



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CRIMINAL CASE NO. 13 OF 2017**

**REPUBLIC.....PROSECUTOR**

**=VERSUS=**

**BENSON KIPNGETUNY BOIYWO.....ACCUSED**

**RULING**

1. This is a ruling on a submission of no case to answer for the charge of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the Charge dated 12<sup>th</sup> February 2013 were that:

**“Benson Kipngetunyi Boiywo: On the 7<sup>th</sup> day of February, 2013 at sabor sublocation, Kimalel location in Marigat district within Baringo court murdered Vitalis Masai.”**

2. The Prosecution case is built on the alleged confession by the accused to PW1 who testified in full as follows:

**Pw1 adult male christian sworn and states in kiswahili**

*I am Alex Kangogo. I reside at Sabor, Kimalel sub-location. I work at a butchery. In 2013, I was at school at Sabor secondary school. I was in form 2.*

*On 7/2/2013, we left prep studying at school at 10.00pm. We were headed home with **Edwin Kiprof Kipchumba**. We went home. It was about 30 minutes walk. We lived in the same house. We school together. **We slept and after 15 minutes, somebody knocked on the door. I opened the door. It was Benson Kipngetunyi. I knew him. He lived at Ngetmoi. It was far from our home. He had blood on nose and the shirt. I asked him what had happened and he said he had got drunk and fallen. It was heading to 11.00pm. I could see the blood by use of torch light which I had with me. I went with Benson to Bed and he told us that he had killed someone. He said he would show us where the body was. He took us to a place in the shamba. The body was in our shamba about 50 metres from the house. I saw the body. We stayed about 2 metres away from the body. He told us it was Masai Vitalis, a person I did not know. Benson asked us to take the body into the bush. We refused to carry the body and he dragged himself.***

*We stayed aside but we could see him drag the body. We saw where he dragged the body. He later came and left on the road to Ngetmoi where he lived.*

*We went to our school and told our school watchman. It was because he had told us not to tell that we feared for our safety and therefore not report to the school watchman. His name is David Sergon. We told him what happened and he referred us to the Assistant Chief. We went with Edwin and the watchman to the Assistant chief Joseph Cheruiyot.*

*We told the Assistant Chief who told that he would talk to the police about the matter. We went to sleep at Josephat Kiptu’s house, the watchmen went back to his place of work.*

*On the following day, the police came. We had gone to school as usual. The police came. We were asked to record our statement on Saturday 9/2/2013.*

*The person who came with blood on his nose is the accused in the court. (Witness identify the accused person).*

**Cross examination by Mr Miyenda for accused**

I am also Kandagor. I have taken out an identity card. **I am 20 years old.** I was the one with the torch on the night when the accused came into the house.

(Witness referred to his statement)

I confirm that the statement is signed by me. The statement is mine. It is original. I did not minute that I had a spot light torch. **The accused told us that he had killed a person, we did not know about happened leading to the killing. We were at school so we cannot tell whether they had fought or where it had occurred. It was at night. We did not go to the place where it had occurred. We also cannot say whether the person was killed by other persons.**

The body was dragged outside our shamba. I did not record that the body was dragged into our shamba. The body was dragged to a bush outside our shamba.

I did not know the deceased person Vitalis. It is not true that I have told lies. What I have written in the statement is the truth.

#### **Re-examination by Ms Macharia**

The statement was written for me by a police officer. I would tell him the events and he would record.

I saw the accused using a torch. I had a torch. We went to where the body was. **The body was on the ground in my father's shamba. When the police came the body was at a forest where the accused had dragged it outside our shamba.**

The statement is truth. What I told the court is what I told the police. It is the police who were writing the statement.

3. **PW2**, David Sergon, the school watchman at Sabor secondary testified that-

**"On 7/2/2013 at 11.45pm in the night, I was at my house neat the school. I had finished my shift. At that time my colleague was on duty. As it went towards midnight, I was called out by two students who I recognized as Alex Kangogo and Edwin Kiprop Kipchumba. They told me that when they got to the house somebody that came to him and told them that he had killed a person. I went to the Assistant chief with the 2 students. When we went to the assistant chief, the students explained what happened to the chief. The chief told us the he would deal with the matter next day."**

On Cross examination by Mr. Miyenda he confirmed that "I do not know his other name. I do not know who killed Vitalis."

4. **PW3**, Solomon Cheboiywo the accused's brother testified merely that "on 10/2/13 I was asked by the assistant chief Joseph Cheruiyot to escort my brother to police station to record a statement as he was a suspect in a murder case" and confirmed on cross-examination that he did not know how the deceased was killed.

5. **PW4**, Joseph Cheruiyot, the area Assistant Chief, Sabor sub-location recalled that –

**"On 8/2/2013 at 1.00am, I got a report from 2 students and a watchman that a person had been killed in the area. The person who had told me he was David the watchman and 2 students. I know one of the students. They are residents of the village. They told me that a person had been found murdered in their area. They told me that a person had been killed. I went to the area in the morning. I found the body. The body was at a place near the house where the students lived. The body had injuries on the neck at the back. I also saw a knife. The knife belonged to the deceased as I had seen him with it. I had seen the young man. He used work casual, I even had given him assignments. I did not know the name. I was told by David that it was the accused who killed the deceased. I reported the matter to the police station and later recorded my statement."**

6. On Cross examination, the Assistant Chief said-

**"The body was near the house of the students. The body was about 20 metres to 30 metres (counsel agree at 30 metres). The house where the students lived is a house belonged to a police officer who worked in Mombasa. He is a village member. I found a knife. It belonged to the deceased. I knew him as I had given him some jobs at my home. The knife was about 5 metres from the house. The police took the knife. I cannot tell who killed the deceased. I was only told of the incident."**

7. **PW5**, Morris Masai Kiprop, the father of deceased Vitalis Kiprono, was at Eldama Ravine on 8/2/13 leaving work at 6.00 p.m when he met some village elders from Eldama Ravine who told him that his son had been killed and that they did not know who had killed him, and they had escorted him to his house to comfort him fearing that the would be affected by the incident. On 12/2/13 he had gone to mortuary at Kabarnet and identified his son's body and postmortem was done. He confirmed that he did not know how the deceased was killed but that he was told that the accused is the one who killed the deceased and he did not know the accused before the incident.

8. **PW6**, Dr. Mwangi Oscar, a Medical Officer, from Kabarnet District Hospital presented a post-mortem of Vitalis Kiprono Masai which was done on 14/2/13 at 3:00 pm at Kabarnet District Hospital by one Dr. Odira who had since been transferred from the Hospital. He said that the result of the examination was that the cause of death was:

(1) *Inter –cranial hemorrhage inside in the head secondary to head trauma.*

(2) Hemorrhage for the ruptured aorta and pulmonary artery, secondary to penetrating chest injury.”

9. On cross-examination, the doctor said –

“I cannot tell what caused the injury from the Report. The deceased could have died on date of death is indicated as 7/2/13. Post Mortem was done on 14/2/2013.”

10. PW7 Sgt Judas Kirimi, the investigation officer then based at Marigat Police station testified that –

“On 8/2/13 I was called by Assistant Chief Sabor Sub-location who informed me that he had found a body of an African male with injuries in a forest and he was dead.

I took one police officer PC Maina and we went to Sabor. We went to the scene and established that the body had a cut on the chest and other injuries on the body. **The area appeared disturbed and it was clear there had been a struggle.** I interviewed the area residents **and 2 students who lived near the area told me that one youth who is the accused went to their house with blood on his shirt and asked for water and he looked frightened.** I perceived the accused as a suspect. We look the body and asked the chief and residents to alert the chief and police when the accused was found... **The scene had signs of struggle. There were marks of pulling of the body upto the point it was found. The deceased was identified by the family and the residents. The two the deceased and the suspect were youths who frequented the area.**

11. On Cross-examination, PW7 conceded that -

*It is true I have not stated in the statement that I interviewed the 2 youths. It is my evidence that I interviewed the 2 youths. I forgot to include it in the statement. **Assistant chief gave me the report of the incident. He said he was the report early that morning by members of the public. I am not sure whether it was during the night or that Monday that the killing happened. The chief was present when the 2 youth told me about the suspect. He herself did not tell me that he knew the culprit. The youth Edwin and Alex told me they suspected Benson, the accused.** They told me Benson Boiywo went to the house to seek water with blood on his clothes. They said he had gone to seek water and he had blood on his clothes. (Referred to statement) **I did not write that the person Boiywo was said to have blood on his clothes**”.*

## **SUBMISSIONS**

12. The Counsel for the accused filed written submissions and the Counsel for the DPP urged the court to consider the evidence presented before it in determining the question of case to answer.

## **DETERMINATION**

13. For determination is the central issue whether on the evidence presented by the prosecution there is established a *prima facie* case to warrant the calling of the accused to make his defence in accordance with section 306 of the Criminal Procedure Code, which provides as follows:

### **“306. Close of case for prosecution**

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, **if it considers that there is no evidence that the accused or any one of several accused committed the offence** shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, **record a finding of not guilty.**

(2) When the evidence of the witnesses for the prosecution has been concluded, **the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court,** either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

(3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.

[Act No. 33 of 1963, First Sch., Act No. 20 of 1965, s. 33, Act No. 5 of 2003, s. 86.]”

### **The accused’s Confession**

14. The accused alleged confession to the witness PW1 that he had killed someone was not processed and taken as required by the section 25A of the Evidence Act as to make it valid evidence against the accused. The relevant Sections 25 and 25A (1) of the Evidence Act is as follows:

### **“25. Confession defined**

A confession comprises **words or conduct, or a combination of words and conduct**, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

### **25A. Confessions generally inadmissible**

**(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice."**

15. It is unusual that a person who had only shortly before lied to PW1 that his blood on the nose was from a fall while drunk turn around shortly thereafter and give a full-blown confession of having killed someone. More significantly, however, the accused's alleged confession on **7/2/2013** to PW1 then **a minor aged 16 years** as he testified that he was 20 years old when he testified before the court four (4) years later on **16/3/2017** is not a valid confession in law for purposes of proving the truth of the alleged statement that the accused had killed someone. Moreover, although testifying as an adult, the events that he recounts appeared to him when he was a minor, and it may also be unsafe to rely on the recollection of a person of events that took place four years earlier when he was a child and impressionable. The statement on alleged confession must be rejected as invalid and unsafe to convict on, the confession having not been taken with the usual safeguards of section 25A of the Evidence Act set out above. What remains of the prosecution case is the interpretation of the circumstantial evidence implicating the accused apart from the alleged confession.

### **Circumstantial evidence**

16. As I observed in **Noah Kipkosgei Kiprop v. R**, KBT HCCRA No. 159 of 2017 -

*22. The cardinal principle of circumstantial evidence, such as sought to be relied upon here, is that evidence must be inexplicable on the basis of any other hypothesis other than that of guilt on the part of the accused, or as elegantly put in **R v. Kipkering Arap Koske** (1949) EACA 135 that -*

**"In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt".**

*See also **Sawe v. R** (2003) KLR 364 and **Ndurya v. R** (2008) KLR 135.*

17. The circumstantial evidence of the accused going the house of PW1 in the night with bloody nose and shirt and the recovery at the scene of a knife five metres from the house by the Assistant Chief (PW4), which knife the witness confirmed belonged to the deceased whose body was 20 -30 metres from the house, and the evidence of the Investigating Officer (PW7) that the scene had evidence of struggle and the medical evidence that the cause of death trauma to the head and rupturing of the aorta does not establish the guilt of the accused for the offence of murder as charged to the exclusion of any other reasonable hypothesis.

18. The circumstantial evidence herein does not rule out a possibility that the deceased armed with his knife were fighting (which PW1 and the evidence of a struggle as testified by PW7 did not rule out) with the accused and or with any other person and that he had been fatally injured in circumstances devoid of malice aforethought as to bring the killing, if perpetrated by the accused to one of manslaughter, or by any other person including the witness PW1 who confirmed that the body was initially in his father's shamba and only 20-30 metres from PW1's house according to PW4, before the accused allegedly dragged it outside the shamba, and that the deceased's knife was recovered according to PW4 only 5 metres from the house where PW1 lived with the other student. This is especially so when it is considered that the other youth **Edwin Kiprop Kipchumba** with whom the witness PW1 was all along the incident forming the basis of circumstantial evidence as testified to by himself (PW1), the watchman (PW2), the Assistant Chief (PW4) and the Investigating officer (PW7) was not called as a witness. The court is at liberty, in accordance with **Bukenya v. Uganda** (1972) EA 549, to infer that this witness who would have confirmed the events of the incident as narrated by PW1 was not called because his evidence if given would have been adverse to the Prosecution case.

19. The proximity of the body of the deceased at 20-30 metres and his knife at only 5 metres from the PW1's house which he shared with the other youth **Edwin Kiprop Kipchumba** makes his evidence crucial in the case. He may have confirmed whether or not there was anything he had observed as an occupant of the house so near to the scene of crime that would implicate or exonerate the accused.

20. Moreover, PW1 and his student friend **Edwin Kiprop Kipchumba** were in their house for **15 minutes** according to PW1 before there was a knock on the door and the accused with bloody shirt came asking for water (according to Investigating Officer PW7 and no one else). It was in the night getting to 11.00pm according to PW1, the students having walked for 30 minutes from about 10.00pm when they left their Prep study at school. No testimony is given as to whether they had heard or found any commotion or disruption on the outside of the house where the body of the deceased was found 20-30 metres from the house according to the Assistant Chief PW4 (and 50metres according to PW1) and the deceased's knife only 5 metres away and according to the evidence of the investigating officer in circumstances where there had been a struggle. It is simply unbelievable that the accused could have killed the deceased only 20-30 metres away from their house in a struggle involving fatal trauma to the head and rupturing of the chest without them hearing the commotion. If the killing had been accomplished before the PW1 and his housemate came home at about 10.30pm, it is unlikely that the killer would have waited for them to come home so that he could go and ask for a glass of water (only according to the Investigating officer PW7), not caring to conceal his bloody clothes.

21. In addition, the knife which the Assistant Chief PW4 testified to have recovered and handed over to the police, and the accused's bloodied shirt, if it were ever recovered, were not presented in evidence and or presented to Government Analyst for investigations. It would be wholly unsafe to convict on the state of evidence in this case, and to place the accused on his defence would be to unconstitutionally require him to prove his innocence or to incriminate himself by filling the gaps in the Prosecution case.

### ***Duty to acquit***

22. A trial Court is under a duty, as held by the Court of Appeal in ***Murimi v. R.*** (1967) EA 542, to acquit an accused if the Prosecution “*failed to make out a case sufficient to require the accused to enter a defence*” and further that such a case is made out when a *prima facie* case is established being “*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.*” See ***Ramanlal T. Bhatt v. R.*** (1957) EA 332, 335.

### ***Finding of the Court***

23. Having considered the evidence presented by the Prosecution to this court and having considered the submissions of no case to answer by the defence and response by the Prosecution, I consider that there is no evidence to prove to the required standard of proof beyond reasonable doubt that the accused murdered the deceased.

24. 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**

25. Accordingly, for the reasons set out above, I find that the Prosecution has **not** established a prima case to warrant the calling on the accused to make his defence in accordance with section 306 of the Criminal Procedure Code.

26. The accused is, consequently, acquitted of the charge of murder contrary to section 203 as read with 204 of the Penal Code, and there shall, therefore, be an order for his immediate release from custody unless he is otherwise lawfully held.

*Order accordingly.*

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF OCTOBER 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Miyenda & Co. Advocates for the Accused.

Ms. Macharia, Ass. DPP for the Respondent.