



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Case 87 of 2003

REPUBLIC.....PROSECUTOR
VERSUS
FRANCIS ATELECH, JOSEPH CHEMANOT.....ACCUSED

JUDGMENT

FRANCIS ATELECH, JOSEPH CHEMANOT and another who is now deceased, are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the night of 14th and 15th December 2002 at Kibasiso near Eldama Ravine Township in Koibatek District within Rift Valley Province, they jointly murdered Esther Tamining Chemalgotwo (the deceased).

The prosecution case is that on 14th December 2002, the deceased who with many other people drinking busaa at the home of PW3 decided to sleep at that home. At about 3.00 a.m. the following morning Accused 2 and 3 took her from there allegedly to Eldama Ravine Police Station to record a statement on the death of Accused 2's father. Later that morning her body was found on the road with injuries. The Accused persons were arrested and later charged with this offence. Dr. Paul Gachunga, PW5, performed the post-mortem examination on the body of the deceased and gave the cause of death as cardio-pulmonary arrest due to haemorrhage secondary to severe head injury.

The accused persons gave unsworn statements in which both of them raised alibi defences and denied killing the deceased. Accused 1 said that on the material night, he was on night duty at Ravine Roses Farm, in Tonyo Location about 16 Km away from PW3's home. Accused 2 said he was at his home about 17 Km away.

The prosecution case is hinged on the sole identification testimony of the deceased's neighbour, Annah Sakayo, PW3. She testified that on 14th December 2002, as she was selling busaa to her customers who included the deceased, Accused 3 who, as I have already said is now deceased, went there and asked her if the deceased was there. PW3 did not answer but asked him to go away and he complied. The deceased and many other people continued drinking busaa until about 4.00 pm by which time many people had left leaving the deceased behind. The deceased slept in PW3's kitchen.

At about 3.00 am of 15th December 2002, PW3 was awakened by Accused 2 whose voice she said she knew. She woke up and lit a lantern lamp and saw the 1st and 2nd Accused with another person. She said she knew the two Accused well. The first Accused is married to second Accused's sister. The two Accused persons went with the deceased alleging that they were taking her to Eldama Ravine Police Station to record a statement on the death of Accused 2's father. On 16th December she learnt that the deceased's body was found on the road with injuries. This is the main evidence against the Accused persons.

The law is clear on the evidence of identification. In *Ogeto-Vs-Republic*, [2004] 2 KLR 14, the Court of Appeal stated although it is trite law that a fact can be proved by the evidence of a single witness there is need to test with the greatest care the identification evidence of a single witness especially when it is

shown that conditions favouring a correct identification were difficulty. See also Marube & Another Vs Republic [1986] KLR 356. As it is possible for a witness or witnesses to be honest but mistaken on the identity of an accused person, the law requires the evidence of identification to be watertight before founding a conviction -Kiarie Vs Republic [1984] KLR 739.

In Wamunga Vs Republic [1989] KLR 424 at p. 426 the Court of Appeal stated:-

“It is the law that where the only evidence against a defendant is evidence of 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 be the basis of a conviction.”

In this case although Accused 2 spoke with PW3 in the dead of the night when conditions for voice identification are supposed to be most favourable -Njeri Vs Republic [1981] KLR 156 at p. 159-- the exact words uttered to PW3 by Accused 2 when asking for the deceased were not given. The intensity of the light from the lantern lamp was also not stated. In the circumstances, both voice and visual identification of the accused persons by PW3 is in doubt. Although the two Accused persons may very well have killed the deceased, it is not safe to rely on the sole evidence of PW3. Consequently, I have no choice but to acquit both the Accused persons under Section 306 of the Criminal Procedure Code for lack of evidence. They shall be set free forthwith unless otherwise lawfully held.

DATED and delivered this 28th day of January, 2010.

D.K. MARAGA
JUDGE.