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| Case Number: | Criminal Appeal 48 of 1980 |
| Date Delivered: | 11 Jan 1982 |
| Case Class: | Criminal |
| Court: | Court of Appeal at Nairobi |
| Case Action: | Judgment |
| Judge: | Eric John Ewen Law, Cecil Henry Ethelwood Miller, Kenneth D Potter |
| Citation: | Waweru v Republic[1982] eKLR |
| Advocates: | - |
| Case Summary: | <p>Waweru v Republic</p> <p>Court of Appeal, at Nairobi</p> <p>January 11, 1982</p> <p>Law, Miller & Potter JJA</p> <p>Criminal Appeal No 48 of 1980</p> <p><i>Evidence</i> - <i>accomplice evidence - appellant fatally assaulted deceased - two witnesses present during assault - witnesses attempted to restrain appellant - witnesses treated as accomplices - whether witnesses were accomplices.</i></p> <p><i>Evidence</i> - <i>evidence of identification - evidence that deceased assaulted by appellant - appellant identified by fellow police officers – appellant convicted - whether appellant properly identified - whether conviction based on such evidence is proper.</i></p> <p><i>Criminal Practice and Procedure</i> - <i>arrest - whether force used grossly excessive.</i></p> <p>The appellant, an inspector of police, was charged</p> |

with the murder of one Kanyoro but was convicted of manslaughter and sentenced to eleven months' imprisonment. The prosecutor's case was that the appellant had entered a shop in which he quarreled with one Kasina, a soldier and who was not called at the trial. After the quarrel, the appellant left and returned in a vehicle and in the company of his driver and two other police officers.

The appellant assaulted Kasina and the proprietor of the shop and ordered their arrest. The deceased, who lived in a house nearby, arrived at the scene as his wife watched through a window. The deceased's wife, the proprietor of the shop and one of the police officers testified that the appellant assaulted the deceased before he was taken to a police cell, where he was found dead the next morning. A post-mortem examination showed the cause of death to be internal haemorrhage due to fractured ribs and a stomach injury.

The appellant in his defence admitted only to having arrested the deceased and suggested that he had been beaten up in the police cell. The trial judge followed the view of assessors that the appellant should be acquitted of the murder charge but convicted of manslaughter. The trial judge also chose to treat the two police witnesses as accomplices.

The appellant appealed against the conviction, stating that the evidence of his identification had been unsatisfactory as there had been darkness and confusion at the material time.

Held:

1. In the absence of evidence that the witnesses used any violence in the arrest of the deceased and merely restrained the appellant there was no justification for treating them as accomplices.
2. Evaluation of the evidence proved that the appellant was properly identified as two of the identifying witnesses had been his fellow officers.
3. There was no doubt that the deceased had died of the violence inflicted by the appellant, which

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| | <p>had been grossly excessive.</p> <p>4. The appellant had been properly convicted and the sentence imposed was not excessive.</p> <p>5. The violence used by the appellant represented a grossly excessive use of force in effecting an arrest.</p> <p><i>Appeal dismissed.</i></p> <p>Cases</p> <p>No case referred to.</p> <p>Statutes</p> <p>Evidence Act (Cap 80)</p> |
| Court Division: | Criminal |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Appeal dismissed. |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
| <p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p> | |

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEAL NO. 48 OF 1980

BETWEEN

WAWERU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the murder of one Thomas Kanyoro at Wajir on the night of July 2, 1979. He was convicted of manslaughter and sentenced to eleven months' imprisonment. He now appeals against conviction and sentence. The prosecution case was that the appellant, who at the material time was an Inspector of Police at Wajir, visited Wajir Township at about 8 pm on July 2, 1979, in the course of his duties as duty officer. He entered a house in which he found two men, one was police constable Paul Omari (PW 10) and the other a soldier, private Bernard Kasina who was not called at the trial. Both were in plain clothes.

