



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: TUNOI, O'KUBASU & WAKI, JJ.A.)

Criminal Appeal 202 of 2003

BETWEEN

GEORGE NG'ANG'A APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Conviction and Sentence of the High Court of

Kenya at Mombasa (Hayanga, J.) dated 15th August, 2003

in

H.C.CR. C. NO. 12 OF 2003)

JUDGMENT OF THE COURT

The genesis of this appeal is a charge sheet dated 5th January, 2000 in which the appellant, George Ng'ang'a (as **1st accused**) and Charles Lwanga (as **2nd accused**) were jointly charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that on the 14th day of August 1999 at Tanzania Village, in Taita Taveta District of the Coast Province the two jointly murdered Suleiman Nasibu.

What led to the death of the deceased Suleiman Nasibu was a fight which involved four men – the deceased, the appellant and his co-accused Charles Lwanga and Masudi Makande Mbuta (PW3). The incident was witnessed by Mariam Hassan Mwari (PW1) and Samuel Jeremiah Mdawida (PW2). In her evidence in Chief PW1 stated:-

“As I was attempting to move near to them to separate them before I reached them George accused No. 1 came and passed me and went and hit the young man who was separating them and he George was carrying a stick about 2 meters long and 21/2 inches. He hit his head with it. First he held the stick up with his two hands before hitting and hit the young man called Suleiman with it. Suleiman and Charles at that time were facing each other while holding each other's shirt. Then as George came with a stick Charles released Suleiman and he Charles raised his hands up. Then George hit Suleiman on the head.”

This witness (PW1) was cross-examined at length but remained firm that he saw the appellant (George) hit Suleiman (the deceased) on the head.

The evidence of PW2 was to the effect that he witnessed this incident in which the appellant hit the deceased. In his evidence in chief he said:-

“After separating them Masudi, ;Ng’ang’a, George and Suleiman started to argue bitterly then they started fighting again. It appeared Charles and George on one side and Masudi and Suleiman on the other. They fought about (sic) which George ran away. Masudi also ran away, Suleiman and Charles remained. They were quarrelling Charles and then George came in running in with a stick thickness of my arm 2½ ft to 3 ft. One side of it was burnt. He came and hit Suleiman and George hit Suleiman on the back and Suleiman fell down..”

Masudi Makande Mbuta (PW3) who was one of the combatants in the fight testified to the effect that as he struggled in this fight he saw the appellant hit the deceased Suleiman on the head. In his evidence in chief PW3 stated:-

“ As we were struggling 1st accused left Suleiman and picked a stick near where we were fighting. I saw him hit Suleiman in the head with that stick. At this juncture myself and 2nd accused stopped struggling . I saw the assault by 1st accused on Suleiman.”

Stopping here for a moment it is to be observed that according to the first three prosecution witnesses (PW1, PW2 and PW3) it was the appellant who hit the deceased on the head. As a result of being hit, the deceased fell down from where he was taken to the hospital (Voi District Hospital) and then transferred to Coast General Hospital on 17th August 1999, where he died on 20th August, 1999. Juma Makelele Mwakimwo (PW4) the elder brother of the deceased was involved in transferring the deceased from Voi District Hospital to Coast General Hospital.

P.C. John Kirui (PW5) was involved in the investigations of the case and he is the one who arrested the appellant and his co-accused Charles.

Finally, Dr. K.H. Mandalia (PW6) conducted postmortem examination on the body of the deceased whose opinion was that the cause of death was ***“due to increased intracranial pressures due to head injury.”***

When put to his defence the appellant elected to give a sworn statement in which he explained how he was walking from a drinking place when he met two people who pushed him into a home. He started struggling with the two men and as a result one of them raised a *rungu* to hit him but instead hit his companion who fell down. The appellant then ran away only to be arrested and taken to Voi police station where he was charged with murder.

The learned trial Judge (Hayanga, J.) considered the evidence before him and convicted the appellant of murder while he acquitted the appellant’s co-accused Charles. The appellant was accordingly sentenced to death. The appellant now comes to this Court by way of appeal and this being a first appeal he is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination – see **OKENO V. R. [1972] E.A. 32** at p. 36. It is for this reason that we have endeavoured to summarize the salient portions of prosecution witnesses' evidence and the sworn statement of the appellant.

Mr. B.O.Odongo, the learned counsel for the appellant, submitted that the guilt of the appellant was not proved as, in his view; it was only PW1 and PW2 who said that it was the appellant who inflicted the fatal blow. He drew our attention to the evidence of the pathologist (PW5) which was to the effect that the deceased was hit on the head while the other witnesses said that the deceased was hit at the back. Mr. Odongo further submitted that the learned Judge did not give reasons for his decision. Finally, Mr. Odongo contended that this was a fight in which the appellant was attacked by the deceased, and in his view, the appellant should have been acquitted.

Mr. V.S. Monda the learned State Counsel was of the view that the facts disclosed the offence of manslaughter rather than murder. He submitted that the incident was witnessed by PW1, PW2 and PW3 who testified that it was the appellant who inflicted the fatal blow on the deceased. He pointed out that this was a fight involving four people in which malice aforethought was not proved.

We have carefully considered the evidence on record and as we have endeavoured to show by setting out what the eye-witnesses (PW1, PW2 and PW3) stated in their respective evidence this was a case in which the deceased died as a result of being hit when he went to separate a fight in which he was eventually engulfed. Taking the evidence of PW1, PW2 and PW3 into consideration it cannot be denied that this was a fight involving four men. Indeed, in his judgment the learned Judge said:-

“The evidence shows that there was a fight involving the four men, the deceased, the two accused persons, and PW3. There is evidence which I accept that a heavy wooden stick measuring about 2 meters in length and 2 ½ inches in width was used to hit the deceased on the head.”

Having re-evaluated the evidence we are in agreement with the learned Judge in his finding that this was a fight involving the four men. There was clear evidence from three prosecution witnesses (PW1, PW2 and PW3) that it was the appellant who hit the deceased on the head using a big stick. In our view, the appellant’s defence to the effect that the deceased was hit by a stray rungu was properly rejected by the learned Judge.

The issue that calls for determination is whether the facts as accepted by the learned Judge (and by this Court) disclosed the offence of murder or manslaughter. The State, through the learned State Counsel, Mr. Monda conceded that the facts disclosed the offence of manslaughter.

We have now considered the evidence before the trial court, the submission by the appellant’s counsel and Mr. Monda for the State and have come to the conclusion that as the appellant hit the deceased in what started as an affray and taking into account all the surrounding circumstances, we are satisfied that the offence committed by the appellant was manslaughter and not murder.

In view of the foregoing, we allow this appeal, quash the conviction and set aside the sentence of death passed on the appellant. We find the appellant guilty of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code and convict him accordingly. Taking into account all the circumstances of the case, including the appellant’s custodial period since his arrest in 1999, we sentence the appellant to five (5) years imprisonment and order that the sentence should run from the date he was convicted of murder by the High Court i.e. from 15th August, 2003. It is so ordered.

Dated and delivered at Mombasa this 22nd day of July, 2005.

P.K. TUNOI

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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.