



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NUMBER 29 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JEREMIAH JUMA WEKESA.....1ST ACCUSED

EVANS ODERA SIGAWA.....2ND ACCUSED

J U D G M E N T

The 1st accused **Jeremiah Juma Wekesa** and 2nd accused **Evans Odera Sigawa** are jointly charged with the offence of murder. Particulars of the offence are that on the 27th day of July, 2019 at Mango Inn Village, Kimilili Sub-county within Bungoma County, murdered **Robert Shem Opiri**.

The case for the prosecution is that **PW 4 David Ogega Sibwanga** is a farmer who keeps chicken. He has 2 employees **Jeremiah Juma Wekesa (1st Accused)** and **Evans Odera (2nd Accused)**. On 27th July, 2019 he had his wife went to church. He went back in the evening and found the deceased lying down and eggs in a jerry can near where he was. He also noticed that 1st accused Jeremiah had sent him a message requesting him to call him. He was informed that deceased had been found stealing the eggs. He noticed deceased had injuries. He took him to the police station where he reported the matter and took deceased to hospital. The next day he received information that deceased had died.

PW 1 Benard Otany Omito testified that he knew deceased who was working in a slaughter house and used to supply him with meat. On 27th July, 2019 at 10.00 a.m. he went to look for deceased at slaughter house but was told deceased had taken food for dogs to his employer. He followed him and saw many people. On going closer he saw deceased lying down. His clothes were blood stained. He saw 1st and 2nd accused attacking the deceased. He saw 1st accused hitting him with kicks and 2nd accused stepping on him. He said there were about 8 people at the scene.

PW 6 No. 231717 Chief Inspector Francis Milia the investigating Officer received a report of Murder from the Officer Commanding Officer. He went to the house of **PW 4 David Ogega** where he arrested the accused as suspects. He received information that deceased had gone to the home of Ogega and 1st accused saw the deceased stealing eggs. He told the deceased to return the eggs and there was a misunderstanding and accused beat the deceased. He then caused accused's to be charged with present offence.

1st accused Jeremiah Juma Wekesa gave sworn evidence. He testified that on 27th June, 2019 he worked at his home till evening and went to sleep. The next day on 28th July, 2019 he went to watch football and on the way back he was arrested by police. He testified that the prosecution witnesses who gave evidence who are liars. In cross-examination by Thuo for state he admits he knows David Ogega as a teacher but denied knowing his home or working for him.

2nd Accused **Evans Odera Sigawa** testified that he sells groundnuts and chapati at Kimilili on 27th July, 2019 he woke up and went to his business up to 10 p.m. when the police went and arrested him. They took his Ksh.12,000/- and took him to the police station. He testified that he know 1st accused but denied having been employed by David Ogega.

M/s Wakoli for 1st accused Jeremiah Juma Wekesa filed written submissions. Counsel submitted that the investigations in this case were shoddy as the prosecution did not establish any employer employee relationship between David Ogega (PW 4) and the accused; that no evidence was adduced that it is accused who inflicted the injury and that there was the requisite malice aforethought.

M/s Isiyee for 2nd accused Evans Odera Sigawa submitted that the prosecutor did not adduce direct evidence but relied on circumstantial evidence to prove its case. Counsel submits that the circumstantial evidence tendered does not meet the tests stated in **R. Vs Kipkering Arap**

Koske & Another 16 EACA 135.

PW 1 Dr. Wanamibsi Caleb Wata who performed the post mortem on the body of the deceased found that the deceased had a deep cut wound on left side of head; blood oozing from the mouth, deformity on the vertebral column L2-L4. He formed opinion that cause of death was due to spinal shock and massive bleeding following a trauma by sharp object. This witness, therefore, had evidence that established not only the fact of death but also the cause of death.

The prosecution sought to prove that it is the accused who inflicted the injuries leading to the death of the deceased. PW 4 David Ogega testified that he came home and found deceased laying down with visible injuries and eggs by his side. He took him to police where he reported the matter and then took him to hospital where he died. In cross-examination by M/s Wakoli and Isiya he testified he did not see 1st accused and 2nd accused assaulting the deceased. Pw 5 Juliet Ogega the wife of David Ogega testified that they came and found the deceased injured but were not there when he was injured.

The only evidence relied on by the prosecution as to who assaulted the deceased is that of **PW 2 Benard Otwane Omato**. He testified: -

“On 27th July, 2019 at 10.00 a.m. I was going to the slaughter house at Kimilili. On arrival I did not find the deceased. I was told he had taken dog food to his employer. I started going towards his employer’s home. On going near the home I saw many people. The deceased had been beaten and was lying down unable to stand. His clothes were blood stained. I left him there and went home. The next day I received information he died.

I saw 1st accused and 2nd accused attacking him. I know him. I saw 1st accused hitting him with kicks and fists. 2nd accused was stepping on him.”

However, in this statement to police which was produced as Defence Exhibit 2 he had stated: -

“I am the above named Teso Male adult aged 40. Currently I am a casual Labourer at Kimilili Township. I can recall since 2013 one the deceased who I cannot remember his name normally bring some meat from slaughter house in Kimilili. On 27th July, 2019 at around 10.00 a.m. I went to slaughter house to check for meat since he delayed.

I was told by one woman whom I cannot identify that he had taken blood to one man who is a Kisii and he normally takes meat to that place for dogs. The same day at around 5.00 p.m. while I was at Kimilili Township, I heard someone screaming at the said home while tied with a chain. I was not able to get inside the home since I was going to Webuye. I went on 28th July, 2019 at around 8.00 a.m. I heard that the deceased had passed away. Today 3rd August, 2019 at 4.00 p.m. I was requested by the brother of the deceased to accompany him to Kimilili Police Station to record statement of which I did.”

The prosecution relied on the evidence of this single witness PW 2 Benard Otieno to prove the identification of the accused as the persons who inflicted the injuries on the deceased. The prosecution, therefore, relied on the evidence of the single identifying witness. The court is, therefore, obliged to warn itself of the danger of relying on the evidence of a single identifying witness before relying on it as a basis of conviction in **Wamunga Vs Republic [1989] KLR 424** the Court of Appeal stated: -

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

On the particular issue of the evidence of a single identification witness, the same court acknowledged in **Ogeto versus Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows:-

It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.

The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria versus Republic (1967) EA 583 at page 584**. It stated:

A conviction resting entirely on identity invariably causes a degree of uneasiness...

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.

The court also cited its own decision in **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** where it held:

Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can

reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

The need for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness is an issue that was taken up in the Court of Appeal in **Kisumu Criminal Appeal No. 20 of 1989, Cleophas Otieno Wamunga versus Republic** where it noted that evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. The court proceeded to state further that whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant based on the evidence of the identification.

Again, in **Criminal Appeal No. 24 of 2000 Paul Etole & Reuben Ombima versus Republic**, the Court of Appeal reiterated the need for caution. It stated as follows;

The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant.

As the only evidence connecting the accused to the offence is that of **PW 2 Benard Otwane Omito**. This court must be satisfied that it is credible for it to form a basis of conviction.

The accused recorded a statement at the police station on 3rd August, 2019, six (6) days after the incident. The evidence in court and the statement recorded has been reproduced above. They appear materially different and contradictory. Where there were contradictions between the *viva voce* evidence in court and statements made to police, the court must resolve the same as it goes to the credibility of the witness.

S v Mafaladiso en Andere 2003(1) SACR 583 (HHA) the South African Court of Appeal stated:

“The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness, could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.”

The *viva voce* evidence of PW 1 Benard Otany in court is that he found the deceased having been beaten lying down and unable to talk. He left him there and went home. He then said he saw Accused 1 and 2 attacking the deceased. In cross-examination he testified that when he arrived when deceased had been beaten and saw his clothes blood-stained. He said he saw 1st accused hit the deceased with kicks and 2nd accused stepped on him. He, however, confirmed that he did not know the names of accused.

In his statement to police, the witness stated that he heard screams and was informed that there was a person tied with chains. He did not get inside the home as he was going to Webuye. The next day he heard that the deceased had died.

These two statements made by one person in same proceedings appear contradictory in material particulars, in particular whether the witness ever visited where deceased was and if he never saw the accused. It is noteworthy that in the statement to police he never mentioned seeing

any of the accused assault the deceased.

A witness in any proceedings before court should not give an impression that he is not telling the truth. This severely erodes the credibility of the witness before court and materially affects the reliability of his evidence. In this case, the only identifying witness has not from his testimony and previous statement not earned the confidence at this court that he is saying the truth. Consequently, I do not accept his evidence that he saw accused attack the deceased as truthful.

Considering the whole evidence, I find that the prosecution has not established its case against the 1st and 2nd accused. I, therefore, find 1. **Jeremiah Juma Wekesa**. 2. **Evans Oderao Sigowa** not guilty of the offence of Murder Contrary to Section 203 as read with Section 204 Penal Code and acquit them under Section 215 of the Criminal Procedure Code. Accused to be set at liberty unless otherwise lawfully detained.

Dated, signed and delivered at Bungoma this 25th day of November, 2020.

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S N RIECHI

JUDGE