



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 74 OF 2010

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

ABDUB DOYO BUDA.....ACCUSED

RULING

1. The accused **ABDUBA DOYO BUDA** is charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are:

“On the 11th day of November 2010 at Manyatta Konso, Dakabaricha Location in Marsabit Central District within Eastern Province, murdered TUTO SHALO.”

2. The prosecution called three witnesses. The facts of the prosecution case are that three men that is, one Molu Halake, PW3 and BIDU SHALO went to visit Tilla Abila after she was bereaved. Tilla was not home but was expected. The three men sat in the sitting room on one sofa set while a lamp lit the room from a table near the entrance door.
3. As the three men sat waiting for Tilla, a man peeped at the door from outside without getting inside the sitting room. Then BIDU stood up to go and check who it was and what he wanted. According to PW3, no sooner had the deceased reached the door and as he stepped outside, he was hit with a long log. The log was produced in court as P. Exhibit 1. Bidu lost consciousness. The area Chief was called on phone to assist but he did not go there until the next day. The deceased was taken to hospital still unconscious. He died later in hospital without regaining consciousness.
4. At this stage of the trial the prosecution required to establish a prima facie case against the accused person to warrant the court placing the accused on his defence.
5. Ms.Nelima who acted for the accused in this case raised two issues. The first is the issue of the identity of the person who was with PW3 and HALAKE, and who is said to have died. The second issue was that of identification of the person who hit Bidu.
6. Regarding the issue whether the person named as the deceased in the information was in the company of PW3 and Halake. Ms.Nelima urged the court to note that PW3 did not mention the name of the deceased as among those who were at the house on the material night.
7. Mr. Mungai, Senior Prosecution Counsel, in his submission did not address the issue of the identity of the person who is named as the deceased in the information in this case.
8. I have considered this issue. It is true that the name of the deceased in the information is TUTO SHALO. In the Post Mortem Examination Form, the name of the deceased is also given as TUTO SHALO. However in the evidence of PW3, he stated that he was seated in TILLA ABILA’S house with BIDU SHALO and MOLU HALAKE. None of these names fit the name described in the information.

9. At the trial Ms.Nelima cross-examined PW3 on the question of the names of his friends and of the one who is said to have been injured. PW3 was clear in his evidence that the friend he was with and who was injured and subsequently died was called BIDU SHALO.

10. The State did not seek any clarification of the name in Re-examination of PW3 despite that question being put to PW3 in cross examination. I find that the evidence adduced by the prosecution regarding the identity of the person who was assaulted and subsequently died of the assault, does not match the name of the deceased in both the information and the charge sheet.

11. The other issue raised was that of identity. Ms.Nelima urged the court to find that the moonlight and lantern lamp which PW3 stated aided him to see the assailant were not described as to their intensity.Mr. Mungai did not agree with the counsel for the defence. Prosecution urged that proper descriptions of the light were made and that it revealed that the accused was properly identified as the one who hit the deceased.

Mr. Mungai in his submissions urged that the intensity of the two lights and their distance from the accused were described.

12. The issue of identification is very important and must be considered with care and caution especially where it is that of a single witness made at night. There are many cases which deal with evidence of identification or recognition made at night.In **ABDULLAH BIN WENDO vs. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a 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 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.”

13. In **RORIA –V- REP [1967] EA 582** the Court of Appeal for Eastern Africa held:

“While it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence, in the circumstances of this case it was not safe to do so.”

14. The principles applicable when dealing with evidence of visual identification are now well established. In the case of **Charles Maitanyi Vs Republic [1985] 2 KAR 25** at page 77, the Court of Appeal held:

“It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into.”

15. I have carefully considered the evidence of PW3 in order to test the quality of the identification he made at the time of this incident. First of all PW3 described how the three of

them sat inside TILLA'S house. PW3 testified that he was seated at the middle of his friends. BIDU was seated to the left and MOLU to the right.

16. Secondly PW3 stated that at the time the assailant took a log and hit Bidu, he was seated only six meters from the door. What PW3 did not say is whether he sat facing the door, or behind the door or whether he was seeing the door from the side. It is not clear whether PW3 had a clear view of the scene or whether he had to position himself in a manner in order to see what was happening at the door.

17. Thirdly the evidence regarding the intensity of the night was to the effect the lantern lamp was the big size while the moon was said to be out at the time. Regarding the lantern lamp PW3 said it was on a table near the door. Regarding the moon PW3 said there was moonlight outside.

18. The point is the incident took place after dusk. There is no dispute that Bidu was just stepping out through the door when he was hit. The assailant runaway immediately after hitting Bidu. Given the evidence that he was seated inside the house six meters from the entrance door where the incident occurred; and given lack of evidence to show at what stage he saw the assailant, I am not satisfied that PW3 had a clear view of the assailant. It appears to me that PW3 had a fleeting glance at the assailant, from a position which is not clear. In the circumstances I find that the evidence of identification was not free from mistake or error.

19. I have come to the conclusion that the prosecution has not adduced evidence to prove that the deceased named in the information and the post mortem report was the same one PW3 saw being hit. Secondly I am not satisfied that PW3 was in a position to identify see and correctly identify the assailant.

20. Having come to the conclusion I have of this case I give the accused the benefit of doubt and acquit him of the charge at this stage under **Section 306** of the **Criminal Procedure Code**.

DATED AT MERU THIS 24TH DAY OF OCTOBER, 2014.

LESIIT, J.

JUDGE.