

COURT OF APPEAL FOR EASTERN AFRICA.

Before SIR JOSEPH SHERIDAN, C.J. (Kenya); SIR SIDNEY ABRAHAMS, C.J. (Tanganyika) and WEBB, J. (Kenya).

REX, Respondent (*Original Prosecutor*)

v.

SIRASI BACHUMIRA, Appellant (*Original Accused*).

Cr. App. No. 150/1935.

Criminal Law—Murder—Identification of *corpus delicti*—Retrial.

The appellant was convicted of the murder of one Mutundi. Witnesses who were present when he stabbed Mutundi gave evidence and there was evidence that seven days later a person called Mutundi was admitted to hospital suffering from a wound caused by a sharp instrument, but there was no evidence identifying this person with the person stabbed by the appellant.

Held (18-2-36).—That there was not an irresistible inference that the person who died in hospital was identical with the person proved to have been stabbed by the appellant, and that a re-trial should not be ordered merely to enable a gap in the case for the prosecution to be filled.

Appellant absent, unrepresented.

Dennison, Crown Counsel, for the respondent.

JUDGMENT (delivered by SIR SIDNEY ABRAHAMS, C.J.).—The appellant was charged with the murder of one Mutundi in the Masindi District of Uganda. The evidence undoubtedly establishes that the appellant stabbed Mutundi in the chest with a knife and had neither excuse nor extenuation for so doing. The Sub-Assistant Surgeon at Masindi Hospital stated that, to quote his own words, he “remembered Mutundi being brought to the hospital” on the 26th October—that is one week later than the stabbing. He was suffering from a dangerous wound on the left side caused by some sharp instrument. He eventually died from pericarditis due to pneumonia caused by the wound. The head dresser at the hospital stated that, also to quote his own words, he “received Mutundi who was brought by four men” and told the dresser what his name was. The dresser handed this Mutundi over to the Sub-Assistant Surgeon and told him the name. No person who accompanied the deceased Mutundi to the hospital was called in evidence and, though the Sub-Assistant Surgeon mentioned that he saw a woman, Kalwara, in Court, which suggests that this woman did accompany Mutundi, he was unable to identify her as having accompanied him, and she was merely offered for cross-examination, and was not questioned, and we do not think it would be proper to refer

to her deposition for the purpose of establishing identification. No person was called to say that the Mutundi who died in hospital was the same as the Mutundi who was stabbed by the appellant, and the question for us to decide is whether the death of a man alleged to have been murdered has been properly proved. It is hardly necessary to say that the onus of proving this is upon the Crown.

Counsel for the Crown submits that there is a strong inference from the circumstances that the Mutundi who died in the hospital is the same as the Mutundi who was stabbed by the appellant. We are of the opinion that to establish such a fact from circumstances an irresistible inference must be shown. Is there such an irresistible inference? The facts are that on the 19th October one Mutundi in the district of Masindi was stabbed in the chest and on the 26th October one Mutundi was admitted to the hospital suffering from a wound in the left side. All the witnesses who saw the stabbing on the 19th October refer to the victim of the assault as the deceased and in all probability think him dead. We do not think that we can say that there is an irresistible inference of the identification. Counsel also suggests that in the interests of justice we should send back the case for a re-trial or for the taking of such evidence. We have of course power to do either, but what the Crown actually requires is the admission of evidence to prove the fact of death and nothing more, and in our opinion additional evidence should not be taken to fill a gap in the prosecution's case. The Crown when it frames its information ought to have its case complete, and it has no ground of complaint on appeal when it appears that it has failed or omitted to prove an essential fact, especially when it had the means of so doing. In this connection the observations of Sundara Ayyer J. in *Jeremiah v. Vas* (36 Mad. 457) are in point. This is perhaps an extreme case because it seems possible that the Crown would have had no difficulty in proving the necessary facts, but extreme cases must yield to principles which logically apply to them, and if we now let in evidence of an essential fact which the Crown ought to have proved at the trial we do not know where we should have to stop.

We have considered whether we can properly find the appellant guilty of attempted murder, but since the knife has not been produced and no evidence is apparent from the record from which we can ascertain the position and nature of the wound, we think we cannot venture to go so far.

We therefore quash the conviction and acquit the appellant. It is hardly necessary to add that it is still open for the Crown to take further proceedings against him for any offence other than that of murder or manslaughter.
