REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL CASE NO.10 OF 2013

REPUBLIC.....PROSECUTOR

VS

JANE CHEBET CHEPKWONY &

KENNEDY CHERUIYOT.....ACCUSED

RULING

1. The accused, Jane Chebet Chepkwony and Kennedy Cheruiyot Ngetich are 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 22nd day of December 2012 at Ndarugu Farm in Londiani District within Kericho County, they jointly murdered Simon Kipsang Cheruiyot.

2. The prosecution called 8 witnesses and produced exhibits in support of its case. At the close of the prosecution case, Counsel for the State and the defence made submissions on whether or not the prosecution had made out a prima facie case to warrant placing the accused on their defence.

3. The position of the state as presented by Ms. Keli is that the prosecution has presented a water tight case and adduced strong evidence through its witnesses that justified placing the accused on their defence. Two of the prosecution witnesses, PW1 and PW2, were eye witnesses who testified that they had seen the 1st accused arguing with the deceased. The 1st accused had then started screaming and had rushed to her house, about 50m away. She had returned with her son, the 2nd accused. Both were armed, the 1st accused with a club and the 2nd accused with a cane. They used the club and the cane to assault the deceased as he lay on the ground. PW1 and PW4 testified that they saw the deceased bleeding profusely and they raised the alarm, causing the two accused persons to flee.

4. According to Ms. Keli, PW2, PW3 and PW5 all testified that they went to the scene in response to the alarm raised by PW1 and PW4. They found the deceased lying in a pool of blood, and there was a club fitted with a nut lying beside him. Their evidence was that he had multiple injuries on the head, which corroborated the evidence of PW1 and PW4.

5. The state further submitted that the medical evidence produced by PW7, the doctor, who testified on behalf of Dr. Oyoo, who performed the post mortem, confirmed the evidence of the witnesses that the deceased had multiple injuries on the head and cut wounds. The cause of death was severe haemorrhage as evidenced by epidural and subdural haematoma. A post mortem report was produced in respect of the deceased.

6. The evidence of PW8, Corporal Fredrick Ngunu the investigating officer, was that he had visited the scene and found the deceased with serious injuries on the head. He had also recovered the club fitted with a nut on the head, which he produced as exhibit no. 2. He also testified that this weapon, exhibit 2, was identified by PW1 and PW4, who were eye witnesses, as one of the weapons used by the accused to assault the deceased. According to the evidence of PW6, the arresting officer, the 1st accused was arrested from a neighbour's toilet where she was hiding after the incident. The 2nd accused was arrested in the Brooke area after he was identified by members of the public.

7. The state's submission was that the two accused persons had used weapons and force to assault the deceased, who was unarmed. The fact that the 1st accused went to call her son, the 2nd accused, who did not resist but joined his mother in assaulting the deceased, who had a relationship with his mother, showed, according to the state, that their intention was either to cause grievous harm or death to the deceased. Both the *mens rea* and *actus reus* had been established; the accused were well known to the eye witnesses, PW1 and PW4, and so the issue of their identity did not arise as they were recognised by the witnesses. The state's submission was therefore that a prima facie case has been established. Counsel relied on the decision in **Ramanlal Trambaklal Bhatt vs Republic [1957] EA 332** and urged the court to place the accused on their defence.

8. The response of the defence through Mr. Ngetich is that the accused persons strongly deny the charge against them and the evidence given by the prosecution witnesses cannot meet the threshold for conviction under the Penal Code. He submitted that the prosecution case was mired with contradictions; that the 1st accused is the mother of the 2nd accused, and that the deceased had come home drunk on the fateful night. He noted that PW1 had alleged that she heard screams from the 1st accused, which, according to Mr. Ngetich, meant that the 1st accused was beaten by the deceased. His further submission was that PW1, PW2 and PW4 are not credible witnesses.

9. Mr. Ngetich also took issue with the question of lighting. He submitted that PW1 had said that there are security lights which made them see what was happening outside. The evidence of PW2, a neighbour, was that there are no security lights in the compound. In his view, it is not possible to tell who was beating the deceased, as there were no eye witnesses to the assault.

10. Mr. Ngetich further questioned the failure by the prosecution to call the small brother whom PW4 said was in the house with her, and that they had watched the assault through the window as there was moon light. His submission was that this small brother should have been called to testify. The submission of the defence is that the state has not established a prima facie case and so the accused should not be placed on their defence. Counsel relied on the decision in **Nakuru Criminal Case No. 153 of 2000- Kokwony vs Republic.**

11. In her response, Ms. Keli maintained that PW1 and PW4 were eye witnesses and had seen from their house the accused assaulting the deceased. With respect to the contradiction on the lighting, the state's response is that whether it was security light or moonlight, the witnesses were able to see the accused assaulting the deceased and the inconsistency was not one that could not be cured under section 382 of the CPC.

12. With regard to the submission that PW4's brother should have been called as a witness, the state relied on section 143 of the Evidence Act which provides that no number of witnesses shall be required for the proof of a certain fact. Ms. Keli's submission was that the prosecution is free to call any number of witnesses as long as its case is proved.

13. Counsel noted, with respect to the decision in **Kokwony vs Republic** relied on by the defence, that the decision is premature at this stage as the authority is on a case where the murder case went for full trial, the defence of provocation was considered and the charge of manslaughter was substituted.

14. I have considered the evidence on record and the submissions of Counsel for the state and for the defence. I have also read the decisions cited by both counsel. With respect to the authority cited by the defence, I agree with the state that **Kokwony vs Republic** is not applicable at the present stage in these proceedings. All that the court has to consider is whether the prosecution has made out a prima facie case against the accused that warrants their being placed on their defence.

15. In the case of **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335** relied on by the state, the court stated as follows:

> ***"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. Similarly, in **R vs Jagjiwan M. Patel and Others (1) T.L.R. (R) 85** 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. In this case, the evidence indicates that there were two witnesses to the assault on the deceased, PW1 and PW2. They both knew the deceased and the accused. The deceased worked for them as a tractor driver, while the 1st accused assisted with household chores. They heard the 1st accused scream, and saw her run to her house within the compound, and return with the 2nd accused, her son. They were both armed, with a cane and a rungu with a metal bolt at the end, with which they assaulted the deceased. They only stopped and run away after the screams of PW1 and PW4 attracted neighbours.

18. The post mortem report was produced by PW7, Dr. Kibos Ezekiel. His evidence was that the cause of death of the deceased, who had multiple cut wounds on the head and a fracture of the parietal bone, was severe bleeding as evidenced by epidural and subdural haematoma secondary to the cut wounds on the head after assault.

19. Having taken into consideration the evidence before the court, I am satisfied that the prosecution has made out a prima facie case to warrant placing the accused on their defence. At this stage, I am not required to decide whether or not the evidence before me is weighty enough, if believed, to prove the case beyond reasonable doubt. This determination can only be made after the case for the defence has been heard.

20. I am therefore satisfied that the prosecution has made out a prima facie case against the accused. I accordingly place the accused on their defence in accordance with section 306 of the Criminal Procedure Code.

21. I also wish to inform the accused of their right under section 306 (2) of the Criminal Procedure Code to inform this court whether they intend to give a sworn or unsworn statement in their defence and whether they intend to call any witnesses.

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

MUMBI NGUGI

JUDGE