



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: BOSIRE, GITHINJI & ONYANGO OTIENO JJ.A)

CRIMINAL APPEAL NO. 39 OF 2010

BETWEEN

HENRY KIRUI CHIRCHIR..... APPELLANT

AND

REPUBLIC..... RESPONDENT

**(Appeal from the conviction and sentence of the High Court of Kenya at Kericho (Ang'awa J.)
dated 15th day of March 2010**

in

H.C.C.C. NO. 19 OF 2008

JUDGMENT OF THE COURT

By an information dated 8th May 2008, Henry Kirui Chirchir, the appellant, was arraigned before the High Court sitting at Kericho charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, the particulars thereof being:

“On the 20th day of April 2008 at Chebitet Village Kaplelartet sub-location in Kericho District within Rift Valley Province murdered CHARLES KIPKOECH KIRUI.”

A post mortem report produced at the trial shows that externally the deceased who was the son of the appellant did not have any visible serious injuries. All the doctor noted were two small scratch marks, one at the left loin and another on the right upper thigh. In the head, however, the doctor noted:

“scalp haematangi on the right parietal pantenci part and right temporal bones. Large comminuted fractures (1) on the right parietal bone autencilly and another on the right temporal bone. Subdural haematoma as well bleeding into the brain substance beneath the fractures on the right cerebrum.”

The cause of death is noted as:

“Head injury due to physical injury from a blunt object.”

Three witnesses were called to testify as to how the deceased may have sustained the injuries which the doctor noted in the post mortem report. Joel Kipngetch Mutai (PW1), the Assistant Chief of the area testified that the assault of the deceased herein was reported to him while he was in his office away from

the scene. The report he received was to the effect that David Chirchir had quarreled with his son. He did not witness the assault.

J.C, (PW2), was as at the date of the alleged murder a minor. The record of appeal shows that she was not sworn before she testified. She stated in evidence that she was aged 18 years, on 28th July 2009, when she testified implying that on 20th April 2008, when the alleged murder was committed, she was under 17 years of age. As material, her evidence went like this:

“Concerning this case I would say he killed. That my father killed. My father is called Henry Chirchir. He is in the dock (points). He killed Charles Kirui. Charles Kirui is my brother. When this matter occurred we were chased away. I went to Richard another father of mine. I came to see Charles. He came to Richard, when he came he was quit (sic) he had wound in his hand. He had blood on his head. After seeing Charles I told Richard. I did nothing. Charles slept there that day – yes. The following day Charles was taken for treatment at Nyabondo. I never went to hospital.”

The witness was cross-examined notwithstanding that she had not been sworn or affirmed. The other witnesses were either affirmed or sworn before they testified. Under cross-examination the witness stated that she did not know where the soil or blood on the deceased’s hands came from meaning that she did not witness any assault on the deceased.

The third witness who testified was Kipchirchir Arap Kosgy (PW3). His evidence was of a hearsay nature. He was categorical that **“we were not there when the fight broke out.”** It was allegedly the appellant who told him that he had beaten the deceased and ...” **left him lying down.”**

The other witnesses were formal witnesses.

In her judgment, however, the trial judge (Ang’awa J.), as material, made the following finding:

“It has been confirmed in evidence that the accused is the one who inflicted these injuries on 20th April 2008. It is also noted from the evidence that death did not occur immediately. This occurred at the Aga Khan Hospital in Kisumu. The date and time of death was 24th April 2008 at 5.00 a.m.”

And later after the learned Judge asked a rhetorical question as to whether the appellant inflicted the injuries which led to the deceased’s death, she answered that question thus:

“The answer is yes. He went to PW3 and informed him that he had beaten his child, Charles. P.W.1 deceased sister saw her brother the head having blood to the right side of his head. The injuries were indeed inflicted by the accused on the deceased. This is not denied. He blames the Hospital.”

The appellant in his defence did not at all admit he assaulted the deceased. In his statement the appellant denied he ever met with the deceased before injuries were noted on his body. He stated that he is the one who assisted the deceased to Nyabondo hospital in Kisumu. That notwithstanding the learned Judge found the appellant guilty as charged, convicted and sentenced him to death for murder and hence this appeal.

Mr. Kivihya for the state conceded the appellant’s appeal, quite properly so, in our view, on the ground that the evidence on record is unclear and unsatisfactory as to how the deceased met his death. In his view there is variance between the judgment of the trial court and the evidence tendered before it. Mrs. Toigat for the appellant agreed and prayed that the appellant’s conviction be quashed and the sentence of death which was imposed on him be set aside.

We have considered the matter as a whole. The appellant was convicted of murder contrary to **section 203** as read with **section 204** of the Penal Code, on the basis of the evidence we summarised earlier. That evidence does not in any way support the charge of murder as the learned trial Judge held in

her judgment. None of the witnesses testified that she/he witnessed the incident in which the appellant is alleged to have assaulted the deceased. Clearly, therefore, there is no basis upon which we can sustain the appellant's conviction. That being our view of the matter, and there being no proper basis for ordering a retrial of the matter we quash the appellant's conviction for the aforesaid charge, and set aside the sentence of death which was imposed on him. We order that he be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at N

akuru this 9th day of June. 2011

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR