

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Criminal Appeal 23 of 2000

MOSES MUNJARU DESTERIO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

I have considered this appeal, the arguments by Counsel for the Appellant and Submissions by Counsel for the Republic.

The Respondent does not oppose the appeal. I have considered the concession by the State that:-

1. There was no eye witness to any attack of the deceased by the accused. There was no direct evidence linking the Appellant to the offence.
2. That PW 4 alleged that the deceased had told him on 5-4-98 that the deceased had beaten her. The deceased died on 11th April, 1998. It is clear that the alleged statement was not a dying declaration as it was not contemporaneous and in anticipation of death. It was unreliable evidence.
3. Deceased told PW 3 that she was feeling pain in the back. She did not talk of any beating or refer to the deceased.
4. The post-mortem showed a fractured skull but no evidence that it was caused by the accused. That the fracture could have been caused by a fall or injury by an object. That such injury could occur even after death, if the body was dropped or fell down.
5. That the relatives of the deceased did not take the body to the Police or mortuary. Instead they took it to her parents house/home.
6. That it is the accused who reported the death when he went to the Police for help in respect of the burial dispute relating to his wife.
7. That the allegation of beating or killing arose from the burial dispute between the Accused and the deceased family. It was alleged that he had not paid dowry for the deceased.

From the foregoing, I do find that the conviction of the Appellant was based on insufficient evidence. The trial Magistrate erred in law and in fact in finding that the prosecution had proved its case beyond any reasonable doubt. It was wrong for the police to rely on the post-mortem report alone to decide to charge the accused with manslaughter. They should have considered all the other evidence.

As a result, I do hereby allow the appeal. I do hereby set aside and quash the conviction and sentence of the Appellant.

I do hereby order that the Appellant be released from custody forthwith unless lawfully held and if he is

out on bond to remain free and at liberty in respect of this case.

The bond shall be cancelled, his sureties released and any securities or cash accordingly released.

DATED AND DELIVERED AT ELDORET ON THIS 29TH DAY OF JANUARY, 2009.

M. K. IBRAHIM

JUDGE

In the presence of:

Mrs. Khayo for the Appellant

Mr. Chirchir for the State