REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MURDER CASE NO.35 OF 2016

REPUBLIC.....................................PROSECUTOR

VS

DENNIS KIPKURUI BETT.................ACCUSED

RULING

1. The accused, Dennis Kipkurui Bett, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 31st day of October 2016 at Manyoro village, Kericho County, the accused murdered Victor Kiplangat Tanui.

2. The prosecution called 7 witnesses and produced a post mortem report in respect of the deceased. The evidence of PW1, Hilary Kiprono Bii, was that he had carried the accused, the deceased and a woman on his motor cycle from Brooke Trading Centre. The deceased and the woman had initially requested to be ferried, then the accused requested to be carried on the same motor cycle as he and the deceased and his companion were going in the same direction. The woman sat behind PW1, the deceased behind her, and the accused behind the deceased. They left towards their destination, Manyoror.

3. At a place called Tarpet, the accused asked PW1 to stop as he wanted to alight. PW1 did not get to stop as the accused stood up and the motor cycle lost control. The deceased asked the accused why he wanted them to be injured, but the accused did not reply. The motor cycle crashed with the deceased, his woman companion and PW1, but the accused did not fall.

4. The accused then stabbed the deceased with a knife, got hold of the woman, and pulled her, screaming, into the darkness. Before he left, he threw the keys of the motor cycle, which he had taken from PW1, back to him and told him to take the deceased to hospital. He left with the knife that he had used to stab the deceased.

5. The deceased was pronounced dead on arrival at Kericho Nursing Home, and the matter was reported at Kericho Police Station and Brooke Police Post. The following day, the accused called PW1 and told him that he wanted them to record a statement at the police station. He surrendered himself to the police.

6. The evidence of PW2, Julius Kiprono Bore, was that he was stopped on the road at Tarpet by PW1. He saw the deceased on the ground with blood on his body and sweater. He recognised him by the light of his motor cycle. He was informed by Kiprop that the deceased had been stabbed by the person who had been with PW1 on the motor cycle. PW1 used the nickname, ‘Molongi,’ which is the name that PW2 knew the accused by. PW2 then called a person who had a motor vehicle, and they tool the deceased to Kericho Nursing Hospital where they were told to take him to the mortuary.

7. Like PW2, PW3 came on the scene after the incident. He was stopped by PW1 and found the deceased lying on the ground. He recognised the deceased, whom he saw by the light of his motor cycle. He was told, with PW2, that “Molongi” had stabbed the deceased. He was among the people who took the deceased to hospital, where he was pronounced dead.

8. PW4, Wilson Kipkoech Cheruiyot, a cousin of the deceased, identified the body of the deceased on 2nd November 2016 at the Kericho District Hospital Mortuary. PW5 was the investigating officer, while PW6 was the scenes of crime officer who produced various exhibits in support of the prosecution case.

9. In the post mortem report produced by the last prosecution witness, PW7, Dr. Fibian Kosgey the cause of death of the deceased is indicated as severe internal haemorrhage due to cardiac and great vessel injury resulting from a stab wound to the chest. PW7 told the court that an external examination of the body showed a stab wound on the left anterior chest measuring 3x2 cm.

10. In his submissions on behalf of the accused, Learned Counsel, Mr. Mwita, submitted that the prosecution had failed to establish a prima facie case that would justify placing the accused on his defence. He noted that the knife that the accused person had used to stab the

deceased was not produced in court, the prosecution evidence being that the accused had taken it with him. Mr. Mwita's submission was that the knife was never presented to court as an exhibit, and there was no evidence before the court by way of affidavit to demonstrate why the murder weapon was not produced in evidence. Counsel relied on the decision in **R vs Fredrick Wakala (2016) eKLR** for the proposition that in the absence of a murder weapon linking the accused to the offence, the charge against the accused should fail. Counsel also relied on the decision in **R vs Charles Kibet** which he stated was to the same effect.

11. Counsel further noted that PW1 in his testimony informed the court that there was a female companion whom he knew very well, knew her residence and had carried her on his motor cycle on several occasions. He wondered why the said person was not called as a witness by the prosecution, yet she was the only witness who would have given evidence that corroborated or was contrary to the evidence of PW1. The submission from the defence was that the prosecution case was full of inconsistencies, the medical evidence could not be relied on as the witness was a general practitioner, that the prosecution case was based on circumstantial evidence, and the accused should not be placed on his defence.

12. In response, Ms. Keli submitted that the prosecution had established a prima facie case against the accused. The prosecution witnesses were consistent, reliable and credible, and a strong prosecution case had been made out. Ms. Keli submitted that the case was not based on circumstantial evidence as there was an eye witness to the murder, PW1. PW1 had testified that he had carried the deceased, the accused and a woman on his motor cycle; that the accused had destabilized the motor cycle when they reached a certain place, the motor cycle had crashed with the deceased, the woman and PW1, and the accused had then stabbed the deceased, and had disappeared with the woman. PW2 and PW3 had come along, and the deceased had been taken to hospital, where he was pronounced dead. PW1 had gone to the police station to make a statement, and had been informed that the accused had turned himself in at the police station.

13. I have considered the evidence before the court and the submissions of Counsel for the state and the defence. At this point, all I am required to do is to consider whether or not a prima facie case has been made against the accused that warrants his being placed on his defence. From the evidence, which I have set out in brief above, there was an eye witness, PW1, who was present when the accused allegedly stabbed the deceased. The accused was known to PW1, as he was also a motor cycle rider. Their colleagues, PW2 and PW3, also knew who he was when he was described as the assailant by PW1.

14. The defence has submitted that the fact that the murder weapon was not produced means that the charges cannot stand. I believe that there are other decisions, some binding on this court, to the effect that failure to produce the murder weapon in a murder trial is not of itself fatal to a conviction- see **Ekai vs. Republic (1981) KLR 569; Karani vs. Republic (2010) 1 KLR** and **Malindi Criminal Appeal No. 117 of 2014- Abdalla Hassan Hiyesa vs Republic.**

15. In the present case, I am satisfied that a prima facie case has been made out sufficient to warrant placing the accused on his defence. I am guided in this regard by the exposition of the law in **Ramanlal Trambaklal Bhatt vs R [1957] E.A 332 at 334 and 335** in which the court stated as follows with respect to what amounts to a prima facie case:

> ***"It may not be easy to define what is meant by a "prima facie case", but at least it must mean 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."***

16. I am also persuaded by the words of the court in **R vs Jagjiwan M. Patel and Others (1) T.L.R. (R) 85** in which the court stated that:

> ***"…..all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."***

17. I therefore place the accused on his defence in accordance with section 306 of the Criminal Procedure Code. I also inform him of his right under section 306 (2) of the Criminal Procedure Code to inform this court whether he intends to give a sworn or unsworn statement in his defence, and whether he intends to call any witnesses.

Dated Delivered and Signed at Kericho this 31st day of January 2018.

MUMBI NGUGI

JUDGE