



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL CASE NO. 1 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PETER CHESIRO OMARI.....ACCUSED

JUDGMENT

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence was that **on the 28th day of September 2013 at Kinyoro area within Trans Nzoia County murdered Herbert Magari Chonge**.

2. The accused denied the plea and the prosecution called several witnesses to prove its case. Their evidence can be summarised as follows.

PW1 Petronila Chemaiyo testified that on 28/9/2013 at 7.,30 pm she was at home when she heard her brother the deceased coming home. He was drunk and talking. He said

“ Chesiro Bwana, Kwanini unaniwa na nimekata mambo yako.”

She could hear his voice. She then heard a thud. Her sister Pauline was outside fetching water. They rushed to the scene and found the accused standing against the post and the deceased lying down. The accused threw the post he was holding and took off. They checked on the deceased and blood was oozing from the face. They screamed and people came . The police were called by the Assistant Chief who came and carried the body.

3. **PW2 Christopher Mwenge Titim** testified that he was on his way home on 28/9/13 at 7.30 pm when he saw the accused, the deceased and a 3rd person quarrelling. The deceased was telling the accused that he had stolen a phone and he did not know how to use . As he left and went away he heard the deceased saying;

“ nini mbaya bwana.”

Then he heard something being hit. He stood and after a while he heard girls screaming. He went back and found the deceased lying down. The accused ran away and left one of his shoe behind. Assistant chief came and called the police who came to the scene and collected the body.

4. **PW3 Pauline Chepkemoi Kibori** testified that she was home when she heard the deceased say;

“ Mama, jambazi ako area”

5. On inquiring who Jambazi was he said it was the accused. The deceased said that the accused had a big phone which he did not know how to operate. She also heard the deceased coming home while drunk and talking. Just like PW1 she heard him being hit twice and he went quite. They went and checked and found him lying down. The accused dropped the post he was holding and escaped. They screamed and PW2 arrived. The deceased had been hit on the mouth and lost some teeth. Later the police came and took the body.

6. **PW4 Dr. Godfrey Obara** produced the post mortem report on behalf of Dr Chesori who formed an opinion that the cause of death was cardiopulmonary failure secondary to asphyxia due to upper airway obstruction which was due to comminuted fracture of maxilla and mandible due to trauma.

7. When placed on his defence the accused gave sworn evidence denying the charge. He said that he was a tea plucker by profession. That he went to Kapsokwony and ploughed land with his brother. Later the chief came and required that he goes to his office. He was thereafter

brought to Kitale police station and later charged. He said the deceased was his cousin and had not differed at all. He had stayed with him for over 10 years. He wanted him to be employed as a tea plucker. The deceased according to him had poor relationship with his family who had even cut his ear.

Analysis and Determination

8. Having summarised the proceedings and having perused the submissions by the respective counsels herein, the main question to determine is whether it was the accused who assaulted the deceased that fateful night.

9. The question of whether the accused knew each other with the deceased is not in doubt. Infact in his unsworn evidence the accused stated that the deceased was his cousin and was helping him to secure a job as a tea plucker.

10. The incident occurred at around 7.30 pm as admitted by the prosecution witnesses. Save for PW2 who saw the deceased with the accused and another 3rd person, whom he did not identify, the rest came after the fact. All the key prosecution witnesses heard the deceased talking with the accused. Its admitted by PW1 & 2 that the deceased was drunk.

11. Since the incident took place at night, the question of identification must first be summounded. That position held sway in the now famous case of **R. Vs Turbull & others (1976) 3 ALL ER 549** where Lord Widgrey C. J stated as follows:

“ First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before ? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was the any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and the actual appearance?”

12. In respect to the case at hand PW1, the sister to the deceased heard him talking to the accused. She said that his sound was very clear. She further went on to state;

“ ----- our mother was in the house. We got the torch and went downward with Pauline. We went to our gate. We went left and saw no one. On the right side we saw Chesiro standing against the post and the deceased was lying down. Chesiro threw the post he was holding and dashed into maize plantation. I directed the torch light on him. I knew Chesiro very well before. He was a close friend to my brother. He was for 3 to 4 years. He was guarding the land of a neighbour since 2008. I had a 2 batteries torch.”

13. PW2 on his way home saw the accused with the deceased quarrelling. As he went he heard the deceased saying;

“ nini mbaya bwana”.

After this he heard the girls scream and saw the accused run away.

14. PW3 equally testified that she saw the accused run away when the torch was directed at him.

15. From the evidence of the above witnesses, this court is satisfied that the accused was together with the deceased. PW2 saw them on the way. PW1 and PW3 saw him take off immediately after the incident. The light from the torch PW1 was holding was enough to have enabled her to see accused.

16. Although the murder weapon was not produced there is sufficient evidence that the deceased died as a result of injuries afflicted upon him via a blunt object. The post mortem report attest to this.

17. Although it was relatively dark, the history of the accused and the key witnesses showed that they knew each other very well. Actually according to the accused they were cousins. Having stated so, it was not very difficult for them to have known each other including through their voices.

18. I thus find that the prosecution has proved its case against the accused beyond any shadow of doubt. One may conclude that the dispute between the accused and the deceased could be over the phone which the accused had.

19. Be it as it may I find that the deceased died as a result of the injuries occasioned upon him by the accused. He is thus convicted under the provision of Section 203 of the Penal Code.

Delivered, signed and dated at Kitale this 11th day of February, 2019.

H.K. CHEMITEI

JUDGE

11/2/19

In the presence of:-

Mr Omoria for the State

Mr Wanyama for Nyamu for Accused

Accused – present

Court Assistant - Kirong