



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

Criminal Appeal 66 of 2005

REUBEN NDOLO1ST

APPELLANT

DOMINIC NGARUIYA2ND APPELLANT

DAVID LESILELE3RD APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Justice Rawal) dated 6th October, 2003

in

H.C.CR.C. NO. 44 OF 2003)

JUDGMENT OF THE COURT

REUBEN NDOLO, DOMINIC NGARUIYA and **DAVID LESILELE**, the 1st, 2nd and 3rd appellants respectively were jointly charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. According to the information filed by the Attorney General at the High Court of Kenya at Nairobi, the three appellants on the 17th day of April, 2000 at Ngara in Nairobi within Nairobi Area, jointly murdered **ERIC MAITHA WAMBUA**, the deceased.

The trial of the appellants commenced on 16th June, 2003 before Rawal, J sitting with three assessors. The facts of the case were largely undisputed. The deceased, Eric Maitha Wambua, was living at Jeevanji Estate, Nairobi in a house belonging to his brother, **Timothy Kinyili Wambua** (PW1) and his wife **Bibiana Kalimi Kariuki** (PW3). That family had a neighbour who complained of her house having been broken into by the deceased. This complaint was reported to the Chief’s Camp at Ngara. The items, which were alleged to have been stolen by the deceased were clothes, lotion, ID Card, Barclays Bank Pass Book card and cash Shs.1,300/=.

As a result of this report, three Administration Police Officers (2nd appellant, 3rd appellant and **Hillam Maina** (PW7) visited the scene and conducted a search but did not find the suspect (the deceased). The

Administration police officers left the scene stating that they would come back. All this happened on 16th April, 2000. The following day (17th April, 2000), the 1st and 2nd appellants acting on instructions of **Hillam Maina** (PW7) went back to the scene and arrested the deceased that morning. They all walked up to the Chief's Camp at Ngara. At about 9:45 a.m. the deceased became sick and was taken to Ngara Health Centre where he was pronounced dead.

It was the prosecution case that the deceased died as a result of being assaulted by the three administration police officers – the three appellants herein. Prosecution relied on both circumstantial and direct evidence. Those who were present during the arrest of the deceased were **Wambua** (PW1) **Kinyili** (PW2), **Kariuki** (PW3) and **Syuma** (PW4). Each of them testified on how the three appellants mishandled the deceased. In his evidence in chief, PW1 stated:-

“They came following day at 9:00 a.m. They found Eric. One of the police officers removed a pistol and threatened to kill him because he had a habit of breaking into people’s homes. He started beating Eric. The person who beat him is in Court. Identifies 2nd accused.”

..... We followed them through verandah. Eric was asked to lie on his stomach by then. 2nd accused picked jembe’s stick and hit Eric on his back. Then he said he was not going to kill in presence of his people but would do that in police station. He picked Eric up and took him to Chief’s Camp, Ngara.”

According to PW1, it was the 2nd appellant who assaulted the deceased.

According to evidence of PW2, the deceased was being badly handled by the police officers as they arrested him. PW2 was not specific as to who did what to the deceased.

In his evidence in Chief, PW3 stated inter alia:-

“I can remember and identify them in court. (identifies 1st and 2nd accused). They came towards us and one removed a revolver and asked who was Eric. I got scared and told him he was there. He slapped Eric. I asked him why he was doing that. He said that was what they do to thieves (identifies 2nd accused). He handcuffed him. He went around through the back door. We went from the home. When we were there, I saw 2nd accused hitting (sic) on his chest. Eric fell as a result.”

According to PW3, it was the 2nd appellant who assaulted the deceased on that material day. As regards the evidence of PW4, it was to the effect that it was the 2nd accused who assaulted the deceased.

Dr. Paul Maundu, (PW8), gave evidence on the postmortem examination of the body of the deceased as conducted by Dr. Olumbe who was not available to testify as he had left the country for Australia. Dr. Maundu said that he was familiar with the signature of Dr. Olumbe. According to the post mortem report, cause of the deceased’s death was head injury due to blunt object.

When put to their defence, each appellant admitted having been involved in the investigation and arrest of the deceased but denied having assaulted the deceased.

The learned Judge of the superior court considered the evidence before her, analysed the same and came to the conclusion that the three appellants were guilty of unlawful killing of the deceased and hence convicted them of manslaughter. In concluding her judgment the learned Judge expressed herself thus:-

“All the three accused persons were with the deceased and were the last persons seen with him, and, in their undue enthusiasm to assist the cause of justice, so to speak, they embarked on a joint enterprise with common design which was unlawful. In my humble opinion, it is not for the prosecution to determine what part each of the Accused person took or to what extent. They all were aware that their actions was (sic) in stark negation of their duties as administrative officers and by conniving in that act, all of them became the principal wrong doers.

I am satisfied that the circumstantial evidence as specified hereinabove, do not leave any doubt in my mind as to the guilt of the accused persons or as to capability (sic) to raise any reasonable hypothesis as to their innocence.

The result is that I convict all the accused persons for the offence of manslaughter as per section 202 of the Penal Code having caused death of one, Eric Maitha Wambua, and not for the murder of the said deceased.”

The learned Judge delivered her judgment on 6th October, 2003 when she sentenced each appellant to seven years imprisonment. In sentencing the appellants, the learned Judge ordered:-

“Considering all the above and doing my best, I order and sentence each accused persons to serve imprisonment for seven years. The sentence shall commence from 1st April, 2002.”

Being dissatisfied by the foregoing the appellants, through their counsel, have now come to this Court appealing against both conviction and sentence.

Mr. Wandugi, the learned Counsel for the 1st appellant started his submission by stating that the learned Judge did not comply with the mandatory provision of **section 306(2)** of the **Criminal Procedure Code** and hence his client was not granted the opportunity to address the Court. In Mr. Wandugi’s view, failure to comply with the said provision was incurable and that on this point alone, his client, the 1st appellant, ought to be set free. Submitting generally on the evidence before the trial court, Mr. Wandugi pointed out that his client merely booked the deceased and placed him in custody and that he was only called later. As regards the sentence, Mr. Wandugi submitted that a sentence of 7 years imprisonment was manifestly excessive.

Mr. Njanja, the learned counsel for the 2nd appellant supported Mr. Wandugi on the issue of non-compliance with **section 306(2)** of the **Criminal Procedure Code**. As regards the evidence against his client, Mr. Njanja submitted that there were serious contradictions in the evidence adduced by the prosecution witnesses. He emphasized that this was a case based on circumstantial evidence and that being so, the contradictions in prosecution evidence should have been addressed by the learned Judge. Mr. Njanja went on to complain that the learned Judge did not consider his client’s defence.

Mr. Maina, the learned counsel for the 3rd appellant, associated himself with the submissions of his learned colleagues.

Mr. Kaigai, the learned Senior State Counsel appearing for the State, did not wish to support the conviction of the 1st and 3rd appellants. As regards 2nd appellant, Mr. Kaigai submitted that there was clear evidence that it was him who assaulted the deceased and that the cause of death being head injury was consistent with the assault. As regards the 2nd appellant’s defence, Mr. Kaigai was of the view that the same was displaced by the prosecution case.

On the issue of non-compliance with **section 306(2)** of the **Criminal Procedure Code**, it was Mr. Kaigai’s submission that although the Judge failed to record **section 306(2)** yet the appellants defended themselves by giving sworn evidence.

In the appeal, therefore, there was a common complaint that the learned Judge did not comply with **section 306(2)** of the Criminal Procedure Code which provides:-

“When the evidence of the witnesses for the prosecution has been concluded and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his

advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself and upon being informed thereof, the judge shall record the fact.”

