



**REPUBLIC.....APPLICANT**

**- VS -**

**SHERINGHAM ELISHA ODHIAMBO.....RESPONDENT**

### **JUDGMENT**

The accused has been charged for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya

particulars of the offence as stated in the information are as follows:

“On the 15<sup>th</sup> May, 2005 at Mathare North Area, jointly with others not before court murdered GERALD ODHIAMBO.

In his evidence, PW1 David Odhiambo who is a panel beater recalled that in the year 2005 he was staying with his uncle viz, Edwin Odhiambo in Mathare North. On 15<sup>th</sup> May, 2005 he was in the house with his uncle and girlfriend viz, Jessica. While they were resting, seven young men went to the house and took away his uncle. The PW1 identified these young men as Shee, Otieno, Alfred, Tom, Dan “Consi” and Elisha. Unfortunately, the young men never explained why they were taking away the uncle to PW1. Earlier, when they came the PW1 deceased and Jessica were using a lantern lamp that had sufficient light. Subsequently, at around mid-night the young men took back Edwin Odhiambo to his house. The PW1 observed that he had been assaulted seriously and was complaining of feeling bad due to the beatings. Seeing that he could not undress, PW1 helped him to do so. The PW1 found that the uncle’s body was swollen and later asked him to lie on the bed while he was complaining of chest pains. Though the PW1 stayed with his uncle throughout the night he passed away by 7.00 a.m. on the following morning. In response, PW1 went and called his brother viz, Elisha who in turn rang Huruma Police which declined to collect the body of the deceased since they did not have a vehicle. Consequently, Muthaiga Police Station organized for the collection of the body of the deceased. According to the PW1, the young men assaulted the deceased on the basis that he was an idler – and was not working. The PW1 clarified that the deceased was working and that the accused is also known as “**Shee**”. Earlier, PW1 testified that when the deceased was brought back he was being carried and that Jessica had already left. On the other hand, PW2 – PC John Muiruri testified that on 16<sup>th</sup> May, 2005 while he was on duty at Muthaiga Police Station, a man reported that his brother had been killed on the previous evening. While in the company of PC Busuru, the reportee led them to a house in Mathare Area II. Inside the same, they found a body of a young man lying on a mattress on the floor. The PW2 observed that the body was naked and there were no signs of any struggle in the house. He also never saw any visible injuries. From there, they took the body to the City Mortuary. On 7<sup>th</sup> June, 2005, PW2 was informed by the controller that there was a suspect who was being held at the office. On going there with CPL Sembuji they found the accused whom they re-arrested and booked for the offence of murder. In her medical evidence, PW3 Dr. Jane Wasike Simiyu testified that on 6<sup>th</sup> June, 2005 she performed a post-mortem on Gerald Odhiambo. She found that the deceased was about 20 years old and was in fair nutritional status. On external examination, PW3 found that he had multiple bruises of the upper, and lower limbs and the back. She also found that he had subcutaneous haemorrhage of both upper limbs, later aspect at the back, both lower limbs lateral aspects. She also found bruises on the scalp. Besides the above, PW3 found that

the internal appearance was normal. The PW3 formed the opinion that the cause of death was due to multiple extensive bruising following blunt trauma.

In his defence, Sherigham Elisha Odhiambo Owiti (hereinafter referred as the accused) testified that he is a community health worker at Mathare North Health Centre. He recalled that on 15<sup>th</sup> May, 2005 they had organised joint activities at Kariobangi grounds. After mobilizing themselves from Mathare, they proceeded to the venue where the event was being held to bring the community based organisations and the community together through sports. According to the accused, the event ended at 5.00 p.m. and thereafter, everybody departed for their various homes. The accused reckoned that he later went to the house of the Centre Coordinator where they typed the minutes of the events in a computer upto 10.00 p.m. From there, the accused went to his house where the wife told him that a man had been beaten by members of the public after being found with a stolen mobile phone. On 7<sup>th</sup> June, 2005, the accused went to Mathare North Health Centre where he was grabbed by two men. One of them shouted .....”officer .....officer .....” before another man came running. When two City Council workers went to the rescue of the accused, the officers stated that the accused was required by the Chief of the area. On arrival at the Chief’s office, they met the Assistant Chief who confessed that the matter was beyond his comprehension. Later at around noon police officers from Muthaiga Police Station went and re-arrested the accused. On the way to the police station, one of the people who arrested the accused complained that the latter had killed their brother. The accused lamented that he was placed in police custody for about three months before being brought to court and charged for the present offence.

After the summing-up was delivered on 12<sup>th</sup> April, 2007, all the three assessors returned a verdict of “**Not Guilty**” against the accused for the offence of murder.

This court has carefully considered the evidence on record. It is apparent that the incident took place between 9.00 p.m. and mid-night of 15<sup>th</sup> May, 2005. When the accused and others not before the court went and collected the deceased from his house, there was a lantern lamp that was on. Besides the above, the accused later went back to the same house to return the deceased. By then, the accused was accompanied by one Otieno. In addition to the above, it is apparent that prior to the incident, the PW1 had known the accused for about eight months before the offence was committed. That means that the PW1 was able to recognize the accused even before the offence was committed. Lastly, it was also apparent that the PW1 never had any grudge against the accused which would have motivated him to give false evidence against him in such a serious offence. In the case of

Abdallah Bin Wendo and Sheh Bin Mwambere - vs - Reginam

Criminal Appeals No.44 and 45 of 1952.

The Court of Appeal for Eastern African held as follows:

**“Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting identification, especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence, circumstantial or direct, pointing to guilt is necessary”**

In this case, the PW1 had the advantage and opportunity to see the accused twice on that material night. Earlier, he saw him when the accused and his friends collected the deceased. Later he saw him when they returned him after being assaulted. This court finds as a fact that the accused was positively identified by the PW1 as among the assailants who picked the deceased before assaulting him. The circumstances were favourable to a positive identification.

As far as the intentions of the assailants are concerned, the injuries that they inflicted on the deceased is self-explanatory. The post-mortem form - Ex. 1 clearly show that the deceased sustained the following injuries:

Ø Multiple extensive bruising of upper limbs, lower limbs – back - subcutaneous.

Ø Haemorrhage both upper limbs lateral aspect, back – both lower limbs lateral aspects.

Ø Bruises scalp

Dr. Wasike concluded that the cause of death was multiple extensive bruising following blunt trauma.

Having participated in unlawfully removing the deceased from his house, the accused must have participated in assaulting the deceased. That is why he was also seen returning the deceased back to his house. This court has carefully considered the defence case and finds that the same does not ring true and has no merits. Having had the advantage of seeing the manner and demeanor of the accused carefully, I do find that he was indeed economical on the truth.

Due to the above analysis, I hereby wish to differ with the findings of the assessors. The upshot is that the prosecution have proved their case beyond any reasonable doubt. The accused is found “guilty” of the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The accused is convicted accordingly.

**MUGA APONDI,**

**JUDGE.**

Judgment read signed and delivered in open court in the presence of the accused, M/S Odemo Defence Counsel and Mr. Ondari, Principal State Counsel.

Order: Assessors to be paid allowances.

**MUGA APONDI,**

**JUDGE.**

**15<sup>TH</sup> MAY, 2007.**