



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 84 OF 2013 (MURDER)

REPUBLIC.....PROSECUTION

VERSUS

JAMES ASEKO CHIBA.....ACCUSED

JUDGMENT

1. **James Aseko Chiba**(the Accused) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are, on the 28th day of June 2013 at Emesa Sub-location in Kenyenyra District within Kisii County in the Republic of Kenya he murdered Shem Mwebi Ogonjo.

2. The accused denied the charge and the case was heard. The prosecution called 3 witnesses. Pw1 Jane Kwamboka testified that on the 22/2/2013 at about 9pm she was in her house sleeping. She heard her husband screaming near the road. She got out and went to where her husband was screaming. She found the accused beating her husband with a walking stick. She knew the accused before, he is like an uncle to her. Her husband started feeling bad on the head, they took him to hospital at Nyangena the following day. He got worse and died a month after the attack. She testified that before the deceased died he informed her that they were walking home with the accused and Oseko the accused took money from his pocket and started beating him on the head with a stick.

3. Pw2 Ibrahim Ogonjo testified that on the 23/2/2013 at 11am he was informed by the wife of Shem that Shem had been attacked that he was injured and that they had taken him for treatment. Shem died on the 26/6/2016 after being treated for a while before he died. He reported the matter to the police and was given a P3 form. He later identified the body for post mortem.

4. Pw3 Doctor Samuel Onchere testified that he has worked with doctor Asava who did the post mortem but has left the service. The post mortem was done on the 8/7/2013. The body was refrigerated and there was rigormortis in the lower limbs. The deceased died due to head injury sustained on the 28/2/2013. The body had features of having been treated before. It had healed bruises on the face and right hand. He had ulcers on the sacral. On opening the skull there was moderate increased intracranial pressure, healing bruises on the right eye temporal and front region, the scars were healing. The cause of death was increased intracranial pressure secondary to closed head injury.

5. The accused person gave a sworn statement in his defence. He stated that on the 28/6 2013 he was at Transmara a place called Ngarau. He was farming maize and vegetables at the said place. He did not murder Shem Mwambi on the 28/6/2013 as he was at Ngarau. He did not meet with the deceased. The case should be dismissed. During cross examination he testified that the relationship with the deceased's

father is good, the deceased was the son of his brother. He stays well with Jane Kwamboka. He is now sick he does not farm. That in February 2013 he was at Ngarau, he had no dispute with Shem.

6. At the close of the prosecution case the defence submitted that the Pw1 did not inform the court whether there was any source of light that assisted her to identify the alleged assailant of the deceased Shem. That evidence adduced was that the deceased was assaulted on the 23/2/2013 and the deceased died on the 28/6/2013. That there was no evidence adduced to connect the accused person that he murdered the deceased on 28th June 2013 as indicated in the information filed in court by the prosecution. That the prosecution should have produced the medical treatment notes of the deceased from Magena health centre, Nyamache District Hospital and Kisii Level 5 hospital to shed light to the court what ailment the deceased was being treated for and the kind of drugs which were being administered to him and the kind of operation that was done on the deceased. Mr. Omwega argued the court to acquit the accused person. Mr. Otieno for the state relied on the evidence on record.

7. In this case what the prosecution is required to prove beyond reasonable doubt is the death of the deceased, the cause of the death and that the accused caused that death by an unlawful act and that he had malice aforethought.

8. Having considered the evidence on record the prosecution have adduced evidence that the deceased died on the 28/6/2015. The cause of death was increased intracranial pressure secondary to closed head injury.

9. The next issue is whether it is the accused who caused the death of the deceased. The evidence that links the accused to the alleged murder is that of Pw1 the deceased wife. Her evidence was that she heard her husband scream at 9pm she went out and saw the accused beating her husband. That her husband told him before he died that it is Oseko who beat him as they walked home. During cross examination she testified that it was dark and that there was no light on the road or at the scene. How was she able to identify the accused if it was dark? Was it that she was able to identify the accused or that it is her husband who told her that the accused beat him? In *Roria vs Republic EA (1967) 583* the Court of Appeal held as follows;

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C said recently in the House of Lords in the course of a debate on s 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.”

*That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification. In the case of **Abdalla Bin Wendoh & Another v R** (1) this court reversed the finding of the trial judge on a question of identification and said this (20 E.A.C.A. at p 168):*

“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 the 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”[Emphasis mine]

10. PW1’s evidence does not convince me that she saw the person who assaulted her husband on the

night of 22/2/2015. It is either that she saw the incident happen and saw the accused beat her husband or she was informed by the deceased. She admitted it was dark when she went out. It is not clear how she identified the accused. She was a crucial witness but her evidence does not conclusively point to the accused as the assailant of her husband. In addition the deceased is said to have been assaulted on the 22/2/2015 and he died on the 28/6/2015. I agree with the defence submission that there was need to produce the medical records from the various hospitals the deceased was treated to show the link or connection between the alleged assault and the final cause of death. All in all I find that the prosecution have failed to prove their case beyond reasonable doubt and the accused is acquitted and is free to go unless lawfully held.

Dated signed and delivered at Kisii this 12th day of March 2019

R.E.OUGO

JUDGE

In the presence of;

Accused Present

Mr.Omwega For the Accused

Mr.Orinda For Respondent

Rael Court clerk