

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 52 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

EDWIN KIBIWOT CHERUIYOT.....RESPONDENT

RULING

EDWIN KIBIWOT CHERUIYOT is charged with the offence of Murder, contrary to *Section 203* as read with *204* of the *Penal Code*.

The particulars of this offence are that on the 21st day of September, 2009 at Barageywet village in Nandi North district within the Rift Valley province, the accused murdered *Eliud Kipruto Kibitok*.

The prosecution case is that PW-3 in this case is the mother to the deceased one *Eliud Kipruto Kibitok*, and also to PW-4 and PW-5. On 21st September 2009 at around 8.00 a.m PW-1 was in company of the deceased, PW-2 and one *Paul Korir*. PW-2 is the son of *Paul Korir* and they were at their home where they were constructing a house. There was a time when the deceased and one *Kipkemboi* left briefly and went towards the river where beer was being sold and returned to the scene after about 30 minutes. At lunch time *Judith Korir* served them with lunch under the shade of a tree. They ate it and continued to chat. The deceased had sat between PW-1 and PW-2. The accused appeared at the scene armed with a panga. Without uttering a word he attacked the deceased, cutting him with it from behind. Those present screamed, attracting other neighbours to the scene. The accused escaped, leaving the weapon of attack behind, blood stained. The chief called the police. The police went to the scene and collected the body. They took it to Kapsabet District Hospital mortuary. On 23rd September, 2009 PW-4 and PW-5 identified the body at Kapsabet district hospital for post mortem.

The prosecution, from the foregoing reached point, were not able to avail any other witness and closed their case on 4th December 2018. It is therefore upon this court to determine whether a prima facie case is established against the accused person, so as to warrant him be placed on his defence. The cause of death to a deceased person, in line with any other available evidence, is established beyond reasonable doubt by the reliable and admissible evidence of a post mortem report. In this case, though clear that postmortem was conducted on the body of the deceased on 23rd September 2009, the doctor who performed it was not called as a witness and nor was the investigating officer, during the entire period of 9 years of which the accused underwent trial. Though the evidence of PW-1, PW-2 and PW-3 strongly suggests the attack by the accused to the deceased by use of a panga led to his instant death, such is not ascertained in absence of a post mortem report as to the actual cause of his death. The prosecution have therefore failed to ascertain beyond reasonable doubt that it is the accused who killed the deceased. As such, a prima facie case is not established by the prosecution and the accused is accordingly acquitted of the offence of murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code*, under *Section 210* of the *Criminal Procedure Code*. He is hereby set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of March 2019.

In the presence of:-

1. The accused
2. Ms. Mokuu for state /prosecutor
3. Mr. Mwelem- Court Assistant