thereafter charged for matters he was not aware of.

Mr. Kanyangi, the learned counsel for the appellant, submitted that the learned Judge of the superior court failed to analyse the entire evidence properly and gave no more than lip service to the legal principles enunciated in the case of ***<u>Abdallah Bin Wendo & another vs. R</u> Criminal Appeal No. 44 and 45 of 1952*** which the learned Judge apparently referred to but did not in fact apply them according to Mr. Kanyangi. He pointed out several instances, which he submitted should have been considered but were

not considered and urged us to allow the appeal. Mr. Kaigai, the learned Principal State Counsel, on the other hand while conceding the appeal, felt that the evidence tended to support the offence of manslaughter and not murder. In his submission, he stated that whereas it was clear that the appellant was one of those who took the deceased away, and later brought him back and thus the provisions of ***section 111*** of the Evidence Act would be invoked, it was not clear as to the reasons for their attack on the deceased. As they brought him back, it could mean all they wanted was to discipline the deceased and no more. That being the case, the intention to murder the deceased was not clearly brought out and so he felt manslaughter was the most appropriate offence in the circumstances.

We have considered the evidence available in the record. We must accept that it is to a large extent scanty as some witnesses such as the people who identified the body of the deceased to the doctor, the people who made the report to the police and investigation officer were not called to testify. However, considering the law as set out in the case of ***Bukinya and another vs. Uganda (1972) EA 549,*** we do not think the material evidence, was barely adequate to warrant an inference that the evidence of those not called would have tended to be adverse to the prosecution. David, was the only witness who identified the appellant as one of the young men who collected the deceased from the house. Although he refers to the deceased as Edwin Odhiambo whereas the prosecution refers to the deceased as Gerald Odhiambo, we are certain that the deceased was one and the same person. One person who identified him to Dr. Simiyu was Elisha Awuor. David told the Court that Elisha was a brother to the deceased and was the first person he called immediately after the death of the deceased. Elisha, being a brother to the deceased could have known the deceased's other name of Gerald whereas David, being a nephew may not have known that deceased's other name. We take judicial notice of the fact that many people have more than one Christian name. David had known the appellant about eight months prior to the incident. There was lantern used by the appellant and his colleagues. He knew appellant's name. Whereas we accept, as is stated in the case of ***R vs. Turnbull (1976) All ER 549,*** that even in the case of recognition of people well known to the witnesses, mistakes may still be made, in this case, we agree with the learned Judge that the appellant was properly identified as one of the people who took away the deceased from his house at about 9.00 p.m. on 15th May 2005 and returned him around midnight of that day when the deceased who was earlier on in good health was in such pain that he could not even undress himself and thereafter died at 7.00 a.m. early next morning. ***Section 111 (1)*** of the Evidence Act Chapter 80 Laws of Kenya states:-

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law enacting the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."

In this case, the appellant pleaded an alibi but clearly David's evidence, which was accepted by the superior court and which we also accept, though is evidence of a single witness, clearly ousted that plea of alibi and thus the appellant was clearly at the scene of the incident. He never explained what happened to the deceased who was taken from the house while in good health, by him and others and taken back in poor health and died thereafter from injuries the doctor said were received from blunt object. Without that explanation, the appellant did not discharge the burden placed upon him by ***section 111*** of the Evidence Act. That being the case, the superior court was plainly right in finding and holding that the appellant together with others were responsible for the death of the deceased. We cannot disturb that finding.

However, the best we can say from the evidence on record is that he was one of the people who must have caused the death of the deceased. We cannot go beyond that as the entire record does not reveal in crystal clear terms the reasons for removing the deceased from his house, assaulting him and returning him back to the house. David said in his evidence in chief that the young men assaulted the deceased on the basis that he was an idler. It is not certain where he got that from as he said in evidence that the young men never talked to him and never talked to Jessica and that they never explained why they were taking away the deceased. The appellant also said that he heard from his wife that a thief had been beaten thoroughly in the neighbourhood for stealing mobile phone. That was hearsay and of no value. However looked at either way and considering that the young men went to deceased's house without any weapons, took him away and returned him with bruises some of which were serious though and caused his death, one cannot rule out the possibility that these young men were after disciplining the

deceased for one reason or the other but were not people who had formed intention to kill him or to cause him grievous harm. The acts of coming to his house with no weapon, taking him away and returning him are acts that are hardly committed by people intent on causing death or grievous harm to their victim. It is on those grounds that we agree with Mr. Kaigai, that this was a suitable case for a charge of manslaughter pursuant to ***section 202*** as read with ***section 205*** both of the Penal Code.

Before we conclude this judgment, one of the grounds of appeal was that the appellant's constitutional rights were violated as he was arrested on 7th June 2005 but was never produced in court till 31st August 2005. The short answer to that is that the appellant was represented in the trial court by a lawyer. He never raised that complaint. This Court, has on several occasions stated that where an appellant had an advocate at his trial or at the first appellate court, he had the opportunity to raise such matters as violation of constitutional rights in that court. In any case he should have proceeded under the provisions of ***section 84*** of the Constitution. If he failed to do so, he is deemed to have waived his rights and cannot be heard to seek to revive them later. That scenario obtains in this case. We see no merit in that complaint.

As indicated above, upon the views we have set out, we allow this appeal, quash the conviction for the offence of murder and set aside the sentence of death. We substitute therefor a conviction for the offence of manslaughter contrary to ***section 202*** as read with ***section 205*** of the Penal Code. The appellant is sentenced to serve imprisonment for a period of ten (10) years from 15th May 2007, being the date of his conviction in the superior court.

Dated and delivered at Nairobi this 23rd day of April, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR