



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 23 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MOSES KIPROTICH BETT.....ACCUSED

RULING

[1] The accused person herein, **Moses Kiprotich Bett**, was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. In the Information filed herein on **21 March 2016**, it was alleged that on the **8 March 2016**, at around 12.00 midnight at Kipsamoite Trading Centre in Sang'alo Location within Nandi County, he murdered **David Kipketer Maiyo**. The accused person denied those allegations and, in proof thereof the Prosecution called 10 witnesses.

[2] At the close of the Prosecution Case, **Mr. Oduor**, learned counsel for the Defence, filed written submissions of no case to answer, positing that the evidence adduced by the Prosecution's 10 witnesses falls below the threshold of a *prima facie* case; and therefore does not warrant the placement of the accused person on his defence. While conceding that the death of the deceased was proved to the requisite standard, **Mr. Oduor** took the view that no evidence at all was presented to demonstrate that the death was due to an unlawful act. He submitted that since the autopsy report produced herein gives the cause of death as asphyxia secondary to aspiration following trauma, it was incumbent upon the Prosecution to show the nexus between the trauma suffered by the deceased and the accused person.

[3] **Mr. Oduor** urged the Court to take into consideration the evidence by the Prosecution itself that the deceased was drunk on the night in question and that he hit himself on a post before falling down. He postulated that he could have choked to death in his drunken state. Counsel made reference to **Modi's Medical Jurisprudence and Toxicology** where the opinion is expressed that:

“Choking and obstruction of the airwave is mostly accidental. The vomited matter may regurgitate into the larynx and by aspiration/aspiratory efforts may be aspirated into the bronchi and may cause suffocation, which is common in acute alcoholism.”

[4] Counsel further submitted that, since there was no evidence of bad blood between the accused and the deceased, a key ingredient of murder, namely, malice aforethought, was not proved. He also thought it was significant that the deceased was found, lying unconscious on the ground, some considerable distance from Sinbird Bar where he had stumbled onto the accused; suggesting that there were intervening circumstances between the time of the encounter between the accused and the deceased and the time of his death.

[5] Counsel for the State, **Ms. Kegehi**, opted to rely on the evidence on record; including the Postmortem Report exhibited by the Prosecution. That Report indicates, as part of the brief medical history, that the deceased was found lying unconscious in the cold after a drinking spree the previous day.

[6] Needless to say that it a requirement of the law that the Court be satisfied that a *prima facie* case has been established by the Prosecution before the accused person can be placed on his defence to answer the charge against him. The case of **Ramanlal Trambaklal Bhatt vs. Republic** [1957] EA 332, is instructive. It was held therein that:

“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 is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. 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.”

[7] Section 203 of the Penal Code, Chapter 63 of the Laws of Kenya, pursuant to which the Information was laid, is explicit that any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder. Thus, the ingredients that the Prosecution needed to show, albeit on a *prima facie* basis are: the fact of death; that the death was caused by the accused by an unlawful act; and malice aforethought on the part of the accused person.

[8] With the foregoing in mind, I have carefully considered the evidence presented herein by the Prosecution. That evidence shows that, on the 7 March 2016, the deceased visited Sinbird Bar at Kipsamoite Trading Centre in Nandi County for the purpose of partaking of alcohol. The bartender, **Elizebar Jepkemboi (PW7)** told the Court that the deceased, a person hitherto unknown to her, went to the bar at about 8.30 p.m. and ordered for a bottle of beer. She added that the deceased was already drunk at the time; and that he mindlessly took a bottle of soda that a fellow customer had been served with and broke it. As he was being a nuisance, **PW7** called the owner of the bar, **Julius Tuwei (PW3)**, to handle the situation.

[9] **PW7** further testified that **PW3** managed to calm the deceased down and persuaded him to go home as he was already inebriated. She added that as the deceased was leaving the bar, he stumbled and fell on a table where there were two customers; and that again, **PW7** had to intervene, whereupon the deceased offered to pay for the drinks. She did not know what happened to the deceased thereafter; and only got to know the following day that the deceased had died.

[10] **Julius Kiptoo Tuwei (PW3)** confirmed that he is the proprietor of Sinbird Bar; and that the bar was open on the night of 7 March 2016. He testified that the deceased visited the bar on that night; and that they had drinks together. He further told the Court that after a while, the deceased got up, went to the counter and paid for his drinks, including the bottle of soda that he had broken, and thereafter left the bar. **PW3** concluded his testimony by stating that he left the bar at about 10.00 p.m. and did not know what may have befallen the deceased.

[11] The Prosecution also called **Wesley Kipkosgey (PW1)**, who told the Court that the deceased was his grandfather. He was at Kipsamoite Trading Centre on the 7 March 2016; and therefore testified that at about 8.30 p.m. as he was leaving Sinbird Bar, he saw the accused accost and remove money from the pocket of the deceased, who was drunk. He added that the incident occurred at a corridor between Sinbird Bar and an adjacent building; and that, because he had witnessed the occurrence, the accused gave him Kshs. 20/= of the money he had taken from the deceased as hush money. **PW1** mentioned that he immediately gave the money to a certain young man called **Kiplimo** and left for his home. He concluded his testimony by saying that he did not know where the deceased went after the mugging incident.

[12] **Saul Kibet Kosgey (PW2)** was also at Kipsamoite Trading Centre on 7 March 2016. His account was that at about 8.30 p.m. on the date in question, he was seated on a bench outside Sinbird Bar when the deceased walked out of the bar. He added that, as he stepped out of the bar, the deceased staggered and was about to fall down when the accused got hold of him; and that when he told the accused “*usiniibe*”, the accused pushed the deceased and he fell down on his back. He was unable to intervene as he received a call on his mobile phone which diverted his attention as **Meshack** went to the aid of the deceased. He added that he went away after receiving the call.

[13] **Meshack Kipsang Kurgat** testified as **PW6**. His evidence was that he was taking tea at Sinbird Hotel at about 9.00 p.m. when he saw the accused get hold of the deceased; and that the deceased started shouting saying “*leave me alone*”. He added that he was shocked to learn the next day that the deceased had died. He explained that the deceased had hit himself against a pillar outside the bar and was about to fall down when the accused got hold of him. He explained, in cross-examination, that the deceased was drunk, and that he walked out of the bar in a staggering gait; and that both of them fell down when the accused attempted to rescue the deceased from falling and hurting himself.

[14] **Philip Kiplimo Arap Chumba (PW4)**, **Prisca Jepketer (PW5)** and **Naftaly Songok (PW8)** are relatives of the deceased. **PW4**, a brother to the deceased, was one of the identifying witnesses for purposes of the postmortem that was conducted on 15 March 2016. He noted that the deceased’s body had injuries on the hands, knees and back. **PW5** received a report that her brother, the deceased, was lying unconscious at the local centre. Her evidence was therefore that, on arrival at the scene, he found the deceased unconscious; and that he was bleeding through the nose and mouth. She then made arrangements and rushed the deceased to **Kapsabet District Hospital** where he died while undergoing treatment. On his part, **PW8**, a brother in law to the deceased, told the Court that he received information that the deceased had been taken to **Kapsabet District Hospital**; and since he was at Kapsabet at the time, he went to the hospital to check on him but found that he had just died. **PW8** told the Court that he saw no visible injuries on the body of the deceased.

[15] The last two Prosecution witnesses were **Dr. Evans Biwott (PW9)** and the investigating officer, **P.C. Philip Wekesa (PW10)**. **Dr. Biwott** testified on behalf of **Dr. Rutto** who conducted the autopsy on the deceased’s body. He explained that **Dr. Rutto** had left the employ of **Kapsabet Hospital** for further studies. His role was therefore to produce the Postmortem Report on behalf of his colleague. He read out the contents of the Report to the Court and mentioned the key findings and conclusion of **Dr. Rutto** as to the cause of death of the deceased; namely that the cause of death of **David Kipketer Maiyo** was asphyxia secondary to aspiration following trauma. **PW9** produced the Postmortem Report as **the Prosecution’s Exhibit 1** herein.

[16] **C.I. Wekesa (PW10)** testified that he was on duty on 9 March 2016 when the relatives of the deceased went to his office and reported that he had been found lying unconscious at Kipsamoite Trading Centre in Nandi County. He visited the scene and gathered information that

the deceased had gone to Sinbird Bar in a drunken state; and that he drank alcohol from early afternoon till about 8.30 p.m. He further gathered information indicating that the accused had held the deceased after he hit himself on a pillar as he walked out of Sinbird Bar. He stated that he recorded the witness statements and thereafter compiled his case file on the matter which he forwarded to the **Office of the Director of Public Prosecutions (ODPP)** for advice. The accused had been arrested as the suspect in the case; and that he was charged and arraigned before court after the ODPP approved his prosecution. **PW10** further told the Court that he did not find any evidence of bad blood between the accused and the deceased.

[17] From the foregoing summary of the Prosecution's evidence, there is no dispute that the deceased was found lying unconscious on the morning of **8 March 2016** at Kipsamoite Trading Centre. There is likewise no dispute that, though the deceased was rushed to **Kapsabet District Hospital** for treatment, he died while undergoing treatment. The Postmortem Report, produced by **Dr. Biwott (PW9)** as the **Prosecution's Exhibit 1**, shows that the deceased died of asphyxia following aspiration due to trauma. Accordingly, the fact of death has been proved herein beyond reasonable doubt.

[18] As to whether the trauma was inflicted by the accused person, the evidence presented herein is to the effect that the accused merely held the deceased after he drunkenly staggered out of Sinbird Bar and hit himself on a pole, with a view of helping him. Both **PW2** and **PW6** were categorical that all the accused did was to hold the deceased by his waist to prevent him from falling and hurting himself; and that when the deceased protested and asked to be left alone, the accused extricated himself from the deceased. Thereafter the deceased got up and walked away. Thus, in cross-examination, **PW6** told the Court that:

"...The deceased walked out of the bar alone. He was staggering and appeared drunk. He hit a pillar before falling down. He hit the pillar on his own. Moses held him to assist him. They then both fell down and that was when Maiyo said to leave him alone...Moses got up and left the deceased on the ground. I did not see Moses with any weapon or see him beat or hit the deceased. He just held him from behind around the belly..."

[19] I note that, in his evidence of **PW1** gave a slightly different version of what transpired. According to him the accused accosted the deceased, held him by his neck and robbed him of his money. I however find that account improbable. First and foremost, the Postmortem Report does not show that any injuries were noted on the deceased's neck. Secondly, it is unbelievable that **PW1**, a grandson of the deceased, would witness such an occurrence and walk away without any attempt to come to the aid of the deceased; and that instead he would accept Kshs. 20/= from the deceased's assailant so as to cover up the incident. Thirdly, from his own account, **PW1** appeared to have witnessed the encounter from a further distance than **PW2** and **PW6**. Hence, I find the evidence of **PW2** and **PW6** to be more probable.

[20] That said, the question to pose is whether that physical encounter between the accused and the deceased was the cause of the deceased death. It is significant that the deceased was found lying unconscious some considerable distance from Sinbird Bar. Indeed, there is credible evidence from **PW6**, **PW7** and **PW10** in this respect. However, there is no direct evidence as to what may have happened to the deceased after he left Sinbird Bar on that night; for the Prosecution evidence does not account for the period between 10.00 p.m. or thereabouts when the deceased got up from where he had fallen and left the vicinity of Sinbird Bar, and the morning of **8 March 2016** when he was found lying unconscious at Kipsamoite Trading Centre.

[21] Thus, the Court has been asked to conclude that the physical contact between the accused and the deceased is what caused his death. As was conceded by the investigating officer, **PW10**, none of the Prosecution witnesses saw the accused beat or otherwise assault the deceased. That being the case, there has to be a veritable link between the physical contact aforementioned and the cause of death of the deceased. As to the cause of death, **PW9** testified on behalf of **Dr. Rutto** who conducted the autopsy and stated that externally, the body of the deceased had mild palour and haemorrhage, along with cyanosis of the fingers. Also noted were bruises on the frontal region of the deceased's head and left nostril; as well as bruises on the back, the left elbow joint, left elbow region and left lower limb. Upon internal examination there was a swelling of the lungs, indicative of lack of oxygen; and the stomach was filled with some liquid substance. The doctor also noted that the liver was enlarged. From these findings, **Dr. Rutto** concluded that the cause of death was asphyxia secondary to aspiration following trauma.

[22] In medical parlance, aspiration is the action or process of drawing breath; and includes the accidental drawing in of food or gastric matter into the lungs. Accordingly, **PW9** explained in cross-examination that:

"The external injuries noted on the postmortem form were superficial in nature...They were cuts and lacerations... Ordinarily there should be no fluid in the lungs. It is true that a choke can interfere with the function of the lungs. Asphyxia can be caused by choking and it can lead to death...Trauma can be caused by anything including falling from a height..."

[23] In the premises, there is no saying whether, after he left Sinbird Bar, the deceased, who was evidently drunk, fell down and choked to death. Granted the clear evidence that the deceased was inebriated, counsel made reference to **A Textbook of Medical Jurisprudence and Toxicology**, 6th Edition by **Dr. Modi**, for the opinion that:

"Chocking and obstruction of the airwave is mostly accidental. The vomited matter may regurgitate into the larynx and by aspiration/aspiratory efforts may be aspirated into the bronchi and may cause suffocation, which is common in acute alcoholism."

[24] In the circumstances, the encounter between the accused and the deceased outside Sinbird Bar may not have been the cause of his death, granted the evidence that he got up thereafter and walked away unaided. It is a cardinal principle that for circumstantial evidence to count, it must rule out all other reasonable hypotheses and point irresistibly to the guilt of the accused person. In this case, it cannot be said that the Prosecution ruled out all other such reasonable hypotheses. Thus, in **Mwangi v. R [1983] KLR 522**, the Court of Appeal held that:

"In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be

incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (*Sarkar on Evidence - 10th Edition p 31*). It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference..."

[25] Similarly, in Omar Chimera vs. Republic - Criminal Appeal No. 56 of 1998 (UR) the Court of Appeal reiterated that:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established,**
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,**
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else".**

[26] Lastly, it was incumbent upon the Prosecution to prove malice aforethought on the part of the accused. What constitutes malice aforethought is set out in **Section 206** of the **Penal Code** thus:

Malice aforethought shall be deemed to be established by the evidence proving any one or more of the following circumstances—

- (a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**
- (c) An intent to commit a felony;**
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

[27] In the light of the foregoing analysis, and having found that the intention of the accused in getting hold of the deceased was merely to prevent him from taking a hard fall and suffering injury, it would follow that the requisite malice aforethought was not proved. At any rate, there is no proof of bad blood between the accused and the deceased or that he intended to cause him grievous bodily harm. Accordingly, it cannot be said that the Prosecution has made out a *prima facie* case against the accused person to warrant his being placed on his defence. Accordingly, I find the accused not guilty of the offence of murder and acquit him thereof pursuant to **Section 306(1)** of the **Criminal Procedure Code**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF MAY, 2021

OLGA SEWE

JUDGE