There was also a woman called Wangari (PW 2) who owned the shop and who was probably supplying the men with liquor, although she denied this. A quarrel arose between Kasina and the appellant, who left the shop and went back to the police station to fetch reinforcements. The appellant came back to the house in a Landrover, accompanied by his driver constable Mwangi (PW 12), Sgt Ole Musia (PW 13) and constable Obara (PW 6) who was armed with a rifle. They found Kasina inside, and the appellant slapped him, and hit him with the butt of Obara's rifle which he snatched from Obara. The appellant was calling Kasina a *shifita* bandit.

Wangari came into the room and was also struck by the appellant, who ordered Kasina and Wangari to be arrested and put in the Landrover. While this was being done, the deceased Kanyoro who lives in the house next door to Wangari's, arrived on the scene. His wife Margaret watched through the window. According to Wangari, Sgt Musia and Margaret, the appellant struck the deceased on the chest with Obara's rifle, knocked him to the ground on his back and proceeded to step on his body and trample him with his feet. Sgt Musia deposed that the appellant was wearing boots.

The deceased had to be lifted into the Landrover and he, Kasina and Wangari were placed in cells. During the night, the deceased complained of being ill, and asked for water. He was not given any. Next morning he was found dead. The following day Dr Muturo (PW 1) performed a postmortem examination of the body and found bruises on the forehead and scrotum and swollen testicles. On internal examination, he found that the sixth, seventh and eighth ribs had been fractured and the stomach wall was bruised. The injuries had been caused by a blunt object and the cause of death was massive internal haemorrhage due to the fractured ribs and stomach injury.

The appellant gave evidence on oath at some length. He denied beating anyone or even touching the

deceased, although he admitted arresting him and the other two. He suggested that the deceased was beaten up in his cell, and that two other prisoners who were in the cell at the time could have given relevant evidence but were intentionally not called by the prosecution. The learned judge chose to treat the police witnesses PW 6 and PW 13 as accomplices, but we see no justification for this. They were taken to the scene by their senior officer, the appellant, to assist him in arresting persons suspected of illicit drinking. There is no evidence that either of these policemen used any violence when the deceased and the other two suspects were arrested. The appellant does not suggest that either policeman used violence at the time of the arrests. He deposed that no violence was used at all by anyone at that time. We do not in these circumstances see how PW 6 and PW 13 can be said to have been accomplices in the violent assault which occasioned the death of Thomas Kanyoro, which violence we are satisfied was inflicted at the time of the arrest by the appellant and by the appellant alone. Furthermore, both Wangari (PW 2) and PW 6 deposed that Sgt Ole Musia (PW 13) tried to prevent the appellant from hitting the deceased and the other two suspects with the rifle butt. We can see no reason for treating the two policemen as accomplices.

The assessors, after a full and careful summing-up, advised that the appellant should be acquitted of murder but convicted of manslaughter, and the learned judge was of the same view. The appellant has submitted before us that the evidence of identification implicating him was unsatisfactory, as the events occurred at night, and there was much confusion. A vital witness, Kasina, was not called as a witness. This man was a serving soldier, and the prosecution tried repeatedly but unsuccessfully to secure his attendance. On our own evaluation of the evidence, we are satisfied that the appellant was properly identified, especially as two of the identifying witnesses were members of his own police party and we have no doubt that the deceased died as a result of the violence inflicted on his body by the appellant, using a rifle butt and his feet. The deceased had offered no violence or provocation. At the most, he may have sat down to express his objection to being arrested, which would not have been unreasonable, as he asked why he was being arrested but was given no reason. The violence used by the appellant represented a grossly excessive use of force in effecting an arrest, and we have no doubt that he was properly convicted of manslaughter. The sentence cannot by any stretch of imagination be described as excessive.

We see no merit in this appeal which we order to be dismissed, both as regards conviction and sentence.

Dated and delivered at Nairobi this 11th day of January, 1982.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR



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