We have considered this complaint of non-compliance with **section 306(2)** of the **Criminal Procedure Code** and our short answer to that complaint is to be found in the record of the trial court. That record shows that the learned State Counsel (*Mrs. Ouya*) closed the prosecution case on 2nd July, 2003 and immediately thereafter, Mr. Njanja who was appearing for all the appellants (accused in that court) is recorded to have said:-

“The accused will give sworn statement but defence shall not call any witness.”

The court then proceeded to record that defence case would commence on 10th July, 2003. And on 10th July, 2003 when the court reconvened, Mr. Njanja again repeated that the three accused (appellants herein) would give sworn statement. Thus each appellant gave evidence on oath.

In these circumstances, we are unable to accept the submission that there was non-compliance with **section 306(2)** of the **Criminal Procedure Code**. What took place was substantially in compliance with **section 306(2)** of the **Criminal Procedure Code** and we are satisfied that by mere omission to record the said section did not prejudice the appellants’ trial.

Coming now to the substantive aspects of this appeal, we would point out that when the evidence of arrest is analysed it was quite clear that the principal player was the 2nd appellant. We endeavoured to set out the salient portions of the evidence of **PW1, PW2, PW3** and **PW4** who could be described as eye witnesses during the arrest of the deceased. These witnesses told the trial court what they observed during the arrest.

From that evidence it emerges that while the three appellants were executing their duty to effect the arrest of the deceased it turned out that one of them acted beyond what the law allowed him to do in the circumstances of the case.

As we consider the submissions by counsel appearing for the three appellants it must be remembered that as this is a first appeal we are duty bound to examine and re-evaluate the evidence on record to reach our own conclusions in the matter, always remembering that we had no advantage, as the superior court did, of seeing and hearing the witnesses – see **OKENO V. R [1972] E.A. 32**.

It is also an established principle that an appeal court will not normally interfere with a finding of fact by the trial court, whether in a civil or criminal case, unless it is based on no evidence, or on misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see **CHEMAGONG V. REPUBLIC [1984] KLR 611**.

In this appeal, we have already observed that the facts of the case were largely undisputed. The genesis of all this was a suspicion that the deceased might have broken into a lady’s house. As a result of that suspicion, a report was made to the Chief’s Camp which led to the appellants, as administration police officers acting on instructions, proceeding to the scene and arresting the deceased. We have already set out elsewhere in this judgment what the eye-witnesses stated in their respective evidence. On our own assessment of the recorded evidence, we are satisfied that the learned Judge was entitled to make a finding that the appellants went beyond what the law permitted them to do in effecting the arrest of the deceased. But the evidence as regards assault of the deceased only points at the 2nd appellant. The witnesses who were present during the arrest of the deceased told the trial court what exactly the 2nd appellant did to the deceased. There was no evidence to connect the 1st and 3rd appellants with the assault. We are therefore not surprised that the learned Senior State Counsel did not wish to support the conviction of these two appellants. Accordingly, we allow the appeals of the 1st and 3rd appellants, quash their conviction and set aside the sentences imposed on them and order that the two be set at liberty forthwith unless otherwise lawfully held.

As regards the 2nd appellant, we are satisfied that he was convicted on sound evidence as he clearly went beyond what the law allowed him to do in effecting the arrest of the deceased. We, however, note that while he was convicted on 6th October, 2003, the learned Judge ordered that his sentence should commence from 1st April, 2002. We had difficulties in understanding the significance of that date of 1st April, 2002. The offence took place on 17th April, 2000, and the trial commenced on 16th June, 2003. The judgment in which the 2nd appellant was convicted was pronounced on 6th October, 2003. On 1st April, 2002 the trial of the 2nd appellant (and his co-accused) had not even commenced. So there is no way he could start serving a sentence for an offence he had not been convicted of. We must rectify this anomaly. For that reason, we reduce the sentence of the **2nd appellant** from **seven(7) years imprisonment** to **five (5) years imprisonment** and order that the said sentence shall be served as from 6th October, 2003 when he was convicted of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. That shall be our judgment.

Dated and delivered at Nairobi this 17th day of March, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR