REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 296 of 2006

EDUSEI ASILI MALEMA……..……APPELLANT

AND

REPUBLIC…….……...…….…….RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Busia (Sergon, J) dated 30th November, 2007

in

H.C.CR.C. NO. 5 OF 2003)

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JUDGMENT OF THE COURT

The appellant was tried with the aid of assessors in the High Court sitting at Busia for a charge of murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars of the offence alleged that on the night of 26th and 27th September, 2003, the appellant murdered one *Eureka Abwavo* (deceased). The three Assessors reached a unanimous verdict that the appellant was guilty of the offence of murder. The trial Judge, *Sergon, J,* however found the appellant guilty of the lessor offence of manslaughter contrary to *section 205* of the Penal Code and sentenced him to serve six (6) years imprisonment. The appellant appeals from the decision of the superior court against both conviction and sentence.

The deceased was the last born son of *Naftali* and *Hellen Abwavo.* The couple had three other children among them *Nelson Abwavo (PW10) (Nelson)* and *Faith Abwavo Machoni (PW1) (Faith).* Naftali died in 1999 and his wife in the year 2001 leaving their four children as orphans. According to the evidence of the appellant Naftali left a written will appointing *Miriam Musindi (DW2) (Miriam),* appellant's wife, as the administratrix of his estate. Miriam was a sister to Naftali. The appellant as brother-in-law of Naftali took the four children, his nephews, into his custody after the death of the parents.

On the night of 26th September at about 3.00 a.m., the appellant accompanied by his wife Miriam went to Korinda Police Patrol Base and found two police officers, *Cpl. David Amani (PW6) (Amani)* and *Pc. Lumbasi Chigule (PW8).* The accused was carrying the deceased who was unconscious on his back. The appellant reported that during the robbery at his home at about 1.00 a.m. the child he was carrying screamed and one of the thugs kicked the child injuring him. The child appeared dead and police advised the appellant to take the child to a nearby clinic. *Miriam* took the child to Mubweka's clinic at Kolinda

arriving there at about 3.00 a.m. She found a watchman who woke up *Valeria Ouma (PW12) (Valeria),* a nurse who was on duty. *Miriam* reported to Nurse *Valeria Ouma* that the child had been attacked by thugs. Valeria uncovered the child and discovered that the child was already dead. The police were informed and the body was taken to Busia District Hospital Mortuary. On 4th October, 2003, *Dr. Njau* performed a postmortem examination on the body of the deceased. He found that the deceased who was about 12 years old had multiple bruises on the skin, and; external injuries on the head, and was bleeding from mouth and nose, and had a ruptured spleen. He formed the opinion that the cause of death was cardio-respiratory arrest due to internal hemorrhage due to ruptured spleen.

The report made by the appellant that the deceased was killed in the course of robbery was investigated by *Cpl. Thomas Somba (PW9)* then attached to the divisional C.I.D. Busia. The investigating officer after visiting the appellant's house and recording statements from witnesses found that no robbery had taken place as reported and that it is the appellant who had beaten the deceased using a *panga* and a *rungu* for allegedly stealing his Shs.200/- and that the report of robbery was made to police as a cover-up.

The investigation officer reached that decision on the basis of information given by witnesses particularly by *Annah Nafula Oswaga (PW2) (Annah)* and *Nelson.* The superior court heavily relied on the evidence of Annah. She testified at the trial that, among other things, on the material night she was awakened by persistent crying of a child from the house of the appellant, a neighbour, and she went there to see what was happening to the child. She continued:-

"*Dogs started barking. I saw Nelson and I requested (sic) to cool down the barking dogs(sic). I saw the accused's wife holding her kitchen door. It was at night. There was a lantern lamp emanating from the kitchen (sic). I saw the deceased lying on the floor. Faith Abwavo and another girl were boiling water. Faith was sitting. The deceased was hitting his head on the floor. The deceased raised his head and said he was being killed. I demanded for an explanation from the accused's wife why the deceased was being beaten. She told me that her husband had beaten the boy because he had stolen. I observed the deceased and saw a lifeless person. Sussy the accused daughter pulled me and took me to my house. Shortly, Sussy came knocking at my door seeking accommodation. When I opened the door I saw Sussy in company of the accused. He warned me not to dare to be a witness in this case. I closed the door and they went back."*

