IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 272 OF 2008

FREDRICK OKARAU CHESEBE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Bungoma, (M. Mbogholi, J) dated 16th December, 2008

in

H.C.CR.C. NO. 10 OF 2006)

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JUDGMENT OF THE COURT

This appeal has a rather long and unhappy history. The appellant *FREDRICK OKARAU CHESEBE* was arraigned before the High Court at Bungoma on an information which charged him with murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars contained in the information were that on the 8th day of November, 2005 at Cheptais Market, Cheptais location in Mt. Elgon District within Western Province the appellant murdered *ALICE CHEPKWEMOI*. The appellant initially appeared before the Senior Principal Magistrate *(K. Ngomo Esq.)* on 31st January, 2006 but the matter was adjourned to 22nd February, 2006 when the appellant appeared before *Ombija*, J. The charge was read and explained to the appellant who on being asked to plead denied the charge.

The trial commenced before *Lady Justice W. Karanja* sitting with three assessors (as the law then provided) on 24th January, 2007 when six prosecution witnesses testified. The trial was adjourned to the 23rd April, 2008 when the prosecution called two more witnesses and closed its case. It was then ordered that submissions by the counsel appearing would be on 22nd May, 2008 but come that date the learned Judge made the following order:-

"It is 1.00p.m. I have another matter for this afternoon. Due to constraints of time I will not be in a position to take submissions herein. Let the matter be placed before Justice Mbogholi on 26/6/08."

On the 26th June, 2008 the matter was, indeed, placed before *Mbogholi Msagha, J* who ordered that submissions would be taken on 22nd July, 2008. But on that day (22nd July, 2008) the State Counsel was absent and the trial was adjourned to 23rd July, 2008 when the State Counsel *(Mr. Ondari)* appeared but

informed the court that he did not have the file! So the trial was adjourned to the following day when the following was recorded as having taken place:-

"*Court: This case is part-heard by Lay (sic) Justice W. Karanja who has been transferred. Section 2001 (2)(sic) and 200(3) of the Criminal Procedure Code apply. Accused has been informed of his right under section 200(3) of the Criminal Procedure Code.*

Accused: I do not wish to recall any witness.

Court: Proceedings shall continue from where my predecessor stopped.

As ordered above the trial indeed proceeded before *Mr. Justice Mbogholi-Msagha* when *Mr. Kraido* the learned counsel for the appellant made a submission of no case to answer while *Mr. Onderi* countered that submission by maintaining that the prosecution had made a prima facie case to warrant the appellant being put to his defence. The learned Judge considered the rival submissions and delivered a short ruling in which he said:-

"*I have gone through the evidence on record and submissions by both learned counsel. I am convinced at this stage that the accused has a case to answer and shall be put on his defence."*

The court then ordered that the appellant would defend himself on 18th September, 2008 but on that day the trial was adjourned again to 24th September, 2008 when the appellant eventually took the witness stand as he defended himself by giving evidence on oath. He called his wife *Marrion Muthoni Okarau* as a witness.

In a judgment delivered on 16th December, 2008 *Msagha, J* convicted the appellant and sentenced him to death. It is from that judgment that the appellant comes to this Court by way of first and final appeal. That being so the appellant is entitled to expect the evidence tendered in the superior court to be submitted to a fresh and exhaustive examination and to have this Court's own decision on the evidence but as we do so we must always remember that we have neither seen nor heard the witnesses and give allowance for that - See *OKENO V. R. [1972] E.A. 32* and *MWANGI V. R. [2004] 2 KLR 28.*

Having so stated we must now proceed with the examination and re-evaluation of the evidence tendered before the superior court.

Evans Morara (PW1) who described himself as a security officer testified that on 8th November, 2005 he was in a bar at Cheptais market where he was having drinks with *Mr. Daniel Chemekwet* and others. In that same bar there was the appellant who was sitting with his wife Alice (the deceased) behind the bar. The appellant came where Evans and his friends were and greeted them. The appellant then went back to where he had been sitting with his wife, leaving Evans sitting with his in-law *Mr. Somwetwa*. These two (*Evans and Somwetwa)* decided to go and eat after which Evans went back to the bar and this time he found the appellant arguing with his wife. The quarrel culminated into a fight and Evans saw the appellant slap his wife. The barmaids managed to separate the combatants and Evans joined other bar patrons in talking to the appellant and as a result the fight ended. Evans then left the bar leaving the rest continuing with their drinks.

Isaac Cheboss Okarau (PW2) aged 22 years was a son to the appellant and the deceased. He *(PW2)* testified that the appellant left home on 7th November, 2005 and did not come back but the following day (8th November, 2005) a '*boda boda'* person came home bringing some meat for supper and said that he had been sent to take the deceased to where the appellant was. The deceased obliged and went with the '*boda boda'* person. Later the appellant and the deceased came back home at about midnight. The following day the deceased did not come out of the bedroom until after five days. When she came out of the bedroom her face was swollen and when Isaac asked her what had happened she told him to ask his father (the appellant). When Isaac asked his father what had happened to his mother the appellant told him to leave his (appellant's) wife alone. The deceased went to Cheptai's Health Centre and then went to

her mother's home. The appellant requested that she be brought back for further treatment. When the deceased came back from her mother's home she had not improved and the appellant took her to Bungoma for further treatment. She was later discharged but there was no improvement in her state of health.

Supt. David Chengek Kirui (PW3) introduced himself as the Deputy OCPD Lengera Division and that the deceased was his sister and that he received information that the deceased had been admitted at Elgon View Hospital. On receiving this information *Supt. Kirui* travelled from his work station to Bungoma hospital where he found the deceased. The deceased could not talk although *Supt. Kirui* could not see any visible injuries on her body. When *Supt. Kirui* tried to inquire from the doctors they could not give him any information. It was *Supt. Kirui's* evidence that after his inquiries he came to the conclusion that the deceased had been assaulted by the appellant. He *(Supt. Kirui)* went back to Narok but on 27th December, 2005 he was informed that the deceased had passed away.

Pc. Augustus Wepukhulu (PW4) testified that on 30th December, 2005 he received a report that the deceased had died as a result of having been assaulted by the husband. This report was made by *Supt. Kirui.* As a result of that report *Pc. Wepukhulu* and other officers arrested the appellant.

Esther Chemonga Kirui (PW5) aged 70 years was the mother of the deceased. The old lady testified that she received a report that her daughter (the deceased) had been beaten by her husband. As a result of that report she (PW5) went to see her daughter who started crying on seeing her mother. The deceased's head was swollen. It was the evidence of the old lady that her daughter told her that her husband had knocked her head against the wall in a bar. The deceased further informed her mother that she (deceased) was dying because of her husband's retirement money. This old lady ended her evidence by stating that her daughter did not tell her why she was beaten.

Mr. David Kangoto (PW6) was a police officer attached to Chesikaki Police Station. On 25th December, 2005, he received a report from *Supt. Kirui (PW3)* that the deceased had been murdered by her husband. As a result of this report *Kangoto (PW6)* visited the appellant's home where he found the deceased's body lying on a bed. PW6 did not see any physical injuries on the body. The body of the deceased was then taken to Bungoma District Hospital for postmortem examination.

Dr. Mulianga Ekesa (PW8) examined the appellant for his mental status and in the doctor's view the appellant was stable and of sound mind. The same *Dr. Ekesa (PW8)* produced the postmortem report which had been prepared by *Dr. Aluanga* who had carried out the postmortem examination on the body of the deceased. According to the postmortem examination report the cause of death was stated as follows:-

"*Cause of death was cardio respiratory failure secondary to massive left subdural haematoma which was secondary to trauma."*

Another important aspect of the postmortem examination was that according to *Dr. Aluanga* the deceased was in her mid 20s. On being cross-examined at the trial *Dr. Ekesa (PW8)* stated inter alia:-

"*She was in her mid 20's. It could be between 24 years and 26 years. It would be easy for a doctor conducting the postmortem to distinguish between a body of 29 years old and one aged 49 years old. There is no possibility of confusing the body of a 29 years old and 49 years old. The doctor identifies the body that has been identified to him.*

In this case the body was identified by David Kirui and Doris Omuse. It is possible for people to misidentify a body of a relative. Doctors have even been called upon to exhume bodies in order to identify the proper body."

Doris Kipkerich Musa (PW7) was the sister of the deceased. She testified that on 18th November, 2005 she visited her (the deceased) at her home where she met the appellant. The deceased was lying in bed but when Doris called her she (deceased) came to the sitting room. It was the evidence of Doris that

the deceased told her that she had been beaten by her husband. Doris went to her home where she reported to her mother and then went back to Nairobi. On 27th December, 2005 Doris received information that the deceased had died.

When put to his defence the appellant elected to give a sworn statement. In that statement he told the superior court that the deceased was his wife whom he married in 1977 and that they had lived well and during that period of living together, they had seven children but two had died. It was his evidence that he did not know what killed his wife. He stated he was in Gilgil and on returning home on 7th October, 2005 found his wife ailing. He returned to Gilgil on 13th November, 205 and he produced the bus tickets to support his evidence as regards trips between Gilgil and Bungoma. It was the appellant's evidence that on returning home he found his wife sick. She was under treatment from Cheptais Health Centre but the appellant decided to take her to Elgon View Hospital in Bungoma which was a private hospital. She was admitted and diagnosed as suffering from malaria. She remained in that hospital from 2nd December to 16th December, 2005 when she was discharged. After Christmas she fell sick again and this time the appellant took her to Cheptais Health Centre where she was admitted and put on a drip for two days. On the third day she passed away while undergoing treatment.

As regards the evidence that he had assaulted his wife the appellant testified that all that evidence was false. He went on to testify that his wife was 49 years old when she died and for that reason the appellant said that he does not believe that the body on which the postmortem examination was done belonged to his wife. He emphasized that he was not present during the postmortem examination and that he had not nominated anybody to represent him during the postmortem examination. In concluding his evidence in chief the appellant stated *inter alia*: -

"*The doctor's evidence as to cause of death is not true. There was no reason why I could beat my wife and cause her death. It is not true that I fought with my wife at Cheptais Trading centre."*

On being cross-examined as to the cause of his wife's death the appellant stated: -

"*I am not a doctor. I was satisfied she died of malaria. The cause of death was explained by the doctor here. I did not hear him say it was because of beating. It is hearsay that I was drinking with my wife and that we fought. It is not true.*

The doctor also told lies. I am not a doctor. I believe my wife suffered from malaria, treated of malaria and died of malaria."

The appellant, as already stated elsewhere in this judgment, called his second wife *Marrion Muthoni Okaru (DW2)* as a witness. She confirmed that she was, indeed, the appellant's second wife having been married in 1995 and that the deceased was her co-wife. Marrion went on to testify that she used to live in Gilgil but when the deceased was admitted at Elgon View Hospital in Bungoma she stayed with the deceased in hospital for two days. It was on 27th December, 2005 that she was informed the deceased had died.

The appellant's counsel *Mr. Kraido* made final submissions in the superior court to the effect that the offence of murder had not been proved and that even the lesser charge of manslaughter could not be considered as there was no sufficient evidence. *Mr. Kraido* particularly stressed that there was no proof of cause of death as no postmortem examination was carried on the body of the deceased as the postmortem evidence tendered related to a younger woman aged between 20 and 26 years while the deceased was 49 years old. It was further contended that the appellant's defence of alibi was not displaced as the appellant produced evidence to show that at the material time he was in Gilgil.

On his part the learned State Counsel *Mr. Onderi* submitted that prosecution had proved its case against the appellant.

It would appear that although the trial of the appellant in the superior court commenced with the aid of the

assessors, these assessors appear to have fallen out in the course of the trial. According to the record of the superior court the assessors were present on 24th December, 2007 when PW3, PW4, PW5 and PW6 gave evidence. When the trial proceeded on 28th February, 2008 when PW8 testified there is no indication that there were assessors present. This must be due to the fact that sections 262 and 266 of the Criminal Procedure Code which provided for trial with the aid of assessors had been deleted by virtue of *Statute Law (Miscellaneous Amendments) Act No. 7 of 2007.*

With the greatest respect to the learned Judge, we find that it was a misdirection on his part to discharge the assessors in view of *Section 23(3)* of the Interpretation and General Provisions Act (Cap 2 Laws of Kenya) which provides:-

"*Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -*

(a) ……..

(b) ……..…

(c) ……..

(d) ……..

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing written law had not been made."

Accordingly, the learned Judge should have continued with the assessors up to the completion of the trial, notwithstanding the enactment of the Statute Law (Miscellaneous Amendments) Act, 2007 which abolished the role of assessors in murder trial from 15th October, 2007, - See *BENARD KINOTI M'ARACHI V. R – Criminal Appeal No. 114 of 2008 (unreported).*

Going back to the trial in the superior court we find that the learned Judge *(Mbogholi-Msagha)* considered the evidence and the submissions by counsel and in the end came to the conclusion that the prosecution had proved its case against the appellant. In concluding his judgment which he delivered on 16th December, 2008 the learned Judge said: -

"*The only logical conclusion is that the deceased died as a result of injuries sustained as a result of the beating by her husband. The question that follows is whether or not the accused person had the intention to kill the deceased or if he knew that the injuries would have led to her death. In my judgment the knocking of the head of the deceased against the wall was dangerous enough to have informed the accused that the consequences were likely to be fatal. Mens rea can therefore be imputed from the actions of the accused. In the end, I find that the prosecution have adduced sufficient evidence to prove the charge against the accused person whose defence cannot withstand the weight of the prosecution case. I therefore find him guilty of the offence of murder c/s 203 as read with s.204 of the Penal Code and convicthim accordingly."*

Having so concluded the learned Judge proceeded to sentence the appellant as follows: -

"*The only sentence provided for in law is death. I therefore sentence the accused to death as provided for by law*."

Being aggrieved by the foregoing the appellant now comes to this Court by way of first and final appeal. Through his counsel the appellant filed a Memorandum of Appeal consisting of the following 12 grounds:-

1. The learned trial judge erred in law and fact in convicting the appellant when the cause of death of the deceased was not proved.

2. The learned trial judge erred in law and fact when he failed to hold that the alleged cause of death of the deceased shown in the postmortem report was twenties (sic) and not of the deceased.

3. The learned trial judge erred in law and fact when he failed to hold that the prosecution did not call evidence to explain the glaring mix-up regarding the exact body upon which postmortem examination was done.

4. The learned trial judge erred in law and fact when he failed to appreciate that the prosecution did not explain why the appellant was arrested on 28th December, 2005 and not charged until 30th January, 2006.

5. The learned trial judge erred in law and fact when he failed to appreciate that the period between arrest on 28th December, 2005 and 30th January, 2006 when the appellant was arrainged before court was utilized by the relatives of the deceased and the police to contrive evidence with which to charge the appellant.

6. The learned trial judge erred in law and fact when he failed to appreciate that the alleged assault of the deceased was fabricated as no report of assault was ever made to the police to corroborate the allegation that there had been a fight in a bar at Cheptais Township.

7. The learned trial judge erred in law and fact when he failed to appreciate that PW1 and PW2 were not credible witnesses whose evidence was devoid of probative value.

8. The learned trial judge erred in law and fact when he failed to hold that the failure of the prosecution to call an independent eye witness from among the staff or management of the bar in which it is alleged the fight took place was fatal to the evidence of PW1 and PW2.

9. The learned trial judge erred in law when he failed to hold that the appellants (sic) alibi had not been dislodged.

10. The learned trial judge erred in law and fact when he failed to consider if the evidence adduced could only support a conviction for a lesser charge of manslaughter.

11. The learned trial judge misdirected himself in law when he failed to appreciate that the ingredients of the offence of murder had not been proved.

12. The decision of the learned trial judge was based on speculative conclusions and contradictory evidence thereby occasioning a miscarriage of justice."

This is the appeal that came up for hearing before us on 24th April, 2009 when *Mr. M. Kraido* appeared for the appellant while *Mr. A.J. Omutelema (*Senior Principal State Counsel) appeared for the State. In his submissions *Mr. Kraido* dealt with the first three grounds. He submitted that the cause of death of the deceased was never established since there was disparity in age between the deceased who was said to be 49 years old and the body which was examined as this was a body of a younger woman aged between 24 and 26 years. This was a mix-up which, in *Mr. Kraido's* view, could not be explained. He contended that there was no evidence linking the appellant with the cause of death.

As regards grounds 4 and 5 *Mr. Kraido* pointed out that the appellant was arrested on 28th December, 2005 and remained in custody until 30th January, 2006 when he was arraigned before the court. It was further contended that it was during that period that evidence was collected and that there was no explanation by the prosecution for that long delay before the appellant could be taken to court.

On ground 6 it was submitted that there was no report of assault made to the police and yet the said assault is alleged to have taken place in public. It was *Mr. Kraido's* contention that the evidence of PW3 was speculative and so there was no credible evidence of such incident

In grounds 7 and 8 *Mr. Kraido* referred us to the evidence of PW1 and PW2 who could be described as star witnesses. He described PW1 as an untruthful witness and that there were barmaids in that bar but none of them was called to testify.

Ground 9 related to the appellant's defence of *alibi* in that he was in Giglgil when it was alleged that he slapped his wife. It was Mr. Kraido's submission that the appellant's defence on alibi was not displaced by the prosecution.

Grounds 10, 11 and 12 were on the weight of the evidence and Mr. Kraido was of the view that there was no evidence to show intention to kill even if the superior court had accepted the evidence of assault.

On his part *Mr. Omutelema* submitted that prosecution had presented evidence which clearly showed that the deceased died as a result of injuries in the head and that there was no mix up in identification of the body. It was his contention that PW6 had positively identified the body of the deceased. As regards the delay of 33 days when the appellant was in custody before being taken to court *Mr. Omutelema* contended that this was never raised before the High Court Judge, who handled the appellant's trial.

Mr. Omutelema further submitted that the deceased remained in the bedroom for five days and that she was scared of the appellant. On the defence of alibi *Mr. Omutelema* contended that this defence was displaced by the evidence of PW2 who was the appellant's son. It was *Mr. Omutelema's* submission that the learned judge was right in rejecting the alibi. As regards the barmaids who were not called *Mr. Omutlelema* was of the view that there was no rule of law to the effect that a multiplicity of witnesses must be called. In his view, evidence of PW1 was sufficient. In conclusion *Mr. Omutelema* asked us to dismiss this appeal.

We have now set out, in brief, the evidence adduced before the superior court, the submissions both in the superior court and in this Court. We have also reproduced the conclusion of the learned Judge of the superior court. As already stated, it is our duty to go over the evidence as a whole, re-evaluate it and come to our own conclusions, but always bearing in mind that we have not had the advantage of seeing and hearing the witnesses. In this case the prosecution, of course, set out to prove that the appellant unlawfully caused the death of the deceased. To do so the prosecution called eight witnesses. It was the prosecution case that the appellant assaulted his wife (the deceased) on 8th November, 2005 and that as a result of the injuries arising from that assault the deceased was treated in various health institutions and eventually died on 27th December, 2005. There was also allegation to suggest that the appellant hit the deceased's head against the wall which resulted into the deceased's death. There was only one witness to the incident of assault in the bar. This was *Evans Morara (PW1).* As regards the deceased being hit against the wall there was evidence from her own mother (PW5) and sister (PW7). However, those two witnesses did not witness the actual incident but said that they were told by the deceased. That being so we can only go back to the evidence of PW1 and the postmortem report. Unfortunately, there was a mix up as regards postmortem report; and to make the matters worse the doctor who conducted the postmortem examination did not testify before the superior court. His report was produced in evidence by a colleague who was familiar with his handwriting. This was done pursuant to *Section 77 of the Evidence Act (Cap. 80 Laws of Kenya).* The postmortem report produced before the superior court was in respect of a female African in her mid 20's. *Dr. Ekesa (PW8)* who produced the report prepared by *Dr. Aluanga* testified that there was no possibility of confusing the body of a 29 year old with that of a 49 year old person. This is where we have a problem. According to the appellant, his wife (the deceased) was 49 years old. This was confirmed by *Doris (PW7)* a sister to the deceased. Hence the postmortem examination relating to a female in her mid 20's could not have been that conducted on the body of the deceased.

In view of the foregoing we are unable to accept *Mr. Omutelema's* submissions that there was no mix up in the identification of the body of the deceased. There was certainly a mix up which has caused us

considerable anxiety.

Leaving the issue of postmortem report for a moment, we must examine the evidence of the activities in a bar at Cheptais on 8th November, 2005. The key witness was of course *Evans Morara (PW1).* It is significant to note that this was the only witness who testified on the assault in the bar. In his evidence he stated that he was with *Daniel Chemekwet* and others when the appellant allegedly greeted them and walked back to where he was sitting with his wife (*deceased).* This witness *(Evans)* also testified that he was with one *Peter Sometwa* who was his in-law. These two people (*Daniel Chemekwet* and *Peter Sometwa)* were not called to testify. Evans further testified that when the appellant and his wife were fighting a barmaid rushed to separate them. This barmaid was not called to testify. We are mentioning these people as necessary witnesses in view of the fact that the appellant's defence was that on the material day (8th November, 2005) he was not in Cheptais but away in Gilgil. The appellant produced bus tickets to support his evidence that he was in Gilgil.

From the evidence on record the deceased was admitted at Cheptais Health Centre and at Elgon View Hospital. While the appellant maintained that his wife was suffering from malaria and died of malaria, there is no counter evidence as regards the deceased's health apart from the postmortem report which, unfortunately, as already stated had a mix up in the identity of the body examined. One would have expected some medical report from Cheptais Health Centre and/or Elgon View Hospital, but none was produced.

In view of the mix up in the identification of the body of the deceased, the failure of the prosecution to call known witnesses who were at the scene and the defence of the appellant taken as a whole, we think that there were many unexplained gaps in the prosecution case which rendered the appellant's conviction unsafe. One of the cardinal principles of our criminal law is that an accused person can only be convicted on clear evidence and that the case against an accused must be proved beyond any reasonable doubt. In the current case, even assuming that the appellant slapped the deceased as stated by *Evans Morara (PW1)* we have further evidence that the deceased was attended to in different hospitals before she eventually died. We do not have any medical evidence from any of the hospitals to clarify as to what the deceased was suffering from. The appellant maintained that the deceased had malaria and that on the material day when he is alleged to have slapped the deceased he was away at Gilgil. It is not upon an accused person to prove his innocence but upon the prosecution to prove its case against the accused person beyond reasonable doubt. In the present case, we have agonized on the matter and have come to the conclusion that it was doubtful whether the appellant is the one who caused the death of the deceased. We do not wish to apportion blame but we must point out that there is evidence of rushed and poor investigations which led to very many critical areas of evidence not being brought out. We have also considered the failure of the superior court to proceed with the assessors to the end of the trial.

In view of the foregoing we have come to the conclusion that the appellant's conviction was based on very weak evidence and it cannot be allowed to stand. Accordingly, this appeal is allowed, the conviction quashed and the sentence of death set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held. These shall be our orders.

DATED and DELIVERED at ELDORET this 29th day of MAY, 2009.

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR