



REPUBLIC OF KENYA

IN THE COURT OF APPEAL  
AT NAKURU

(CORAM: GICHERU, SHAH, J.J.A. & BOSIRE AG. J.A.)  
CRIMINAL APPEAL NO. 67 OF 1995

BETWEEN

1. JEREMIAH RUTTO ASIWATUM

2. ISAAC KIPKEMBOI RUTTO.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

Appeal from a Judgment of the High Court of Kenya at  
Eldoret (Mr. Justice R. Nambuye) dated 2nd November,  
1994  
in  
H.C.CR.C. NO. 23 OF 1992)

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JUDGMENT OF THE COURT

Rengesiwa Tuwotum (hereinafter referred to as "the deceased") left his home in Chesigol Village in West Pokot District of Kenya on 27th October, 1991 (a Sunday) to go to the market to sell beans. He did not return until 29th October, 1991 and when he returned he allegedly informed his wife Christina Arengony that he had been imprisoned at Chesigol Administration Police Camp on account of some problem he had with a lady (PW 2) who had raised an alarm saying that she was pregnant. The deceased was released to go and get some food for himself as there was none at the camp. On 30th October, 1991 the deceased left his home to return to the camp with some maize and cash. He was not thereafter seen alive by Christina.

For the purposes of this appeal it is not necessary to go into the arrest of the deceased, save that after his problem with the lady, Cheponyorio Lorekow (PW 2) an attempt was made to reconcile PW2 and the deceased. The deceased "admitted his mistake" in the presence of elders at the said camp.

What happened on 30th October, 1991 is material. The deceased's sister Eunice Towotum (PW3) found the deceased sitting with 3 persons up on some hill. These three persons, according to PW3 were (1) the first appellant Jeremiah Rutto Asiwatum (the third accused in the superior court) (2) Isaac Kipkemboi Ruto, the second appellant (the first accused in the superior Court) and (3) one Chebon. PW3 was the deceased's sister and she averred that she knew both the appellants who were with the deceased. The deceased saw PW3 he gave the maize and the cash he had carried with him telling her to bring him some food the next day as he expected to be in custody. He was, he said, under arrest.

After giving her the maize and cash, the deceased, however, according to PW3, attempted to run away and was chased by the appellants and Chebon. The first appellant had shoes on whereas the second appellant and Chebon had slippers. So that, according to PW3, the first appellant could run faster. After the first appellant had managed to catch up with the deceased all three (according to PW3) started beating up the deceased. All three had sticks with which they were beating up the deceased. After being allegedly beaten up the deceased was tied to a tree and beaten up again. Whilst the deceased was down after the second beating up a fourth person nick-named as "macho inne" (a police officer) also beat up the deceased.

At around 4.00p.m. on the same day whilst the deceased lay beaten up one Rafael Kiyopojap (a chief) asked the four alleged assailants to release him but they did not.

Come nightfall, PW3 went with the chief, leaving the deceased still tied up only to be taken back to camp to be told that the deceased had died.

PW3, upon being cross-examined, reiterated her version of events. She withstood the cross-examination well. It must be remembered that she knew the first appellant (third accused) for a long time. She witnessed the whole incident of the deceased being beaten up.

The learned judge dealt with the aspect of the evidence of PW3 as a single witness quite thoroughly and in our view properly. In this Court as well as in the superior court the first appellant attempted to discredit the evidence of PW3. The learned judge considered the aspect of corroboration of a single identifying witness by reference to at least six circumstances which convinced her that PW3 was a truthful and a reliable witness and it will not be out of place if we were to set out these circumstances and we do so as follows:-

- (1)The first appellant confirmed in the superior court that two administration policemen ran after the deceased when he attempted to escape and he came upon the deceased already arrested, that is to say, the first appellant was clearly involved.
- (2)First appellant confirmed in his evidence and statement that he was one of the persons escorting the deceased to the camp.
- (3)The first appellant and others confirmed that the deceased was tied up to a tree in their presence.
- (4)The chief (PW7) confirmed that PW3 was watching the events of the day from a distance.
- (5)The evidence of PW3 to the effect that the deceased kept quiet when asked by the chief as to what the deceased had done was corroborated by PW7.
- (6)PW8 (a sister of the deceased, Chebet Tuna Tum) confirmed that she found the first appellant in the camp who told her that he (the first appellant) beat the deceased to wake him up so that he (the deceased) could talk to her (PW8).

We have gone into these aspects of evidence of PW3 at some length for the simple reason that it is the duty of the Court of Appeal to test the evidence on record in the trial against and for the appellant and make its own assessment of facts and more so as the first appellants main grounds of appeal drafted by him are as follows:

"2.That I was not at the scene of crime during the arrest of the deceased - only I went there after hearing people raising alarms.

3.That, the PW3 said he saw me committing the offence while PW6, said he saw me helping the deceased to stand up; this evidence was not only contradictory to each

other (sic) but it also showed that the witness gave false evidence to the Court.

4. That, the learned trial judge did not put into (sic) consideration that I was not one of the administration police officers. I only went there to investigate.

All the evidence before the trial court points out to three persons (the first appellant being one of them) assaulting the deceased to the extent that he died. The assailants intended to cause at least some harm to the defenceless deceased, who had become defenceless after the stone, he may have intended to use to hit the assailants either in defence or as a means of attack, was taken away from him.

The first appellant in our view ought to consider himself fortunate that the learned trial judge reduced the offence to that of manslaughter. It is also the first appellant's good fortune that he was sentenced to only a three and a half year imprisonment term.

We see no merit whatsoever in this appeal and it is dismissed.

Dated and delivered at Nairobi this 17th day of October, 1997

. J. E. GICHERU

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR