



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL CASE NO. 72 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JOHN RERIMOI.....1ST ACCUSED (DECEASED)

WILLIAM KITOO.....2ND ACCUSED

SIMON CHANGWONY.....3RD ACCUSED

RULING ON CASE TO ANSWER

Introduction

1. This is a ruling on the question arising at the *Close of case for the prosecution*, whether, on the evidence presented before the court, there is established a *prima facie* case to warrant the calling of the accused to make their defence. The 2nd and 3rd accused were together with the 1st accused, now deceased, charged with murder contrary to section 203 as read with 204 of the Penal Code. By a Burial permit dated 4/7/2017, the 1st accused died sometime in July 2017 while the case was pending trial. The proceedings against the 1st accused were terminated upon death. The Prosecution Case against the 2nd and 3rd accused in the words of the Investigation Officer who testified as PW9 was that “*they were accomplices of the murder, they were together with the 1st accused who threatened to kill the deceased.*”

Submissions

2. Counsel for the Defence, Mr. Kipkenei, urged a finding of no case to answer submitting that there was nothing to link the two, the 2nd and 3rd accused persons, to the offence and that the case was based on suspicion which is not sufficient ground to convict and, therefore, to warrant the calling on the accused to make their defence. The DPP relied on the evidence presented before the court, as shown in record of court as follows:

“Mr Kipkenei

I wish to submit that there is nothing to link the 2 accused person to the offence.

What was presently suspected to have caused the death was a tobacco sniffed through the nose but the Government Chemist and the pathologist conducting the post mortem in their findings ruled out tobacco as the cause of death.

This left out there suspicion which is not sufficient ground to convict. That is all. There is no case to answer.

DPP

We rely on the evidence. We submit that the case has been established and we pray that the accused be placed on their defence.”

Determination

3. The record of the evidence presented before the court is as follows:

PW1 I am Targok Chelelgo. I stay at Sinende, within Mogotio district. I am a farmer.

On 17/10/2015 at 9.00 am, I was at home. I was with my husband and other people including the deceased. We were all drinking busaa Liquor. The Busaa was for payment of the person who were working at our shamba to prepare the land for planting.

The Busaa was payment of the persons who were working on the farm and I also sold part of it to other people. The accused persons were with me at the farm. I know them as neighbours. The 1st accused is Kilelio, the 2nd accused Kibunga and 3rd accused is Silonge.

Arap Kipsergon is the deceased. I knew him as a neighbor. Kipsergon was also at my house. He was also drinking Busaa. When he came to my house, he came alone. I confirm that the deceased and the 3 accused were at my house that day.

The first accused, Kilelio, went outside with the deceased. They went to talk outside the house and inside the compound. I do not know what they spoke about. They were not quarrelling. They were just talking.

It was the 3rd accused, Silonge who quarreled with the deceased. I was inside the house and I do not know what they were quarrelling about.

All the four, that is the accused persons and the deceased, were sniffing tobacco. I did not hear any of them asking for tobacco from any other. I did not see the four sniffing tobacco as I was inside the house.

The deceased came into the house with the 1st accused, Kilelio and they sat facing each other. The deceased then fell on his back and started vomiting. He knelt down when he was vomiting. He was vomiting through the mouth and the nose and he had whitish substance.

At the time, the 2nd and 3rd accused persons were outside. The deceased and the 1st accused and another brother of the 1st accused's brother was called Arap Soti. He is deceased.

In the house, there was also myself inside the house. Kibonge the 2nd accused was outside the house. The deceased Kipsergon slept on the floor. The three accused persons, Kilelio, Kibonge, and Silonge and Arap Soti who died left. He left Kipsergon in the house. I never saw the accused or the deceased arguing or quarrelling. I could hear them talking and arguing about grazing on the upper and lower side. It was Silonge and the deceased Arap Chepserson who talking the grazing. The accused persons left together. I then went out to bring the animals, sheep and goats back home. It was almost 3.00pm. My husband had gone for a meeting at school at 10.00am.

When I came back from bringing the animals, the deceased arap Chepserson was still sleeping on the floor. I sat down outside the house and later my husband came. My husband did not see me when he came home. He went inside the house and he called me. He has eyesight problem.

My husband asked me why I had not lit a fire and I said that it was because of the man who was lying near the fire and he could get burned. My husband asked me to bring the firewood and he would help set up the fire.

At this time, the deceased was still on the floor. It was my husband who told me that the man was not breathing. After realizing that he was dead. We went to the deceased's home and awoke the wife. We told her that her husband had died. She said she had waited for him to come home that day to attend a meeting in the village.

He had not gone for the meeting.

We went back with the wife to where the deceased was. We later informed the police at Mogotio and the chief.

Chepserson had come to my house at about 8.00am in the morning. He was not sick when he came. He died in my house. That is all.

Cross examined by counsel for accused Mr Kemboi

My husband left home at 10.00am to go to the meeting. At the time he left the accused persons, Kilelio, Kibonge and Silonge came and he left them there. I had gone to fetch water and I left my husband alone. When I came back, I found some other people had come. There were even ladies who were taking Busaa but they later left. I confirm that I am the one who sold the Busaa to all the people who had come. Nobody else touched the Busaa. I had prepared the Busaa and left it ready for drinking when I left to fetch water. I am the one who served the Busaa.

Arap Chepserson came in about 8.00am in the morning. I found him there when I came from fetching the water. I knew Chepserson as a neighbor for long since he was born as he is younger than me.

I am not aware that Chepserson had **Chemongoi** effect of lack tobacco. Its symptoms are that someone appears stiff on the face. After he is given water the effect goes away. In my view, it cannot kill a person.

I did not see anyone sniff tobacco as I was in the house. When the accused fell, it was on the accused, Arap Sote and myself who

were present. The others had gone away.

Chepsergon started vomiting at 2-3 pm. It was the time when school come back home.

I did not tell the deceased's family until late because, I thought he was sleeping when I came back from fetching the animals, it was becoming night and we went with my husband. This was at 3.00am in the night. We thought that he was sleeping.

We did not report the matter because we thought he was drunk. It is not true that we are the ones who killed the deceased. I do not know what killed the deceased. He died in my house near the fire. I cannot tell what killed the deceased because he was well.

Re-examination

Nil

PW2: I am Kipkorir Chelelin. I reside at Sinende, Ndorois. I have a sight problem. I do not do any commercial work. I know the deceased in this case. I knew him as Arap Chepsergon. I do not recall the other name. My son has married a sister to the deceased.

On 17/10/2015, I saw the deceased. He was in my place. He came to my house in the morning. The deceased said we should eat and then go to a meeting. The deceased said that he had come to call me to go for a meeting at Sinende centre at 10.00am. I went to the meeting leaving the deceased in my house although I thought he had gone. There were many people at my home and they were taking Busaa. My wife was giving the Busaa to pay the people who were cutting trees and making charcoal in my shamba.

I have eye problem. I can't see the accused in court. I was at the meeting until 7.00pm when I came back home. When I came back to the house, I found my wife in another house. There was also grandchild of Arap Mam a relative of mine. When I went to the other house, there was chair. I tripped on it and when I asked wife why she had left the chair to trip me, she answered that it was Wei wei the deceased who was using it. The deceased was at the time in the house. The deceased has his house and I do not know what he was doing as he was sleeping in the house.

When i found the deceased sleeping I tried to wake him by moving him over. I asked my wife to light a fire and I got a mabati, iron sheet to cover the fire so that the deceased did not burn. The deceased was lying near the fire.

It appeared the deceased was already dead as he did not breath and he could not move on his own. At first, I did not know that he had died. I called my wife when it appeared that the deceased was not responding. I then went to the deceased's house but got lost on the way and then came back. I wanted to go and inform them that the deceased had died.

I established that he had died after touching his body and not getting any reaction when I came back, I asked my wife to take me to Wei Wei's house. We found the wife and we came back with her to the house where the deceased. We then went to Kirunga to inform him. Kirunga is the son to Mariangut a brother to Wei wei, the deceased.

We then reported the matter to the Chief and then went back to where the body was. The body was taken by police. I later learnt that there were some people who were arrested. There were Kirunga, Silonge, and his wife were among the arrested. The same people had been at my house.

Cross examined by Mr Kemboi for accused

I do not see very well. I cannot identify the young people only the old ones. I can see persons but I cannot able to identify. I knew the people who were at my house. My memory is not good. My wife had been arrested. She was detained for some time. I do not know how long.

The deceased was in my house. When I came my wife was not in that house but in the same home. I came back at 7.00pm in the evening. I confirmed the deceased was dead at about 11.00pm in the midnight. I was in bed and I wondered why the deceased was not even snoring or moving.

I could not see but I could hear that there were people in the house.

Re-examination by Miss Macharia

Nil

Court

How old are you?

PW2

I do not know.

Court

The court assess the age of the witness not over 70years

PW3: I am Lina Chepsergon ID 65922452. I reside at Sinende, Nyalebuch Mogotio. I am a farmer. I know the deceased in this case. He is Targoronu Chepsergon. He was my husband.

On the date that he died it was a Friday evening and he said there was a house where he would go the following day. The house belonged to Kapchelelgo. He also told me that there were people who were looking for him very much. He told me that they had threatened to kill him. He named three people Kilelio, Silonge and Kibunga.

The deceased went to the place he had indicated the following morning. It was on school at 8.00am. He never came back. I did not hear about him the whole day but later in the night I got information from Chelelgo and his wife who came to my place at about 2.00am in the night. They woke me up and told me that things were bad for me. I asked him what was wrong and they told that Wei Wei, my husband had been killed. Wei Wei is the nick name for my husband.

He told me that the deceased had been killed at house of Chelelgo, at his place. He said the deceased had laid on the floor of the house near the fire place. The head was almost at the fire place.

Chelelgo's wife said that she had been sleeping at another room. She herself never told me anything as to what happened to the deceased.

They told me to accompany him to the house where the deceased was. I found him lying on the floor. The deceased told me that he was going to Chelelgo to pick him so that they go for a meeting.

When we reached the house of Chelelgo, we found the deceased had died. I lifted the deceased's hand and established he was dead and then Chelelgo told me to accompany him to inform Kibunga. We found Kibunga and informers him about the death. Kibunga replied asking whether the deceased had died and he had left him okey.

We went to Kibunga because the deceased and Kibunga's father are brothers and they had been together in the house of Chelelgo who said they had been together. They were drinking beer. They were drinking "Busaa"beer.

In addition to my husband and Kibunga there were also Silonge and Kilelio. I was so informed by the wife to Chelelgo. Kibunga is the 2nd accused and Silonge is the 3rd accused Kilelio is the accused who died.

We asked Kibonge to inform his father named Mainaigat Kibunga went and we went back to Chelelgo's house. The body was taken after the deceased's children came. The body was taken by the police.

The body was later buried at our home.

Cross examined by Mr Kemboi for accused

Police came to the scene and recorded my statement. The contents of the statements are true. The deceased told me that there were persons who sought to kill him. He told me himself in the evening.

I know Samuel Lotangi. He was a neighbor. He lived in our shamba but he had left. I told the police about Samuel Lotangi. I told them that the deceased had told me that it was Samuel Lotangi who had told him about the threat. I must have told the police that it was Kibunga, Silonge and Kilelio. I did not tell the police the names. I told them that there was something that the police had told me before he died. I am telling the names of the 3 people for the first time before the court. I just mentioned their name Samuel Lotangi to the police when they were picking the body.

When they were drinking Busaa, I did not see Lotangi. I did not go to the house of Chelelgo. I do not know whether Lotangi was there when they were drinking. I did not ask as to who was there during the drinking. I did not see the deceased with the accused persons. I did not go there so I did not see the people who were there. Lotangi is still available.

In the morning when people were drinking I passed by Chelelgo's house. I did not see anyone as people had not arrived. On the morning after the deceased had died. I did not passed through Chelelgo's house. I passed the house on Saturday as I was going to Jane's place.

The deceased told me he was going to look for Chelelgo so that they can go for a meeting.

The deceased was not armed with anything when he left the house. I did not see the deceased take any weapon or fork jembe.

Re-examination

Nil

PW4 examined by the Court

Court will examine the child to determine whether he understands the nature of oath and is possessed of sufficient intelligence to warrant reception of his evidence. Section 19 of the Oaths and Statutory Declarations Act.

Question – what is your name?

Answer- my name is Alfred Chepsok Kiyai

Question- How old are you?

Answer- I am 17 years demonstrates one and seven.

Question – when were you born?

Answer – 2002

Question – which month?

Answer – I do not know

Question – are you in school?

Answer – yes, standard 7

Question – which school?

Answer – Kamasai primary school

Question- do you have a birth certificate?

Answer – I have a birth certificate

It is not true.

Court

1. The court observes that the child is sufficiently intelligent but for his diminutive size and assertion that he has a birth certificate, the matter is adjourned to date when he can produce the birth certificate which if true puts him outside the bracket of a child of tender age under section 19 of oaths and statutory Declarations Act.

PW4 MINOR AGED 16 YEARS SWORN ON BIBLE AND STATES IN KISWAHILI LANGUAGE

I am Alfred CK. I reside at Kamoske. I go to school at [Particulars Withheld] primary school. I am in class 7.

On 17/10/2015, I was still in primary school at [Particulars Withheld]. I was in class 4 at about 11.00am, I was at my grandmother's place, my grandmother is called Targok Chelelgo. I arrived to find people drinking beer. Some were outside the house and others were inside the house. Some were drinking beer. It was busaa beer. My grandmother used to sell Busaa.

Joseph Chepsergon, the deceased was there that day. I knew the deceased. I used to see him as he passed by our place when going to Solian. I found the deceased at Gogo's place.

There were 4 people outside the house. One was the deceased Chepsergon, the other were 3 Silonge, Kibunga and Kilelio. I saw gogo in the house with other people I did not know how many people there were inside the house.

I know the 3 people Silonge, Kibunga and Kilelio. I found them drinking. Some were quarrelling. This was Chepsergon and Silonge, they were quarrelling about a parcel of land, Chepsergon told Silonge “Kule huko chini na mimi nikule hapa juu, chungu ngombe yako hapa chini na mimi nichunge hapa juu”.

Silonge told him that “nitachunga ngombe yangu mahali nataka” and that Chepsergon's son did not scare him.

Kibonge and Kilelio rose up and came to where Chepsergon and Silonge was.

Chepsergon went into the house and asked for 3 cups of Busaa. He was given 1 cup.

I was outside the house. I saw Kilelio put things into the cup of Chepsergon. The cup into which I saw Kilelio put things was the one Chepsergon left when going into the house to ask for more Busaa.

Chepsergon came and mixed the Busaa he got from gogo into the cup he had been using. I told him not to drink because I had seen Kilelio put things into the cup. Kilelio stopped me when I sought to kick the beer cup away saying “wacha vitu ya gogo” – leave grandmother’s things alone.

Chepsergon drunk the beer from the cup. After drinking one, he asked Arap Sote who had came later to assist with Tobacco for sniffing. Arap Sote did not give him. He said he did not have Tobacco. Kilelio gave Chepsergon Tobacco. Chepsergon put all the Tobacco he had been given into his nose.

Kilelio did not use the Tobacco. Kilelio had two sets of Tobacco. He did not give Chepsergon the Tobacco he was using. He gave him a different set of Tobacco. Kilelio had the sets of Tobacco in different packets. The one he used was from a different packet from the one he gave Chepsergon.

The one he gave Chepsergon was in an old tin, while the one he was using was in a paper. When Chepsergon finished using the tobacco he went into gogo’s house. The two Silonge and Kilelio followed Chepsergon into the gogo’s house.

Chepsergon went into the house and sat by the fire. I went into the house.

Chepsergon started coughing. He coughed until parts of his beard came off when he wiped his beard Silonge called Kibunga who had been left outside and told him to come and see that Chepsergon was about to die.

When Kibunga came, Silonge told him to pay him his balance of money. It is Silonge who asked for his balance of the money for Gogo. Silonge got his balance and left.

Kibunga and Kilelio were left in the house. Chepsergon was asleep in the house. He was vomiting. I was in the house. Gogo had after giving his balance to Silonge, gone out of the house. It remained the 4 of us Kilelio, Kibunga, myself and Chepsergon. When they started singing I left. It was Kilelio and Kibunga who were left in the house with Chepsergon. Kilelio was the one singing and Kibunga told Chepsergon to say hallo his (Kibunga’s) uncle when he left. The uncle was called Usiabu this was about 2.00pm. I asked Kibunga who Usian was and he did not tell me. I left and went outside. Later Kibunga and Kilelio also left passing by the kitchen.

I went back into the house and Chepsergon told me that if he had not taken the beer he would not have vomited.

Before the two left, Chepsergon had asked for water and Kibunga gave him something from the finger for which they were taking Busaa before they had came out of the house. The jug had Busaa when Chepsergon had brought it into the house. When he asked for water he was given something from the same jug. He was not able to drink.

Chepsergon continued to vomit saying that if he had not taken the Busaa he would not have vomited. He just stared at me without talking. I went out of the house and went to the back of the house. I saw Kibunga, Kilelio and Silonge behind the house talking. I went back to the house and started preparing food.

As I prepared to light fire, Gogo told me that not to light a fire in that house so as not to distract Gugo and she referred me to another house. I went to the other house to start the fire. I put vegetables on the fire and told Gogo that I wanted to go to my uncle’s house.

I went back to Gogo’s house after lighting the fire, I found Chepsergon alone in the house. He was a sleep vomiting. I spoke with him and he asked for water. When I gave him he did not take the water and he did not speak to me. He said he was feeling cold.

Gogo gave me a blanket and I prepared a bed on cow hide. Before this he was lying on the floor. He was not able to move to the cow hide and I moved him where he lay on the floor. Gogo had came and given me a blanket, it was then that I left to put the vegetables on fire.

I did not live at Gogo’s house and I had just came visiting. I went after telling gogo that I wanted to go to uncle’s house. On that day Gugo had gone to centre. He came after I had come from my uncle’s place. I came back to gogo’s place at about 5.00pm. Guga came about the same time from the center.

Gugo asked why we had put a fire in the other house. He asked Gogo. Gogo said Chepsergon had laid on the kitchen floor. Gugo went into the house and tried to talk to Chepsergon. Chepsergon did not talk to him.

I went back to my uncle’s to see after supper and slept there. At about 5.00am in the night, I heard people screaming. I came to Gogo’s home and heard people say that Chepsergon had died.

Silonge, Kilelio and Kibonge are the accused.

I see Kibunga and Silonge. Kibunga is the first one and Silonge is the second one. They are the ones who were with Chepsergon on that day.

Cross examination by Mr Kipkenei for the accused

I am in class 7. I am 16 years. I repeated classes in school. I repeated class 3 and 4.

I went to school at age 4. In school I play football. I know drama. I do not play drama. I only play football.

I school at [Particulars Withheld] from nursery to class 4. I then went to a school near home. The Head master is JK. I attend [Particulars Withheld] church. I am in Sunday school. I know the duty to tell the truth.

It is good to tell the truth. If you tell untruth. It is wrong.

I recorded statement at Olkokwe. I recall what I said in the record.

What I have said is in the statement.

I went to Gogo's about 11.000am. I found some people in the compound and in the house. I could not tell who they were in the house. I could only hear the voices in the house.

I did not tell gogo that I had seen someone put things in Guga's drink. When I wanted to kick the cup, it was because I saw him put things in the Busaa.

[Witness referred to his statement]

I did not read statement. It was written by Sarah. [witness is told that there is nothing in the statement about his kicking the busaa]

People had gone. Guga was outside the house when he went were we went to talking place.

I went to my auntie's place. I went by Chepsergon's house. I did not tell the wife to Chepsergon. I only told a young boy at the house. The name of the boy is Kiprono. He is at my age.

I told him that Chepsergon was unwell but he said that his grandfather is usually like that when drunk.

I did not know that Chepsergon was unwell and had allergies. I had seen Chepsergon many times as he passed by our place. I saw the accused Kibunga that day. Silonge, I used to see at the center. Kilelio house is next to school where I attended classes.

[Witness referred to his statement that there is not about putting thing in the Busaa]

The people did not fight when they are quarrelling. When I told Chepsergon not to drink he went on to drink. I only told him not to drink. He did not ask why, I told him not to drink.

It is true that the deceased ordered 3 cups of Busaa. I was not in the house at the time. it is not correct as recorded in the statement that I was inside the house.

[Witness statement is read out]

I told Sarah. I say the issue of Busaa is in the statement.

Kilelio is the one who gave the tobacco to the deceased. I was afraid to tell other people that Chepsergon had been given a different Tobacco.

I forgot to state to the court that the tobacco was in the containers as set out in statement.

I wish the court to rely on what I told the court today.

I saw the deceased's beard coming off. I did not record in the statement or tell anyone.

I was afraid of people. I did not tell the police.

Gugo told me that he would not have vomited if he had not taken Busaa.

He used to have his own tobacco. It was not Kilelio who called for help. I now recall it was Kilelio who called for help.

The deceased asked for water.

I took water in a small cup

[Court: Witness is argumentative when responding to questions by counsel, largely defensive.]

The two people were drunk- Kibunga and Kilelio.

I did not understand the statement by Kilelio that the deceased should say hallo to people in Usaibu. I did not tell this to anyone.

There was no other group of people drinking. I do not recall any of the people.

[Witness is referred to the statement on the issue of seeing the accused at the grave site]

I did not say that in court as in was not asked by the prosecution. I have told the truth.

[Statement indicates that the cow skin was given to the grandfather]

My grandfather told me to give him the cow skin. It was Gugo who brought the skin. I only put on the floor.

After I came from my auntie, I saw the deceased eyes growing big and staring.

The deceased was not taken to hospital. I did not tell anyone who take Gugo to hospital.

I went to Assistant chief who is my uncle. He was not in. his wife was there. I did not tell the wife about the incident. I was small and I did not know about the role of chief.

We have a mobile phone. Even the chief's wife has a mobile phone. I did not tell anyone about that I had seen.

My grand father came about 5.00pm and asked why we had lit a fire in the other house. I did not tell my grandfather what I had seen. I was afraid.

Wei Wei is Chepsergon, the deceased.

Mr Kipkenei

I will seek that the witness statement be produced before the court.

Reexamination

I did not write the statement. I told the police and the wrote. The two accused were at Gogo's house. They were with the deceased and Kilelio.

PW5: *I am Dr. Ngulungu. I am a pathologist works at Provincial General Hospital in department of Diagnosis and as registered Government pathologist.*

My qualifications are MCHB from University of Nairobi Medical pathology and post graduate diploma in forensic medicine from college of medicine of South Africa.

My duties under diagnosis services, laboratory work and forensic work, teaching medical studies and other staff.

I have post mortem report on a body of late Joseph Arap Chepsergon. I performed the post-mortem in Nakuru Public mortuary on 19/10/2015 at 2.00pm.

It was referred from Mogotio police station. body identification by Cyrus Chepsergon, Stanley Takaruni sons of the deceased.

History to ascertain cause of death following sudden death in a house.

I examined the body, I found that it was a body of a male adult of good nutrition and medium sized, height 120 cm.

The body showed a swelling which was discontinuous some areas showed putrefaction (decomposition) and other areas.

Post mortem was done about 3 days after death.

External examination

Body swelling on the abdomen and the upper extensions .rest of the body had no injuries even on dissection at the cutting up the body.

I opened the body and studied the organs. I began with respiratory systems. Anatomy extensively congested. On dissection free haemoglobin fluid freely with areas showing darkness. This is the result fluid in the lungs.

The head had swollen scalp.

On the brain a nervous system also showed swelling.

These are fractures of acute heart failure. The heart was normal appearing and the coronary system was normal. We sought to find out what the failure.

There was a suspicious of ingestion of toxic chemical. I took blood and nasal swab, liver, stomach contents and kidneys for examination at Government chemist.

Doctors do this for confirmation of diagnosis. We used the usual chain of custody through to the Government chemist.

*Later the Report showed that the results of what I ordered contained **heloperiphos** a chemical usually found in insecticides. They are chlorogenic inhibitors. It is where the muscle meets the nerve. When the part is inhibited the person get paralysis.*

Paralysis is mostly seen in involuntary muscles of intestines and the heart. The person get to blood pressure. Then the person has a heart failure.

The causes collapse of circulating and the person dies. I have a report which I personally signed and stamped. I pray to produce them as an exhibit before the court.

[Post mortem report exh.1]

[Autopsy report exh.no.2]

Cross examination by Mr Kipkenei for accused.

The report at the mortuary was the postmortem report. Autopsy report is after I got the Report of the Government chemist.

From the sample I had sent to the Government chemist, it was the contents of the stomach that led to the conclusion of the cause death.

Dissection in the stomach of the deceased was empty and the things left were scanty. There was only mucoid material.

Nasal swab

Cases of chemical toxication may also be administered from the nose. I did not get any findings that there was something that went through the nose. It was through the blood. It did not get through the nose.

The report on the nasal swab did not show anything. The materials in the stomach passed through the mouth.

***Allergic reaction on tobacco and Busaa.** It would just be a local nasal reaction. It is unlikely that allergy could cause tremor and death.*

Congestion of chest

The cause on the heart failure. It was caused by left ventricle failure which causes congest in the lungs.

There was a neuro-vascular blockage. It is not autopsy.

I have been registered for the last 10 years.

Decongestion of areas some faster than others.

There were some enzymes which were accelerating decomposition.

Beard is a sexual secondary characteristic. When are seen a beard we document adult. We record only the matters affecting diagnostics.

No physical injuries

No observation on the beard.

Reexamination

Nil.

PW6: I am Samuel Kipsang Kiplagat. I reside at Nyalebuch, Kisanana Division. I work as a casual labourer at Nyalebuch.

I knew the deceased. He was my neighbor. On the date that he died, I was far away at Mochongoi. I got information that the deceased had died while taking Busaa and Tobacco at the house of Barkok.

The deceased was my neighbor. In August 2015 I had gone to the family of the 1st accused to inform the 1st accused that his wife father had passed on. We were with John Rerimoi, the 1st accused who is deceased. I told John Rerimoi to tell his wife her father had died.

John Rerimoi told me that Wei Wei had bewitched him. Wei Wei is the deceased Arap Chepsergon.

John Rerimoi, Kelelwa, said he had obtain poison from crocodile at Lobi. He said he would sell a cow to buy the poison. He said he would use the poison to put in Arap Chepsergon Wei Wei's Busaa.

I told Wei Wei about the matter. After about 1 week, I went to Targok to drink Busaa. Targok is a grandmother in the neighbourhood. At Targok's, I found Kelelwa, the 1st accused, William Kiptoo, 2nd accused (pointing) and Simoin Changwony (3rd accused pointing). I went seeking to greet them.

Simoin said that I should not talk to him as I lived on the shamba of the deceased Chepsergon. Apart from the 3 people there were other persons in the house. The three were outside of the house.

I know Silonge and Kibunga. Kibunga is William the 2nd accused and Silonge is the Simon Changwony 3rd accused.

Silonge is the one who told me not to talk to him.

About 1996 Simon and the Mzee Arap Chepsergon had disagreed and quarreled. Simon had said that the Mzee had bewitched his goats. They called on elders meeting to resolve the dispute. The elders resolved the dispute. Simon told the elders that he would never speak to Arap Chepsergon.

I recall John Rerimoi had said he would use poison to kill Arap Chepsergon.

Simon had told me not to talk to him. I went to Arap Chepsergon and I told him that I had seen Simon, Kibuka and Rerimoi and it appeared they were playing him as I heard him saying they would poison him.

It is about 500 metres from Targok's house to Arap Chepsergon's house.

After I had told him that to go to Targok's house, I never went back to the Targok's house. I stayed for a short while later in the area and then went to Mochongoi. I went back to Targok's house afterwards.

When the deceased Arap Chepsergon died I was at Mochongoi, I learn from people that he died while drinking at Targok's house.

Cross examination by Mr Kipkenei for accused.

I am Samuel Kipsang Kipsang. That is how I have registered on my identity card. I have the identity card (gives the card to counsel for accused for inspection)

In the statement it is written that I went with another man to report to Arap Chepsergon. I met the other person on the way. I recall his name as Seronei. I do not know his other name. He is distant neighbour.

I went with the person to Kilelio, John Rerimo's house together with the men.

[Witness is referred to his statement]

Kilelio told me with another man that he would poison Arap Chepsergon Wei wei. The truth is that I met with the Mzee on the road near the house of Kilelio.

The statement is not correct. Maybe the one who wrote it was wrong. I usually sign my signature.

[Witness is shown his statement] with a thumb print. I am Samuel Kipsang Kiplagat the ID and mobile phone are mine.

The statement states that I went to inform my cousin about the death of my uncle. Kilelio told me that another elder that I came with him. he was going to bewitch Arap Chepsergon.

It is not true that I am lying. I said I met with Seronei. It may be sometime since it happened.

I now state that I was not with Seroney but I met on the road near Kilelio's house. I was not with him when Kilelio told me that he would bewitch the deceased.

I went and told Chepsergon of the place to kill him and Chepsergon told his wife.

I went to tell Chepsergon about 2 weeks after I learnt of plan. Chepsergon was not near us he had gone to see his wife in Laikipia.

There is a chief in the area. The chief is Richard Kurere. I did not tell him. I told the village elder, Arap Chepsergon. I never told anyone else.

Later after a week, I went to Targok's house to take Busaa that was the 2nd time. I was telling him.

Arap Chepsergon has children. They were my neighbours. I never knew their neighbours. I never called any of them. I decided to wait for the person himself rather than their children.

It is not true that we have placed to fix the accused. It is not a lie. I told the Mzee himself and not the wife. Mzee said that he would not go to Targok's house but later I got information that he had died at Targok's house. I was surprised that he went to drink there after I had warned him.

I was told that the deceased was with the 3 accused drinking at Targok. People practice witchcraft that I have never seen. People talk about witchcraft.

[Court: witness appears to avoid questions on witchcraft]

I knew Arap Chepsergon since 1992. I did not know that he had any sickness. He did not have any sickness.

I know Targok was a witness before the court. I only know the deceased did not have a sickness or allergy. Chepsergon did not have an allergy.

I know the deceased. Between me and Targok and the other witnesses, he was more of my friend as lived on his shamba. Targok lived further away. Arap Chepsergon drank Busaa most of the time at Targok's house.

We did not place anything. I was called to the police station from Mogotio. The others recorded statements at Olkokwe and I recorded my statement at Mogotio police station.

How did the police get to know you had information?

I think that the wife of the deceased had told the children that the deceased had told her what I told him his being bewitched.

Re-examination by DPP

I told the police officers what I knew and the police wrote. Mzee Seroney was with me. I found him near the house of Kilelio.

PW7: *I am Cyrus Chepsergon Takuruni. I reside at Nyalelbuch. I am a forest officer at Koibatek Eldama Ravine.*

I know the deceased. He was my father. On 18/10/2015 at about 4.00am. I was at work. I was called by my brother Francis Chepsergon. He told me that our father had died at the place where he had gone to take Busaa at the Targok mother of the area chief.

He said our father died on Saturday 17/10/2015. I called OCPD Mogotio on Sunday morning and he directed me to OCS Mogotio police station who asked me to go to the police station. OCPD gave me the number of the OCS. I came to the police station and I made my report to the OCS and he called the Investigating officer, Sarah.

We went to the place but before we got there we found Mzee Rerimoi. We went by Police car with Sarah, Investigating officer, OCS and i. we were almost getting there and we found the Mzee when we had been told had been drinking with our father.

John Rerimoi. I asked John Rerimoi to come with us in the vehicle as we had heard they were together. He boarded the vehicle and we went to Targok's house.

We found Targok, chief Johna Korir, William Kiptoo (2nd accused pointing) and other elders. There was also the father of William Kiptoo who is my uncle. William Kiptoo is the son of the brother to my father. We found the body in the Kitchen of Targok. It was covered with a blanket.

I saw the body. It had blood on the sides. I did not see any injury. It appeared that blood was coming from the mouth.

The OCS and investigating officer called the family members including William (2nd accused) and his father and the chief.

William explained that it was not the first time for the old man to vomit in the house and that he had been a previous occasion when he held mzee when he vomited.

I asked William whether Simion cherogony was present at the time because we were aware that they used to disagree even when we were in school. It was a grudge for almost 30 years.

William said Simion Changwany was there. The father t William Kiptoo said that Simion Changwony had quaralled with the deceased my father about a parcel of land. My father had told me that to graze in the lower part of the land.

William's father said that Simion had told my father that even if my father died his children feared him and they would not take any action.

William asked Simion Changwony whether Cyrus was his friend. Changwony answered it was true that Cyrus (myself) was his friend.

The body was taken to Nakuru Hospital. There was no arrests at the time.

Post mortem was done on 19/10/15. I was at the Post mortem together with my brother Stanley Tarkuruni and a police officer of Mogotio.

I identified the body as belonging to the deceased my father.

Cross examination by Mr Kipkenei for the accused

I have worked as a forest officer for 15 years. Almost 17 years.

[Witness is referred to statement]

That he was informed that father had been murdered.

I suspects that he had been killed because I got to know who were with him. My father was healthy. I concluded even before the investigations that if the persons mentioned were with him, they had killed him because of the long story

When I went Rerimoi, I ordered him to accompany us to go and found out what happened.

PW6 Samuel Kiplagat is known to me. He was here today. I have not read his statement.

Before my father died, I had got a report that there was a threat on him. There was a long dispute. I got the report of the threat to kill from my mother. It was after our father died. My father used to say they had disagreed with Simion Changwony.

[Witness told a witness said his father was drinking with the accused persons]

The enmity was still existing. Kibunga is a relative, Rerimoi only Simon Changwony was our father thought he was with relatives among friends.

It is not true that we created animosity story.

I lived with Simon Changwony 3rd accused at his home. He even told me that my father was a bad man. I lived with for 7 years. They still disagreed at the time. He never harmed me as we had not quarreled with him.

Kimangoi sickness. I am not aware that he had sickness. I do not drink. I do not know that my father had an allergy when he drank Busaa and Tobacco. I would be surprised that anybody testified that he had such an ailment.

Kipsang Kiyai (PW4). He did not tell me anything about my father's sickness. I have not read his statement.

I have not coached the witnesses. I never met the child witness. He was told by his grandmother to run away. I have not read his statement.

Postmortem. The doctor suspected poisoning. He told us that the poison had gone into the lungs. The lungs had been destroyed.

We suspected Rerimoi and others, the accused. We did not go to their houses to see whether there was such poison.

I do not have before the court anything to show the accused killed my father. My father had informed my mother that there were

people who planned to kill me with Busaa and tobacco.

We did not take samples of the busaa. People had thrown away the cups or busaa after the death occurred.

The woman who sold the Busaa should have also been charged. I became aware that the Targok was a friend of Rerimoi.

Re-examination

Nil

PW8: I am James Michael Welimo Bsc Chemistry from Egerton University, undergoing Masters in Chemistry at University of Nairobi. I am deployed at the Government Chemist Nairobi in the Forensic toxicology section.

My duties entail carrying out chemical analysis on post-mortem samples to determine whether they contain any toxic substances. I have worked for 15 years.

On 21/10/2015 for No. 87981 PC woman Sarah Bogoshi, the following samples were received.

1. Blood
2. Liver and kidney
3. Stomach and its contents
4. Nasal swab

The samples were sampled deceased Joseph Arap Chepserson. Accompanying post-mortem samples was exhibit memo form, in which it was desired to ascertain whether the samples had any toxic substances.

Upon examination by 3 different analytical methods: 1. ultra vires visible spectral autometry 2. Thin layer chromatography and 3. Gas liquid chromatography.

Upon considering the 3 analytical techniques a conclusion was needed which reads:

“Clorpyrifos and organophosphate pesticide was detected in the stomach contents of the deceased Joseph Arap Chepserson.”

Organophosphate pesticides are poisonous and may be harmful if ingested. No other chemical toxic substances were detected in the post-mortem samples submitted.

Report signed on 16/11/2015. We present as evidence.

That is all.

Court

Report on Government Analyst dated 16/11/2015 is marked P.exh no.3

Cross examined by Mr Kipkenei for accused

I have worked in stations other than Nairobi – Kisumu Government Chemist. I was there for 1 year. For 14 years I have been in Nairobi.

Stomach and contents means the bag that holds the food once ingested is the stomach and the content is what comes in the stomach.

The samples were recovered from police officers after post mortem. It is the police who submits to the laboratory.

I do not know who did the post mortem. It is not part of my work to know.

For the times where we have been invited to attend the government pathologist does the work and he is the one who decides the contents to submit the samples.

In some cases the samples are kept under refrigeration.

In this case, I cannot say the source. Even the police who is submitting provides identification. Apart from the police officer, no other person is included. We receive the samples from the police who are expected to have kept the samples well.

We did not get any poisonous substances in the nasal swab.

I am familiar with tobacco stimulant. It could have come out in the first analytical test. It could come out through the nasal swab. Under the first test, tobacco could have been detected.

I am familiar with Busaa traditional brew. Probably due to the equipment used, the alcohol content in Busaa which is very low is not detected. We did not detect the Busaa.

Chlorpyrifos is a pesticide. The only route that the pesticide could have gone is in ingestion through the mouth to the stomach. It cannot be said whether it came by food, drink, milk ...

Depending on the alcohol of the pesticide, it may take some time. If is not diluted it is a knock down. If diluted it may take some time.

How concentrated was the pesticide? And how long was deceased under the pesticide?

It is not possible to estimate how long the deceased could have stayed with the pesticide after ingestion. I cannot tell the court the concentration but it is spot in three layer chromatography the colouration and pigmentation was almost similar to the standard of the pesticide. A comparison of the pesticide correspond with the pesticide chloropyrifos. There was minimal, if any dilution.

Depending on the nutrition of the deceased, the chloropyrifos could be the probable cause of death. The chemical gives only a time before the victim succumbs. The pesticides stops the function of acetylcholine which coordinates the nerves transmission between the body parts when it stops. It stops the heart beat and the victim succumb.

[problem of deceased to develop convulsion after ingesting tobacco together with Busaa]

A mixture of tobacco which is stimulant activates metabolism in one's system and of this particular person has any other medical condition it may go higher. But for this particular person the deceased, I did not get any such finding

Tobacco plus Busaa cannot transform into the pesticide.

I have never heard of tobacco affecting a person to bring convulsion.

Re examination

A combination Busaa and tobacco cannot translate into a poison.

PW9: *I am 87981 PC Sarah Bokosh Naimayan. I am the investigation officer in this case. I am attached to DCIO Mogotio police station.*

On 18/10/2015 at 8.00am I was in the office and I was minuted a case of sudden death reported to the station.

We went with the OCS Mogotio C. I Githimji to Nyalelbuch and on arrival at the scene, there were 2 houses. One was unfinished and one of finished and in use.

The body was in the new house which was in use. He was lying besides the fire place and he had been covered by a blanket. I looked around surroundings and I did not find anything and the body had no physical injuries. He has no injuries. I enquired as to his name and I was told that he was Chepsergon and was nicknamed Wei Wei. Following investigations, I established he came to home belonging to Targok and Korir wife and husband on 17/10/2015 in the morning at 9.00am.

I was told by the witnesses that he had came and told them that there would be a chief's baraza set for 9.00am that day. He told Korir.

Korir went for the meeting and the deceased, the three accused and others together with the wife Targok who was selling the Busaa were left. There was also a grandchild aged 13 years called Kapkiyai.

We took the body to the mortuary and post-mortem was conducted. The pathologist directed further investigation and I was referred to Government chemist. I wrote an exhibit memo with 5 samples.

I sent to the Government chemist to establish whether there were any substances that caused the death. I submitted them on 21/10/2015.

From my investigations, I established that in August 2015, the 1st accused now deceased, had been given information that there was a father in-law who had died. When so informed he said that it was the deceased in this case who had killed him and he swore that he would kill the deceased in revenge and he would use poison which he would put in tobacco or alcohol and that he would sell his cow and use the money to buy the poison from the 2nd and 3rd accused.

The said witness had told the deceased that to go to where the 3 accused were to avoid being poisoned. However on 17/10/2015, the

deceased was on Targok's house and the 3 accused were present. They bought the alcohol Busaa together after drinking, the 3rd accused Simon Changwony Silonge started arguing with the deceased over a shamba and the accused told the deceased would die and there is nothing his children would do.

Later at 2.00pm, the deceased while drunk borrowed tobacco from the 1st accused who told him that he had a special tobacco for elders. He gave him and after taking the deceased developed convulsion and started vomiting. He was taken into the house and accused 2 Kibunga gave him water and wiped his face. He went on vomiting and the small boy Kapkiyai who was present was helping the deceased. The 3 accused left him when he saw he was getting seriously ill and they went their way.

We got the report from the Government Chemist and when we took it back to the doctor Dr Ngulungu, he said that the poison when taken in 24 hours after ingestion depending on whether it is put on food or drink.

Later I arrested 4 suspects, the 3 accused and the lady Targok. The lady was released later as there was no evidence to charge her. In view of the previous threat to kill and the fact that were drinking together and they had shared tobacco with the deceased. That is the reason I charged them with the murder of the deceased. That is all

I produce Exhibit memo form.

Court

Exhibit Memo form – Pexh 4.

Cross examined by Mr. Kipkeni for accused

I have worked for 13 years. I was at Migori, Ravine and Mogotio. Mogotio is my 3rd station. At Mogotio I have served for 5 years.

When I got the cause, I was 1 year at Mogotio.

[Whether witness acted on suspicion?].

I did my investigation. There is evidence in case.

I heard about, the tobacco. The body had no injury. I did not get any tobacco which was poisoned. I did not get any tobacco on the suspects. I took the contents of the stomach.

I have read the Government chemist report.

PW4 Afred Kapkiyai

I know the witness. Then I dictated what to say. NO.

I wrote what he said.

It is not true. He was not sure of what he saw. I could not write what he did not say.

He said the 3 accused were left with deceased.

I wrote the statement as I understood the witness.

Accused no. 1

He is the one who sent a witness to go and tell the deceased. The threat was not reported to my station. I got to know that area chief said there was land dispute between accused 1 and deceased.

The death was reported by Cyrus Chepsergon at Mogotio Police station.

Targok, the lady was arrested along with other suspects. The DPP found that the lady only helped in covering the deceased. We did recover any alcohol cups. The home was clear when we went. The 2nd accused (William) wiped the deceased's face.

[Put to witness that she brought wrong people to court]

They were accomplices of the murder, they were together with the 1st accused who threatened to kill the deceased.

At Targok's home is a drinking place. It was after 2 months and they are related. I cannot tell why the deceased died and heed the warning of threat to kill by the 1st accused.

It is not fabricated.

[pressure to charge the accused]

It is not true that I was pressured to charge the suspects. I investigated the matter and took exhibits to the Government Chemist.

Re-examination

Nil

Analysis of Evidence

4. Pursuant to sections 163 of the Evidence Act, the court permitted the request by the defence for production of the witness statement previously recorded by the eye-witness PW4 Alfred Chepsoo, which was put into evidence in original by the Investigation Officer in accordance with the procedure approved by case-law authority set out in Philip Durand, *Evidence for Magistrates*, 1969.

“Mr Kipkenei

I request for the production of statement by PW4 Alfred Kiyai Kipsoi.

Court

On request of counsel for accused the witness, PW9 is recalled sworn and produced the statement as follows:

I have the statement recorded by Alfred Kiyai Chepsoo dated 7/11/2015 at 13.00hrs at Olkoke Patrol base. I confirm that I am the one who recorded it from the witness.

It is signed by Alfred Kiyai Chepsoo and I. it is in handwriting. I have the typed version.

DPP

I close the prosecution’s case.”

5. The Prosecution’s case was that the three accused persons had while drinking traditional liquor namely Busaa with deceased introduced into his Busaa a poison and given him poisoned tobacco snuff both which led to his death a few hours later.

6. The eye witness testified that he had seen the 1st accused nicknamed Kilelio put ‘things’ into the Deceased’s drinking cup while the deceased had gone to fetch more liquor, an event not recorded in the written statement of the witness, which the Investigation Officer (PW9) vigorously defended as an accurate record of what the witness had told her, and that when the deceased had borrowed some tobacco snuff, the 1st accused had given the deceased a ‘special’ snuff from a different can than which he himself sniffed, creating the basis for tobacco poisoning.

7. The eye-witness account as to how the deceased was poisoned given by PW4 before the Court is radically different for the previously record statement in which the witness made no mention of 1st accused putting ‘things’ into the deceased’s drinking cup as follows:

“I do recall very well on the 17th day of October 2015 during morning hours at around 11.00am, I went to my maternal grandmothers place namely Targo and when I arrived there, I found many people from Nyalelbuch taking busaa within my grandmothers compound while others were inside the house.

*I saw the deceased one Weiwei in company of Silonge, Kibuga and Kilelio chatting while drinking busaa about 3 metres from the main house. Other people were also there drinking busaa. Then Kibuga and Kilelyo then went to sit near the kitchen about 5 metres from where the deceased and Silonje were and suddenly Silonge started an argument with the deceased about a farm which I heard – the deceased then telling him that he had his farm on the lower side hence should graze his cows there while he (deceased) would graze his cows on the upper side where his farm is. Then Silonge told the deceased and I quote **“why are you so proud of your farm and when you die, I will freely graze my cows in your farm and furthermore your sons are afraid of me that they would do nothing”**, then Kilelyo and Kibuga also supported Silonge’s words. The deceased and Silonge continued arguing about grazing of cows and the deceased told Silonge why he disrespects him while his sons don’t and they were pointing walking sticks at each other but I went inside the house to meet my grandmother.*

After a short while, the deceased came inside the house and ordered three cups of busaa from my grandmother and he was given one cup by my grandmother then since people were coming inside to order busaa, I decided to go out of the house and I saw the deceased join Silonge, Kibuga and Kilelyo who were manning his busaa which was half in kimbo container which is about 500gms but the one which he was given later was in a flowered metal cup and poured the busaa in the cup to the one that was in the kimbo container and drunk it but not all then the deceased borrowed Arap Sote some tobacco sniff but he told him that he did not have and Kilelo was sniffing tobacco then from a brown plastic container told the deceased one Weiwei that he had a special tobacco sniff for elders. Kilelyo then placed the brown plastic container back to his coat pocket and removed a white plastic container that usually for lotion and he gave him tobacco sniff from the said white plastic bottle not the one he had which was

brown in colour. *The deceased sniffed the tobacco and returned inside the house with the busaa that he had left and he was followed by Kilelyo and Kibuga. Kibuga came out of the house after about two minutes and went back to Silonge who was still seated outside.*

Suddenly, I heard Kilelyo calling Kibuga to help the deceased who was vomiting and I also followed Kibuga inside the house. I saw the deceased vomiting and watery mucus was coming out of his nose and I was told to bring water which I did and gave Kibuga who was then wiping the vomits from the deceased. My grandmother was also inside the house....”

8. And he could not have seen any one put ‘things’ in the deceased’s cup because he was inside the house with the deceased until he went out with him after he bought three drinks to allow other customers as recorded in the statement:

“After a short while, the deceased came inside the house and ordered three cups of busaa from my grandmother and he was given one cup by my grandmother then since people were coming inside to order busaa, I decided to go out of the house....”

9. PW6, Samuel Kipsang Kiplagat, a neighbour, testified that the 1st accused had told him that the deceased had bewitched him and that he would obtain poison from crocodile at Lobo and poison the deceased. The same witness testified that the 3rd accused had disagreed with the deceased sometime in 1996 when the accused had accused the deceased of bewitching his goats and an elders meeting was called to resolve the dispute. PW7, the deceased’s son testified to the dispute between the deceased and the 3rd accused over a piece of land which he said went 30 years back. On the material date when the four were drinking at the PW1’s home, the eye-witness allegedly saw the 3rd accused quarreling and coming to a near fight with the deceased over grazing area of land.

10. The eye-witness PW4 also testified to seeing the 1st accused and the 2nd accused at back of a house after the deceased had started vomiting when according to his recorded statement they chased him away. However, in the testimony before the court it was all the three accused persons who were at the back of the house.

11. The medical experts, pathologist Dr. Titus Ngulungu (PW5) and Government Chemist analyst James Micheal Chelimo (PW8) agreed that the cause of death was poisoning by organophosphate pesticide, identified as Clorpyrifos ingested through the mouth and that from the nasal swab taken from the deceased, there was no evidence of poisoning through nasal ingestion, therefore all but ruling out any poisoning through tobacco sniff as alleged in the prosecution’s case.

12. The charge against the first accused is of course terminated upon his death and the court does not pronounce on his guilt or otherwise. The testimony of the eyewitness as to the quarrel between the deceased and the 3rd accused and as to the 1st accused put ‘things’ into the deceased’s liquor and giving his special (read poisoned snuff) does not demonstrate any common intention between the three accused persons to cause the death of the deceased as would attract a finding of common intention or purpose within the meaning of section 21 of the Penal Code which provides as follows:

“21. Joint offenders in prosecution of common purpose

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

13. The allegation by the testimony of the eyewitness (PW4) that the 2nd accused had when asked for water by the deceased after he started vomiting given him something from the same jug that they had used to fetch the Busaa if meant to show an act of poisoning fails because from the eye-witness’ own previously written statement, it was he who gave the water to the deceased as follows:

“Suddenly, I heard Kilelyo calling Kibuga to help the deceased who was vomiting and I also followed Kibuga inside the house. I saw the deceased vomiting and watery mucus was coming out of his nose and I was told to bring water which I did and gave Kibuga who was then wiping the vomits from the deceased.”

14. The circumstantial evidence as to the 2nd accused and the 1st accused had apparently in celebration chided the deceased as he was dying, is not incompatible with any other reasonable hypothesis other than one of conspiracy to poison the deceased given that the accused were drunk having been drinking from 8.00am to 2.30pm as recorded in the eyewitness’s (PW4) statement as follows:

“My grandmother left us inside the house and at that time the deceased was vomiting and then the two men Kibuga and Kilelyo started singing a song and told the deceased bye bye and when he dies he should greet Kibuga’s uncle. I then immediately asked Kibuga which uncle was he talking about and he did not answer me. It was 2.30pm when the Deceased became weak and he fell down near the fire place and was lying on a cow skin that my grandmother used as a mattress then Kilelyo stood up and stared the deceased and also he looked at Kibuga suspiciously and he left and also Kibuga left while I was left with the deceased.”

It is noteworthy that the person who claims to have observed Kilelyo looking at the deceased and Kibuga suspiciously was PW4, at the time a 13-year old child. It is not safe to infer a common intention from this evidence.

15. The 3rd respondent is shown only to have quarreled with the deceased about the user of a piece of land and no evidence on putting anything into the deceased’s drink or giving him any snuff, and could only have been implicated by common purpose principle yet the circumstantial evidence of his leaving the Busaa den after learning of the deceased’s sickness is not exclusively inculpatory, as recorded in statement of the eyewitness PW4:

“While in the house, Silonge [3rd accused] came and ordered more Busaa but when he saw that the deceased was vomiting, he told my grandmother to give him back his money and he hurriedly left after he was given back his money.”

16. The only piece of concerted act between the three accused was in the testimony of the Investigation Officer (PW9) that from her investigations the 1st accused had intimated that he would poison the deceased by poison bought from the 2nd and 3rd accused, as follows:

*“From my investigations, I established that in August 2015, the 1st accused now deceased, had been given information that there was a father in-law who had died. **When so informed he said that it was the deceased in this case who had killed him and he swore that he would kill the deceased in revenge and he would use poison which he would put in tobacco or alcohol and that he would sell his cow and use the money to buy the poison from the 2nd and 3rd accused.”***

17. However, the witness PW6 who said he had been told by the 1st accused of his planned poisoning of the deceased did not so testify, and the court must wonder where the Investigation Officer got her information linking the 2nd and 3rd accused to the alleged poisoning by the 1st accused. PW6 only said:

“The deceased was my neighbor. In August 2015 I had gone to the family of the 1st accused to inform the 1st accused that his wife father had passed on. We were with John Rerimoi, the 1st accused who is deceased. I told John Rerimoi to tell his wife her father had died.

John Rerimoi told me that Wei Wei had bewitched him. Wei Wei is the deceased Arap Chepsergon.

John Rerimoi, Kilelyo, said he would obtain poison from crocodile at Lobo. He said he would sell a cow to buy the poison. He said he would use the poison to put in Arap Chepsergon Wei Wei’s Busaa.”

If indeed, the two accused persons had sold the poison to the 1st accused, it must be shown that they knew the purpose for which the poison was intended.

18. The deceased’s son PW7 on cross-examination expanded the list of suspects and thereby creating a doubt as to the culprits when he said-

“The woman who sold the Busaa should have also been charged. I became aware that the Targok was a friend of Rerimoi.”

19. The deceased’s wife PW3 testified that her husband had told her that there were people who had threatened to kill him and that he “named three people Kilelio, Silonge and Kibunga”. It is wholly unlikely that the deceased who knew the three to be seeking to kill him would have drunk Busaa in their company. PW6 also said that he had warned the deceased about the threat on his life and asked not to drink with the three. Why did the deceased ignore the threat to kill and proceed to have a long drink with the three of whom he had been warned? It would appear that the deceased had by the testimony of PW4, the eyewitness minor, gone for three drinks, apparently for himself, Kilelio and Kibunga with whom he was drinking having bitterly quarrelled with the 3rd accused over grazing land. There is more than a reasonable doubt in the Prosecution case as to how the deceased met his death.

20. The court minuted in its record of proceedings its observation as to the demeanour of the eye-witness PW4 that-

“Court: Witness is argumentative when responding to questions by counsel, largely defensive.”

21. The court is on the evidence left with a verdict that although the deceased was shown to have been in bad terms with the 1st accused and 3rd accused, there was only suspicion that the accused had when drinking in the same home as the deceased on the material date conspired to cause his death by poison. The only person alleged to have put things into the deceased’s drink and given him suspected poisoned snuff was the deceased 1st accused. The evidence of such conspiracy not being cogent, the court is not able to convict the two remaining accused persons. The 2nd accused may, if he did so, only given water to the deceased when he asked for water after he started vomiting and the 3rd accused may even after quarrelling with the deceased over the grazing land not pursued the matter to cause or plan with the other to cause his death. I agree with the submission by the defence that there is no evidence to link the two accused persons with the death of the deceased. The principle that suspicion no matter how strong cannot found a criminal conviction applies to the circumstances of this case.

Conclusion

22. The court has considered the submissions on no case to answer made by the counsel for the accused and the evidence presented by the Prosecution and, respectfully, finds that no *prima facie* case has been established within the meaning of test for the existence of such a case set out in *Trambaklal Bhatt v. R* (1957) EA 332. It would be unsafe to convict on the state of evidence adduced before the court, and consequently, in accordance with the principle in *Murimi v. R* (1967) EA 542, the court is under a duty to acquit the accused persons.

23. Accordingly, in accordance with the duty of the trial court under section 306 (1) of the Criminal Procedure Code, the court shall, therefore, **record a finding of not guilty** and acquit the accused of the charge of murder contrary to section 203 as read with 204 of the Penal Code.

ORDERS

24. For the reasons set out above, I find that the Prosecution has **not** established a *prima facie* case to warrant the calling on the accused to make their defence in accordance with section 306 (2) of the Criminal Procedure Code.

25. Consequently, pursuant to section 306 (1) of the Criminal Procedure Code, the court records **a finding of not guilty** and the two accused are acquitted of the charge of murder contrary to section 203 as read with 204 of the Penal Code.

26. As the accused persons were out on bond, there shall, therefore, be an order for the immediate release to the depositors the security for their respective bonds.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF MAY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kipkenei, Advocate for the Accused.

Ms. Macharia, Ass. DPP for the Respondent.