



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT ELDORET
CRIMINAL APPEAL 98 OF 2006

WILLIAM MAYWA KELAN APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Kitale (Gacheche, J)

dated 2nd February, 2006

in

H.C. Criminal Case No. 17 of 2002)

JUDGMENT OF THE COURT

The appellant herein, **WILLIAM MAYWA KELAN**, was originally charged with murder contrary to **section 203** as read with **section 204** of the Penal Code; the particulars of the offence being that on the 2nd day of March, 2002 at Kamelei village in Marakwet District of the Rift Valley Province he murdered EVERLINE CHEMURUNGU WILLIAM. The appellant pleaded not guilty to the charge and his trial commenced on 23rd March, 2004 before Gacheche J. who sat with three assessors (as the law then provided). After a full trial the appellant was on 2nd February 2006 convicted on a lesser offence of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and sentenced to eight (8) years imprisonment.

Being aggrieved by that conviction and sentence, the appellant now comes to us by way of first appeal asking us to release him on the ground that he was not involved in the commission of the offence.

When this appeal came up for hearing on 7th April, 2008, the appellant appeared in person while Mr. J. K. Chirchir (State Counsel) appeared for the State. The appellant, apart from seeking his release, asked us to allow him present his written submissions. We readily allowed him to do so and we have now had time to peruse the long submissions, certainly prepared for him by somebody who knows something about the law.

Mr. Chirchir on his part submitted that this appeal ought to be dismissed as, in his view, the evidence against the appellant was overwhelming.

As already stated, this is a first appeal and that being so, the appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have this Court's own decision on the evidence – see **OKENO V. R. [1972] E.A 32** and **MWANGI V. R. [2004] 2 KLR 28**.

During the trial of the appellant in the superior court, the prosecution called a total of ten witnesses. According to Isaya Psinen Ngurasia (PW 1), many people had attended a circumcision ceremony on 2nd March, 2002 at Kamelei Village and that as they continued

with their merry making, they heard screams from the hills at about 6.00 p.m. As a result of the screams Ngurasia (PW 1) and others proceeded to where the screams were coming from only to find the appellant beating his wife (the deceased). PW 1 testified how he attempted to restrain the appellant from beating the deceased but the appellant hit him (PW 1) on his hand.

The evidence of Paul Kipkorir (PW 2) a teacher at Kamelei Primary School was that he was merely informed of the sad incident. Benjamin Kelan (PW 3) the Assistant Chief of Kamelei sub-location was also informed of the incident and as a result made enquiries which revealed that the body of the deceased was at Mr. Elgon Hospital. He (PW 3) identified the body to Dr. Sirengo who conducted postmortem examination. The report by Dr. Sirengo was produced by Dr. Liru (PW 4) who was a colleague of Dr. Sirengo. The postmortem report was produced as exhibit 2.

Pc. David Sommon (PW 5) who was attached to Anti-stock Theft Unit (ASTU) received the report of the incident on 3rd March, 2002 and proceeded to the scene where he found the body of the deceased. The appellant was pointed out and Pc Sommon arrested him and took him together with the stick which the appellant had allegedly used in beating the deceased to Kapcherop Police Station.

Clement Kilipa (PW 6) testified that on 12th March, 2002 he and others went to Mt. Elgon Hospital where they witnessed the postmortem examination being conducted on the body of the deceased.

Pc Henry Namachanja (PW 7) was an ASTU officer then stationed at Kamelei. He was instructed to proceed to the scene where he arrested the appellant. It was his evidence that at the time when they arrested him, the appellant was "obviously drunk at the time when we arrested him; that he had no idea what had happened", which evidence was supported by Joseph Kirop Motelio (PW 9).

Pc Benson Remol Kukar (PW 8) was instructed by the Officer Commanding Station (OCS) Kapenguria to prepare the postmortem forms which were later filled and signed by Dr. Sirengo and produced by Dr. Liru as exhibit 2.

Pc Wesley Langah (PW 10) who was then attached to Kapcherop Police Station produced the walking stick alleged to have been used by the appellant in beating the deceased.

At the close of the prosecution case, the appellant was put to his defence and he chose to make an unsworn statement. In his unsworn statement the appellant confirmed that he and his wife (the deceased) attended the circumcision ceremony where he consumed busaa with tea; that he was invited to another party at 4.00 p.m. on the same day where he consumed chang'aa; that he stayed at the venue until 6.00 p.m. at which point his host escorted him to the home of one Kiprop Chepaipai who had hosted a party and the appellant consumed muratina, after which he found himself arrested at ASTU station on 3rd March, 2002 at 6.00 p.m. He was stunned to know that he had been arrested in connection with the death of his wife. In concluding his unsworn statement, the appellant said:-

"I am also shocked and sad, because the deceased was a wife who I loved"

The learned Judge of the superior court carefully considered the evidence of the ten prosecution witnesses together with the unsworn statement by the appellant and eventually came to the conclusion that the appellant was guilty, not of murder, but manslaughter. In concluding her judgment, the learned Judge expressed herself thus:-

"The Assessors have returned a unanimous verdict of guilty of the lesser charge of manslaughter and I am inclined to agree with them for, the accused does not deny having inflicted the fatal injuries, all that he pleads is that he (sic) was intoxicated and did not know what happened. PW 5 and 7 confirmed the fact that he was highly intoxicated. He did not deny ownership of the walking stick, which was produced in court as the offensive weapon, neither does he deny having inflicted the fatal injuries, all that he pleads, is that he was intoxicated and did not know what happened, a fact which was corroborated by PW 5 and 7. He did not deny that the walking stick, which was produced as the weapon, was his stick. I find that he inflicted the fatal injuries on his wife and in the circumstances, though the evidence of PW 1 who had seen the accused assault deceased was not corroborated by an eye-witness I do however find that there was sufficient circumstantial evidence to corroborate the same.

I do therefore find that he caused the death of his wife, unintentionally as he was intoxicated and he is thus guilty of the lesser charge of manslaughter and I convict him accordingly."

We have now re-evaluated the evidence and bearing in mind that we neither saw nor heard the witnesses give evidence, we are of the view that this was a case in which the appellant and his wife (the deceased) attended a circumcision ceremony where the appellant consumed a large amount of various types of drinks like changaa, busaa and muratina rendering him (the appellant) completely intoxicated to the extent that he re-discovered himself almost twenty four hours later. We say so in view of the fact that the ceremony started in the morning of 2nd March, 2002 and went on until evening as the appellant drunk all sorts of drinks. It is to be observed that in his unsworn statement the appellant stated, *inter alia*:-

"I found myself under arrest. I don't know when I was arrested. I found myself in the ASTU Station on 3/3/2002, at 6.p.m. When came round (sic), I knocked the door of the cell where I was held. An officer of the ASTU, (Henry Somei) opened the door and upon my enquiry, he told me that I had been arrested in connection with this offence. I was stunned. Shortly thereafter, my wife's relatives came to the station, and we talked. I am also shocked and sad, because the deceased was a wife who I loved."

From the foregoing, it would appear the appellant was indeed so intoxicated that he was incapable of forming an intention to commit

murder. We are in entire agreement with the learned Judge in her findings that the appellant caused the death of his wife unintentionally. We therefore uphold the appellant's conviction on the reduced charge of manslaughter.

In our view and taking into account all the surrounding circumstances, the sentence of 8 years imprisonment was harsh and excessive. We accordingly reduce it to **5 years**. This sentence of **5 (five) years** imprisonment shall run from the date the appellant was sentenced by the superior court i.e. 2nd February 2006. Those shall be our orders.

Dated and delivered at Eldoret this 11th day of April, 2008.

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