The appellant testified in the trial that he is a teacher and a member of KNUT Executive Committee and that as he was going home on the material night at about 11 p.m. he was intercepted by four people who posed as police officers and robbed him of Sh.2000/=. Thereafter, he was frog-matched to his house and the door forced open. He was pushed into the house where the thugs demanded money and when he failed to produce any he was beaten. His wife was not present and the children who were in another house started screaming. He testified further that:-

"*They took me outside the house. The children started screaming and the gang threw bottles against the walls. The bottles got broken. There was a stampede and the children got injured. The gang took me away from the house. I was ordered to sit down as the gang escaped. Shortly I heard my wife scream. I stealthily moved to my house and found my wife with the deceased who was badly injured by the thugs".*

Miriam the wife of the appellant gave evidence as a defence witness. She testified that as she was ironing clothes on the material night, she heard dogs barking and when she peeped through the window she saw people flashing bright torches. She then heard the appellant warning that he was with dangerous people. She went to the bedroom and took 8000/= which appellant had given her and ran out of the house through the back door, hid in a cassava plantation and only returned to the house when she heard the child cry. She continued:-

"*I came back to the house and found broken bottles thrown all over the place. I heard some screams in the other house. I rushed and observed the deceased who was in great pain ……."*

The trial Judge appreciated that the evidence of *Annah* was crucial and after evaluating her evidence concluded:

"*I observed PW2 as she testified. She appeared to me to be a witness who told the truth. She had no grudge against the accused and his family. If indeed there was a robbery in the house of the accused she could have been the first person to know. Why didn't the accused and his wife (DW2) tell her about the robbery? I agree with the assessors that the defence story in respect of the robbery was a theory created to cover up the heinous acts of the accused ……..*"

The appellant relied on the supplementary grounds of appeal which can be condensed into three main grounds in our own words, that the learned Judge erred in law in allowing Faith and Nelson to be treated as hostile witnesses without following the proper procedure; that the learned Judge erred in solely relying on the evidence of PW2 and PW9 when the evidence was deficient and unreliable, and, lastly, that, the learned Judge erred in law in allowing *Guadencia Mbalwe Okumu* to be an assessor when she was an assessor in another criminal case and in relying on the contradictory opinion of the three assessors.

Regarding the correct procedure for declaring a witness to be hostile at the instance of the party who has called him, *sections 161* and *163 (1) (c)* of the Evidence Act are relevant. Section 161 gives the court discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. *Section 163 (1)* categorizes the evidence which may be called by an adverse party or, with the consent of the court, by the party who calls him for impeachment of his credit. Such evidence which may be called to impeach the credibility of the witness includes proof of former statements whether written or oral inconsistent with any part of the evidence which is liable to be contradicted. (See s. 163 (1) (c)). In *MAHATI BIN RUADIHA V. REX (1938) 5, EACA 52*, the defunct Court of Appeal for Eastern Africa in dealing with *section 155* of the Indian Evidence Act, 1872 which was *pari materia* with *section 163 (1)* of the Evidence Act said at page 53:

"*Section 155 of the Indian Evidence Act provides that the credit of a witness may be impeached by the adverse party or, with the consent of the Court, by the party who calls him by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. The proper procedure is to apply for leave to treat as hostile, prove and put in the former statements and then put to the witness the passages which are alleged to be inconsistent with the evidence given by the witness at the trial. It is essential that the witness should be given an opportunity of explaining the alleged inconsistencies as it sometimes happens that apparent inconsistencies are capable of completely satisfactory explanation if serious and substantial inconsistencies are proved the effect is to render the witness unworthy of the belief and not to make what he said in the former statement available as evidence at the trial ……..*"

In *SHIGUYE V. REPUBLIC* (1975) EA 191, the forerunner of this Court reiterated that the effect of declaring a witness as a hostile witness is to render his entire evidence untrustworthy. The Court stated at page 192 para D:

"*After having declared Shizya a hostile witness, the effect would be that Shizya was an unreliable witness, whose evidence would not be accepted by a court. All parts of the evidence of a witness declared hostile would be rejected as untrustworthy, not only some parts. The purpose of having a witness declared hostile by the party who calls him is to discredit him completely……..*"

The record shows that Faith, a sister of the deceased gave evidence which contradicted the prosecution case. Her evidence in essence, was that the deceased was assaulted in the course of robbery. Before she completed her evidence *Mr. Onderi*, the learned State Counsel merely informed the trial Judge that the witness had completely deviated from what is recorded in the police statement and that he did not wish to subject her to cross-examination since she was a child. It is clear therefore that the prosecutor did not seek leave of the court to cross-examine Faith to impeach her credit or to be declared as a hostile witness. Since the credit of Faith was not impeached, her evidence could not be merely disregarded. It had to be evaluated together with other evidence more so because she was not declared as a hostile witness.

