



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 6 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

DAN WANGILA.....1ST ACCUSED

JAMES KIPKEMBOI.....2ND ACCUSED

RULING

DAN WANGILA and *JAMES KIPKEMBOI* are charged with the offence of Murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

The particulars of this offence are that on the 10th day of September, 2011 at Road Block Estate in Uasin Gishu district within Rift Valley province, the two accused persons, jointly with others not before court murdered *Kenneth Kipsoi Cheptot*.

The prosecution case is that on 10th September, 2011 at about 3.00 a.m PW-2 who is a matatu driver got to Eldoret from Nairobi. Two passengers alighted at Eldoret and he headed towards Kitale. When he got to Road Block, one passenger said that he was hungry. There was a hotel on the right side of the road. PW-2 parked the vehicle on the left side. He alighted and opened for the passenger. He then saw three men chasing another on the right side of the vehicle. The one being chased had blood on the face. The vehicle door was open and the injured man dashed inside for safety. PW-2 went to the door to safeguard him. The assailants attacked him too. One of the assailants was referred to as Wiki. They picked his phone, a Nokia 1209. PW-2 ran and hid. After a while a police vehicle appeared and stopped near the matatu. He went back there. He noted all passengers had ran into the hotel. Police had a dog. Using it they were led to where the deceased's body was. The deceased is the man who had sought refuge in the vehicle. There was electric lights in the hotel and the vehicle headlamps were on. The witness was able to see the assailant to an extent that he could identify them if he saw them again.

The autopsy was carried out on the body of the deceased on 14th September 2011 by PW-4 at Moi Teaching and Referral Hospital mortuary. The doctor noted that the body face was bruised and had several small lacerations on the face, the largest been 3 x 1 cm. There were multiple fractures of facial bones and small bruises on the elbow. On internal examination he noted the skin covering the skull had bruises. There was smell of alcohol within abdomen tissues. There was also intensive bleeding in the area covering the brain. He was of the opinion that the cause of death was intracranial haemorrhage due to severe head injury, due to blunt force trauma. He thus filled the post mortem form of which he produced in court as an exhibit.

At this point the prosecution were not able to avail any other witness and closed their case.

This court must now determine as to whether a prima facie case is established against the accused persons so as to warrant them be placed on their defence.

The crucial evidence that need be carefully weighed is of PW-2, the only eye witness in the case, who claimed to had identified the assailants. Upon his cross examination by *Ms. Orina*, the advocate for the 1st accused person, he disclosed that in his statement to the police he alleged that the assailants were five. He also stated that he was also attacked and did not see properly. Though he alleged one assailant was slim, another short and the third one stout; such was not in his statement to the police. He accepted that he never described the assailants to the police. The police did not also conduct an identification parade.

On cross examination by *Mr. Chepkwony*, the Advocate for the 2nd accused person, he disclosed that he had not known the assailants before then.

The foregoing evidence shows that the evidence of PW-2 is of identification of the alleged assailants rather than recognition. PW-2 did not

describe the assailants in the O.B and in his statement to the police. The description he gave in court during cross examination that one was stout, the other slim and another short, are very general and would apply to many persons, and can hardly lead to any specific given person. The way he described the crime scenario, reveals he could hardly see clearly the assailant to a point of their correct identification. He agreed he was also attacked and could not see clearly. The prosecution did not disclose how the accused were traced, connected with the offence and arrested. PW-2 stated one of the assailants was referred to as *Wiki*, and none of the two accused persons is alleged to go by that name. PW-2 identification of the accused at the dock, amounts to dock identification which is worthless. The court so found in the case of **John Wachira Wandia and Another vs Republic (2006) eKLR** where it stated:-

***“.....the court has on several occasions reiterated that dock identification without an earlier identification parade is almost worthless*”**

The evidence of PW-2 cannot therefore be relied on to conclude that it is the accused persons, together with another not before court, who assaulted the deceased person, leading to his death, and are therefore the ones who killed him. As such the entire evidence fails to establish a prima facie case against the accused persons, and are accordingly acquitted of the offence under *Section 210* of the *Criminal Procedure Code*.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 24th day of April, 2019.

In the presence of:-

Miss Jerono holding brief for Miss Orina for the 1st accused person

Miss Wanguchu holding brief for Mr. Chepkwony for 2nd accused person

Mrs. Fridah Mwanza for state /prosecutor

Mr. Etyang- Court Assistant