



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CRIMINAL CASE NUMBER 54 OF 2016

REPUBLIC.....PROSECUTOR

=VERSUS=

HILLARY KIPNG'ENO KIRUI.....ACCUSED

RULING

The accused person Hillary Kipng'eno Kirui is charged with **Murder Contrary to Section 203 as read with 204 of the Penal Code**. It is alleged that on 16th September, 2016 at Kiptororo village Kuresoi North Sub-County within Nakuru County he murdered Sharon Kirui. He pleaded not guilty.

The matter was part heard before *M. Odero J* when I took over on 9th October, 2019. After several mentions the prosecution closed its case on 30th January, 2020. The only issue for determination is whether the accused has a case to answer to warrant to be placed on his defence as required by **Section 306** of the **Criminal Procedure Code**.

The prosecution called one witness Kevin Kipkemoi Lang'at who testified on 12th July, 2017. He said that deceased was the wife of the accused and they were his neighbours. On 17th September, 2016 he received a call from the Officer Commanding Station (OCS) Kuresoi that the accused person had gone to the police station and reported that he had killed his wife. He went to house of accused where he met a brother of the accused whose name he could not recall and who told him that the accused had phoned him and told him he had done something bad.

He entered the house and saw the body of the deceased lying on the bed covered. The face was swollen. There was blood on both ears and the floor. He saw an axe on the floor which had blood on the blade. It was marked as MFI 1. He also saw a jembe and panga stored in the roof. He said accused had only lived in that house for six (6) months and he did not know the relationship between the accused and his wife.

On cross examination he told the court that he was a *nyumba kumi* official and that was the reason the OCS had called him. He said he did not examine the deceased's body closely nor did he touch it.

Thereafter the matter took a journey that saw it travel without any witnesses with the accused in custody. It was fixed for hearing on 29th November, 2017. It did not proceed though one witness was present. The name was not given. It was again fixed for 15th February, 2018. The Judge could not proceed because she was on transfer. No witness was present. It was adjourned to 2nd May, 2018. The judge did not proceed because she was on transfer and the matter was fresh, but there were no witnesses present.

It was fixed for hearing on 28th June, 2018, when it was taken over by *Ngugi J*, it was mentioned on 17th October, 2018 for fixing hearing date. On that day the Defence counsel was absent. There was no witness. The Case was fixed for mention on 23rd January, 2019 and for new counsel to be appointed for accused.

On 23rd January, 2019 Mr. Mburu was appointed for accused and matter was fixed for mention on 6th March, 2019 when it was fixed for hearing on 13th June, 2019, with an order for typing of proceedings.

On 13th June, 2019 the record shows that plea bargaining was on going between the accused and the state. On 18th June, 2019, the defence had a draft plea agreement which they presented to the State. The Matter was fixed for mention on 11th July, 2019 ostensibly for follow up. A request was made for mention in one month.

It was mentioned on 19th September, 2019 when the state sought a further mention. It landed before me on 9th October, 2019. The

prosecutor submitted that the state had a proposed plea but it had not been attended to. She sought for mention date to confirm the same. I granted 18th November, 2019. On that date counsel for accused submitted that the state had not expressed any interest in their proposed plea bargain. The defence asked for hearing date. The state counsel responded that she had been following up and sought a further mention date. I noted that this was a 2016 matter and we were in 2019. One witness had testified in 2017 and I was informed that four were remaining. The defence counsel was surprised as he had only been supplied with one statement. He expressed the wish to recall PW1. The state submitted that it needed time to find out whether the witness was available.

I allowed both applications and fixed matter for mention on 18th December, 2019 for directions:

- i) On status of the plea bargain and
- ii) In default on how to proceed.
- iii) Fixed hearing from 28th January, 2020.

On the 18th December, 2019 the counsel for accused was not present, state said nothing about plea bargain or any other matter. We confirmed the hearing date from 28th January, 2020. On that date the state requested for the file to be placed aside. By 1.00 p.m. there were no witnesses. The prosecution confirmed that she has ONLY ONE statement in her file and the post mortem report. That she had written to Kuresoi Police Station to avail witnesses on 28th November, 2019 but none had been availed. She sought time to withdraw the case.

On 30th January, 2020 the matter was mentioned for that purposes, the prosecution sought time to seek instructions from Regional Office in Nakuru. This application was opposed and defence asked the court to dismiss the case.

Prosecution had only two options; withdraw or close the case. They chose to close their case. It is noteworthy that on 18th December, 2019, on 28th January, 2020 and 30th January, 2020, different prosecutors appeared in court.

So, then. Is the evidence on record sufficient to warrant to put the accused on his defence?

It is important to point out that as on 19th September, 2016 when the charge sheet was recorded, the state had only listed two witnesses. Paul Kirui and Kelvin Lang'at. As on 28th January, 2020 the prosecutor had only one statement in the file despite the colleagues saying she had four. Here was a case of **murder** where charges were preferred with only two witnesses in the book, and none other, except the post mortem report. That being the case it appears there was no other evidence available to the state save that of PW1. It appears that even the investigating officer, the arresting officers, none had recorded statements, and if they had they were not availed to the state or the defence three years down the line.

Then there was the issue of the plea bargain. It is really bizarre that the accused person could propose a plea bargain agreement and the state not take it seriously. I have noted that "*plea bargain proceedings*" here never seem to end, and a matter can be mentioned for even a year at the behest of the state to attend to a plea bargain proposal.

My understanding of plea bargain is that the law brought this to expedite criminal trials where accused persons willing to plead guilty would have their cases expedited. However as in this case, the ODPP takes "forever" to respond. In this case, from 13th June, 2019 to 28th January, 2020, the state had still not considered the accused's plea bargain proposal, to even reject it or accept it, over six (6) months.

The evidence of PW1 is that he was told what the accused said. He saw a body covered on a bed. He does not know what happened, and apart from seeing the body, and an axe, he cannot say how the body came to be there.

The prosecution did not call even the pathologist to produce the post mortem report, or police officers or other neighbours. The body was not even identified as that of deceased. Cause of death was not established. Causer of the death was not identified. With reference to establishing a prima facie case it is in the case of

Ramanlal Trambaklal Bhatt -Vs- Republic (1957) E.A. 332 that the court stated:

"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not 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.

"(ii) The question whether there is a case to answer cannot depend 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."

The prosecution placed before court a mere scintilla of evidence. It fell far short of the expectation of the law. It is insufficient to establish a prima facie case to warrant accused be placed on his defence. Consequently I make a finding of not guilty as provided by **Section 306 (1) of the Criminal Procedure Code.**

The accused person be set at liberty forthwith unless otherwise legally held.

Dated, delivered and signed at Nakuru this 24th day of February, 2020.

Mumbua T. Matheka

Judge

In the presence of:

Edna Court Assistant

Mr. Mburu S. K. for accused

Ms Wambui for state

Accused