IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 343 OF 2006

NOLEGA SIMIYU

BENJAMIN KIBET LANGAT.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction & sentence of the High Court of Kenya at Kitale (W. Karanja, J) dated 8/12/2006

in

H.C.CR.C. NO. 12 OF 2004)

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JUDGMENT OF THE COURT

The two appellants *NOLEGA SIMIYU* and *BENJAMIN KIBET LANGAT* were arraigned before the superior court on an information which charged them with murder contrary to *Section 203* as read with *Section 204* of the Penal Code. The particulars of the offence were that on the 16th day of January, 2003 at Makutano Township in West Pokot District within the Rift Valley Province the two jointly murdered *DAVID WABWOBA*. Each appellant pleaded not guilty to the charge and their trial commenced on 27th January, 2005 before *Karanja J.*, who sat with three assessors (as the law provided then).

The summary of the evidence adduced before the superior court was as follows.

Everlyn Nafula Watila (PW1), Margaret Nasua Muchunju (PW2) and *Nolega Simiyu* (the 1st appellant) were living in the same house at Makutano when on 16th January, 2003 the deceased *DAVID WABWOBA*, who was a boyfriend of the 1st appellant paid them a visit. According to Everlyn and Margaret the deceased and 1st appellant could loosely be referred to as "husband and wife". According to *Eric Simiyu (PW4)* the 1st appellant was the deceased's girl friend. On her part *Rose Juma (PW5)* testified that the deceased and 1st appellant used to live as husband and wife. While the deceased was with the three ladies i.e. *Everlyn (PW1), Margaret (PW2)* and *Nolega* (1st appellant), the 2nd appellant who was a police officer and a friend of 1st appellant also paid a visit to this house.

With that scenario it was not surprising that there would be no peace. It was the deceased who fired the first salvo by complaining that the 1st appellant was cheating on him with the 2nd appellant. Sensing the looming danger the ladies asked one of the men to leave but none of them was willing to give in. The deceased who appeared incensed by the unfolding scenario pushed the ladies out saying that he and the 2nd appellant needed to sort out the matter. At that moment *Everlyn* and *Margaret* went out of the house only to be followed by the 1st appellant leaving the two men (the deceased and 2nd appellant) inside the house.

The two men started arguing and a fight ensued as they both came out of the house. The 1st appellant was heard complaining that the deceased was embarrassing her. It was at that stage that she (1st appellant) picked a piece of wood and hit the deceased on the head as the deceased had already been knocked to the ground by the 2nd appellant. With the deceased already on the ground the 1st appellant hit him several times on the head. Both appellants then left the scene. The deceased was taken to Kapenguria District Hospital where he was admitted in critical condition. He died the following day. According to *Dr. Omunyin (PW7)* who conducted postmortem examination the deceased had multiple fractures at the back of the head, the left side of the brain was compressed by a massive blood clot at the back and the spinal cord was fractured at the neck. *Dr. Omunyin* formed the opinion that "cause of death was cardiovascular failure due to severe head and cervical head injuries following blood trauma". This doctor went on to say that the injuries must have been caused by a blunt object using great force.

As a result of this unfortunate incident in which the deceased lost his life the two appellants were arrested within Kapenguria Police Station - the 1st appellant was arrested on 19th January, 2003 while in the house of the 2nd appellant and the 2nd appellant was later arrested on 20th January, 2003.

When put on their defence each appellant raised the defence of *alibi* saying that they were not at the scene of crime. According to the 1st appellant she had taken her sick child to Kapenguria District Hospital on the material day leaving *Everlyn* and *Margaret* in the house. After the child had been treated she went to the house of the 2nd appellant where she spent the night. She went on to state that the 2nd appellant left her in the house where *Everlyn* and *Margaret* found her and told her that there was a fight the previous night, and that the deceased had fallen near the door. After delivering this message the two ladies *(Everlyn and Margaret)* left that same morning only for her to be arrested and later charged.

On his part the 2nd appellant said that the 1st appellant visited him on the material day saying that she had come from the hospital where she had taken her sick child. He went on to say that the 1st appellant slept at his house and the following morning he went on duty leaving the 1st appellant in the house but when he came back in the evening he found that the 1st appellant had been locked up in the cells. He remained on duty as usual until 20th January, 2003 when he too was arrested and later charged.

Both appellants denied having committed the offence.

After the learned Judge summed up to the assessors each assessor retuned a finding of guilty in respect of each appellant.

The learned Judge duly considered the evidence adduced by both the prosecution and the defence as well as the submissions by counsel appearing for both sides and came to the conclusion that the two appellants were guilty as charged and she proceeded to sentence each of them to death as by the law provided. In the course of her judgment delivered on 8th December, 2006 the learned Judge stated:-

"*Coming back to the evidence on record, it is not disputed that the deceased died at Kapenguria district hospital while undergoing treatment on the night in question. The cause of death is also not disputed. According to PW1, PW2 and PW5 (ROSE JUMA), the injuries that eventually led to the death of the deceased were sustained outside PW1 & PW2's house. PW5 who was one of the people who took the deceased to the hospital confirmed that she found him lying outside PW1 & PW2's house with the injuries on his head. The scene of crime is therefore not disputed.*"

The learned Judge considered the defence of *alibi* raised by the appellants and having come to the conclusion that the same had been displaced by the prosecution evidence concluded her judgment thus:-

"*In the circumstances, I am satisfied that the prosecution has proved its case against both accused persons beyond all reasonable doubt. I agree with the assessors that the accused persons are guilty of murder. I consequently find both accused persons guilty as charged and I convict them accordingly."*

The learned Judge proceeded to sentence each appellant to death.

It is from the foregoing that the appellants now come to this Court by way of first appeal, and through their advocate *Mr. Chemwok* a supplementary Memorandum of Appeal was filed setting out twelve grounds of appeal.

This is the appeal that came up for hearing before us on 24th February, 2009 when *Mr. Chemwok* appeared for both appellants while *Mr. A.M. Omutelema* (Senior Principal State Counsel) appeared for the State. In his address *Mr. Chemwok* abandoned a number of his grounds of appeal and since *Mr. Omutelema* did not wish to support the appellants' conviction on a charge of murder and asked us to find that the offence disclosed was manslaughter we do not think it necessary to consider in any great detail the submissions of *Mr. Chemwok*. We indeed asked *Mr. Chemwok* to address us on that aspect alone.

In his address *Mr. Chemwok* took issue with the fact that the investigating officer was not called to testify. In our view nothing much turns on this ground since the appellants were indeed arrested, and arraigned in court where they were charged. The fact that investigating officer failed to testify did not prejudice the trial of the appellants.

The rest of the grounds can be considered together and these related to whether there was evidence of intention to kill; whether there was common intention and defence of provocation. Finally *Mr. Chemwok* was of the view that taking into account all the circumstances of the case the appellants should be set free.

Even though *Mr. Omutelema* asked us to find the appellants guilty on the lesser offence of manslaughter it does not follow automatically that the Court is of the same view. This being a first and final appeal this Court has a duty to reconsider the evidence which was adduced before the superior court, evaluate it and draw its own conclusions but giving allowance for the fact that it has neither seen or heard the witnesses – see *OKENO V R [1972] E.A. 32, NGUI V. R [1984] KLR 729* and *OGETO V R [2004] 2 KLR 14.*

Nevertheless, a court of appeal will not normally interfere with the findings of fact by the trial court, unless they are based on no evidence or misapprehension of the evidence, or the trial Judge is shown demonstratably to have acted on wrong principles in reaching the decision – see *KIARIE V R [1984] KLR 739* and *CHEMAGONG V R [1984] KLR 611.*

We have carefully considered the submissions in this appeal and it is our view that there can be no dispute that the deceased and the two appellants were involved in the incident that led to the death of the deceased. The evidence of the two ladies at the scene, *Everlyn* and *Margaret* sufficiently points at the two appellants as the ones who inflicted the injuries that led to the death of the deceased. The only issue for determination is whether taking into account the surrounding circumstances the appellants could be found guilty of murder or manslaughter. We have summarized the evidence of what happened on that fateful evening. The 1st appellant was a girlfriend of the deceased and their relationship led others to consider them as husband and wife. The 2nd appellant was yet another boyfriend of the 1st appellant. When the 2nd appellant arrived and found the deceased in the house with the three ladies the deceased did not take it kindly that the 2nd appellant was also a boyfriend of the 1st appellant. A quarrel and a fight ensued and this led to what we have already alluded to in this judgment. The deceased was naturally provoked in discovering that the 1st appellant was cheating on him and the cause of this cheating was the 2nd appellant. The 2nd appellant was equally enraged to learn that there was yet another man (deceased) competing with him to win the 1st appellant.

Having given a careful consideration to the circumstances under which the deceased met his death we agree with *Mr. Omutelema* that the offence disclosed was manslaughter rather than murder. Passions were aroused and before they were given time to cool down, the fatal blows were struck.

The upshot of the foregoing is that we allow this appeal to the extent that we set aside the conviction for murder as well as the sentence of death and in their stead substitute a conviction for manslaughter contrary to *Section 202(1)* as read with *Section 205* of the Penal Code and sentence each appellant to fifteen (15) years imprisonment to run from the date of their conviction by the superior court i.e. 8th December, 2006. Those are the orders of the Court.

DATED and DELIVERED at ELDORET this 27th day of February, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR