



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 28 OF 2018

REPUBLIC.....PROSECUTOR

-VERSUS-

JACKSON KIMELI KOECH.....ACCUSED

RULING

(1) On 5th March 2015 John Kipsiele Kitur (PW5) was in the company of the accused Jackson Kimeli Koech, the deceased James Kipkemei Koech, Henry Kitony and another by the name Peter in the home of PW3 Alice Chebet Too. Alice had made some *busaa* for some persons who had been digging the foundation for her daughter's house.

(2) After drinking the *busaa* they left together to go to a *chang'aa* den. Before they left Alice heard the accused asking the deceased for his Kshs.10/=. Later a drunken quarrel ensued and she told them to leave.

(3) According to Kitur the deceased had 50/= and asked him Kitur for an additional Kshs.10/= so that they could buy the *chang'aa*. They bought the *chang'aa*, and went back to Alice's place and shared it between them.

It was then that Jackson demanded to know why he had not been included in the sharing. The deceased told him he had shared with Kitur because Kitur had contributed Kshs.10/= for the buying of the *chang'aa*.

(4) Jackson then went to drink with the people outside - then came back to where he Kitur and the deceased were, and began to demand to be told why they were not buying him alcohol.

(5) It was there in the presence of Kitur that Jackson and the deceased began to quarrel. The quarrel became loud and Alice told them to leave. As they left they made up, and shared a cigarette, as they walked ahead of the rest of the group.

(6) Kitur stopped to speak with someone else and after a while some school children came and told him that he was standing there while his friend was lying on the roadside in pain.

(7) He rushed towards the place where his friend the deceased was. On the way he met Jackson who told him that it is him he wanted as he had refused to buy him alcohol. When Kitur got to where James, he found him lying on the ground writhing in pain, he told him that Jackson had stomped on his stomach.

(8) Kitur then decided to go for help, apparently deceased's home was not far from there. On the way he met one Joseph Tanui. They returned to the scene where the deceased was and the deceased told them;

“Jackson amenikanyaga kanyaga tumbo.”

That is Jackson stomped all over my abdomen

Joseph rang the deceased's sister – PW1 Stella Cherotich who came to where they were. By then there were other people and the deceased was still writhing on the ground with pain clutching his stomach saying that Jackson had injured him. Stella arranged for him to be taken to hospital where he was treated and returned home. That evening PW2 Wilson Lekaken his father went to check on him. He found him

still in pain. He was taken to Nyahururu Hospital from where he was referred to the Provincial General Hospital Nakuru but died on 15th March 2015.

(9) On 18th March 2015 postmortem was conducted on his body by Dr. Titus Ngulungu. The Pathologist formed the opinion that cause of death was trauma to the abdomen resulting in peritonitis, shock caused by perforation of the abdomen.

(10) The prosecution's position was that after the incident the accused disappeared to Narok and was not arrested until three years later on 10th June 2018 by members of the public. He was brought to Subukia police station on 12th June 2018, where he was charged with **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. It was alleged that on 15th March 2015 at Simboyon village, Subukia Sub-county within Nakuru County, he murdered James Kipkemei Koech.

(11) He denied the offence.

(12) The prosecutor after calling eight (8) witnesses closed its case.

(13) At this time the only issue is whether the prosecution has established a *prima facie* case to warrant the accused being put on his defence – in the words of **Section 306(2) of the Criminal Procedure Code** whether upon consideration of the evidence, this court has formed the opinion that the accused had committed the offence.

(14) The offence of murder is committed when a person causes the death of another, in an unlawful manner, with malice aforethought, as defined **under Section 206 of the Penal Code**.

(15) There is no doubt that the said **James Kipkemei Koech** is dead. The evidence is that the accused assaulted him, and stamped on his abdomen. The medical evidence on record has shown that it is out of the attack to his abdomen that he suffered the injury that caused his death.

In **Ramanlal Trambaklal Bhatt v. R. [1957] E.A 332 at 334 and 335**, the court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

There is evidence that the accused engaged in a quarrel with the deceased just before the assault and the deceased spoke in the hearing of three of the witnesses that it is the accused person who stamped on his abdomen hence clearly there is *prima facie* evidence to warrant the accused being put on his defence in accordance with **Section 306(2) of the Criminal Procedure Code**.

DATED AND DELIVERED VIA ZOOM THIS 27TH DAY OF APRIL, 2021.

MUMBUA T. MATHEKA

JUDGE

In the presence of:

Edna Court Assistant

For state Ms. Murunga

Accused Present at Nakuru GK Prison

Ms. Chemng'etich for the accused

Defence hearing on 11th May 2021

Mumbua T. Matheka

Judge