



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 9 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

KOSGEI SUTER.....ACCUSED

RULING

1. **ELIAS KOSGEI SUTER** (the accused) was charged with murder Contrary to **Section 203 of the Penal Code** as read with **Section 204** of the **Penal Code** that on 14th January 2009 at **CHESETAN** Location in **MARAKWET** District within **RIFT VALLEY** province he murdered **LORORIAM TULIO OKORIYARA** (deceased).

2. The prosecution case was that on the date in question at about 8.00am the deceased visited his friend **CHEROP CHEPKONGA** (now deceased) at his home to ask for food. **CHEROP** gave the deceased flour to take to his family. They then went to a liquor den and consumed busaa together before returning to the **CHEPKONGA's** house where the deceased opted to spend the night as it was late.

3. At night, the two were awoken by the accused who announced to them that he wanted to escort the deceased home because he had information that some Pokots had been killed in the neighbouring village. The accused who was armed with a panga and four arrows left with the deceased and on the next day, the deceased was found dead with huge cuts. The accused was arrested because he was the last person seen with the deceased.

4. The evidence offered by prosecution was by one **ROTICH** (PW1) a teacher cum businessman in **CHESETAN** Sub-Location who was on his way to his place of business, when he met one **JOSEPHAT WARUT** (a farmer) who was building a channel to direct water for use in irrigation. The said **JOSEPH** informed him that he had found the body of a dead person in the water channel. PW1 saw the body and recognized it as that of **LORARAM** whom he knew as his customer. PW1 relayed the information to police, who visited the scene and carried the body away.

PW1 stated:

“I did not examine the body closely as I was scared and shocked ... I do not know who committed the murder.”

5. Meanwhile on 15.01.2009 at 8.30am a village elder by the name **JAMES** also contacted **JACOB MAIYO CHEBET** the chief of **KIBAIMO** location, within **TOT** division, and informed him that someone had been killed. He visited the scene which was near a river and found the deceased's naked body plus a 2kg packet of flour and a club next to the body.

During that period, there had been hostilities between the Pokot and Marakwet communities and infact another Pokot had been killed the day before.

PW3 therefore convened a baraza for the villagers, and it was at the meeting that the late **CHEPKONGA CHEROP** rose and spoke, saying how the accused had collected the deceased the previous night to escort him to his home.

Both the late **CHEPKONGA** and the accused (who had disappeared) were eventually arrested.

6. **CPL PHILIP MUTISYA** (PW2) who was then based at **MARAKWET** was instructed to take over investigations into the death of deceased –and the chief handed over to him the two suspects (accused and Chepkonga). The late **CHEPKONGA** gave him a version of events similar to what he had told PW1.

On cross examination he stated:

“...My evidence is what I was told by others. There was not much at the scene...”

7. He confirmed that at the time, the Pokot and Marakwet communities were warring against each other pointing out that accused was a Marakwet. However there was no eye witness to the killing and he decided to charge the accused because he took the deceased away from the late **CHEPKONGA**'s house at night and was never seen alive again.

8. The prosecution attempted to rely on circumstantial evidence to link the accused to the deceased's death on two grounds

a) There were hostilities between the Pokot and Marakwets and since the two belonged to the respective communities, the accused could have been out to finish the perceived enemy.

b) The accused was the last person to be seen with the deceased having taken him from the home where he had gone to sleep.

9. Is this sufficient to sustain a conviction? There are several possible issues which weaken the strands that would form a continuous chain to seal the claim that the accused was the culprit.

i) Might the accused have left the deceased at what he may have concluded as a safe place and been attacked by someone else,

ii) Might accused and deceased have met warriors from the hostile community, who then snatched away the deceased and killed him,

iii) Did the accused flee out of fear, realizing that since he was the last person seen with the deceased, no one would believe his innocence,

iv) What caused the deceased's death anyway? Was he attacked by a person, or some wild animal.

9. These questions remain unanswered and under the circumstances it would be improper to call the accused to make his defence and fill in the loopholes left by prosecution. Consequently there isn't sufficient evidence to warrant placing accused on his defence and the court returns a finding of **NOT GUILTY** under **Section 306(1)** of the **Criminal Procedure Code**. He shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED and DATED this 26th day of September 2018 at Eldoret.

H. A. OMONDI

JUDGE