In *MAGHENDA VS. REPUBLIC [1986] KLR 255* this Court observed that it was a misdirection for a trial magistrate to have said that evidence of a hostile witness could be safely disregarded and held at page 255 para 20:-

"*The evidence of a hostile witness must be evaluated in particular if it tends to favour the accused though it may not necessarily be acted upon by the court."*

The trial Judge therefore erred in law when he failed to evaluate the evidence of Faith which tended to support the appellant's case. As a first appellate court it is our duty to re evaluate the evidence of Faith and the entire evidence which was before the trial court and reach our own independent conclusion.

The prosecution and the trial court however used the correct procedure in respect of the evidence of *Nelson (PW10),* a brother of the deceased who turned out to be a hostile witness. The prosecution applied to the court to declare him a hostile witness. The court allowed the application and gave leave to the prosecution to cross-examine him on his previous statement to police.

The prosecution case turned on the evidence *Annah* and *Cpl. Thomas Somba,* the investigating officer. The appellant termed the evidence of *Annah* inconsistent, uncorroborated and unreliable. He testified that she did not go to his house on the material night. Similarly he attacked the evidence of *Cpl. Thomas Somba* as inconsistent and uncorroborated.

This was a case where the trial court was faced with two conflicting versions of who inflicted the fatal injuries on the deceased. On the one hand there was the prosecution version that it is the appellant who assaulted the deceased, and, on the other hand, there was the version of the appellant that the deceased was assaulted by the robbers who frog-matched him to his house and beat up the deceased when he screamed. The trial Judge believed the evidence of *Annah* and *Cpl. Thomas Somba* that it was the appellant who assaulted the deceased and that the defence story about the robbery was a theory created to cover up the heinous crime. We have earlier quoted a passage from the judgment of the superior court to the effect that the trial Judge after observing *Annah* as she gave evidence believed that she told the truth. We cannot as a first appellate court interfere with the finding of the trial Judge based on the credibility of the witness unless it is shown that there was absolutely no evidence to support the finding or no reasonable tribunal properly directing itself would make those findings. (See *REPUBLIC VS. OYIER [1985] KLR 353).*

Cpl. Thomas Somba concluded after investigation that no robbery took place. The surrounding circumstances amply support that conclusion. In the first place the neighbours of the appellant including *Pius Ngaywa Andera (PW3)* did not hear any commotion at the home of the appellant at the material night and the appellant and his wife did not cry for help from neighbours. Secondly, the appellant and his wife were not injured and nothing was stolen from their home. Thirdly, neither the appellant nor his wife saw the alleged robbers assault the deceased. It was the appellant's evidence that the deceased and other children were in a separate house. He gave three versions of how the deceased was injured – first that the deceased was injured in a stampede and, secondly, that the deceased was injured when he screamed. He told *Cpl. David Amani* that deceased was killed when he screamed. On her part, *Faith (PW1)* said that deceased was beaten by robbers while Nelson said that the robbers stepped on the deceased who was sleeping at the door as they entered into the house.

Fourthly, an inference could be reasonably drawn from the evidence that the deceased was carried from the house to the police post and ultimately to the clinic when he was already dead.

Annah observed the deceased and saw that he was lifeless. The appellant admitted that the deceased was unconscious when they took him from the house. *Cpl. David Amani* noticed that deceased was weak and on arrival at Mubweka's clinic, *Valeria,* uncovered the deceased and discovered that he was already dead.

Fifthly, the decision of the superior court was partly based on the unanimous finding of the assessors that *Annah* was a credible witness; that it was the appellant who assaulted the appellant and that the appellant created the report of robbery as a cover-up.

Lastly, although the appellant and his wife denied *Annah* went to their home on the material night, they nevertheless admitted that she was their neighbour.

When the evidence of *Faith*, *Miriam*, and the appellant is considered in the light of the above circumstances, we inescapably conclude that the prosecution case was eminently credible and the learned trial Judge cannot be faulted for disbelieving the defence case.

The last ground of appeal is not material because the appellant was convicted for the offence of manslaughter which is triable without the aid of assessors.

On analysis, we are satisfied that the appellant was properly convicted for the offence of manslaughter. The sentence imposed was lawful and merited. Accordingly, we dismiss the appeal in its entirety.

DATED and DELIVERED at KISUMU this 23rd day of NOVEMBER, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR