REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 63 OF 2009

REPUBLIC..…..PROSECUTOR

VERSUS

STEPHEN KIMOSOP CHEPKURUCH.....ACCUSED

RULING

1. On the night of 23rd August 2009, *Edwin Kibiwott Kipkiror* was shot to death. His body was discovered in a forest the following day. According to his widow, the accused was *one* of the *last* persons seen with the deceased on the fateful night. I am called upon to determine whether there is *sufficient* evidence to place the accused on his *defence*.

2. The accused is charged with *murder* contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 24th August 2009, at unknown time, at Kalachuma village, Embolot Location, Marakwet District of the Rift Valley Province, jointly with others not before the court, he murdered *Edwin Kibiwott Kipkiror.*

3. He pleaded *not* guilty. The prosecution called *three* witnesses. The evidence of the three witnesses was taken by Azangalala J (as he then was). The trial resumed before me on 17th July 2014. I explained to the accused his rights under section 200 (3) of the Criminal Procedure Code. He elected to proceed from where my predecessor had left the matter.

4. For reasons on the record, the prosecution *failed* to call any other witness. On 7th June 2011, the State *dispensed* with the evidence of Kabon Kipkiror. On 16th November 2011, 3rd July 2013, 6th July 2015, 7th September 2016 and 21st January 2016 the Republic had *no* witnesses. On the latter date, and cognizant of the age of the case, I granted the State a *final adjournment*. On 30th November 2016, the State had not procured attendance of any witness. The learned prosecution counsel elected to close her case.

5. PW1, Emily Rotich, was the widow. She testified that on the material night, she was at home with her two children. The deceased returned from the farm. He had his dinner. He then went out to the store. Kimutai and Kimosop (the accused) called the deceased. She said they entered the house. The two informed the deceased that his lost donkey had been found. He left with the two. He never returned.

6. The following day, PW1 identified the body of the deceased in the forest. She found policemen there. The body had a gun wound to the head. Kimutai and Kimosop (the accused) were at the scene. She said the deceased and the accused bore no grudges. She was emphatic that the accused and Kimutai *"were the ones who went out with the deceased and killed him"*.

7. Upon cross examination, the witness conceded that she did not mention the two in her original

statement to the police made on 25th August 2009. It was made at Kapsowar Police Station. She explained that it was because she was crying; and, that she had informed her uncle, Kiplimo. In the original statement she stated that the deceased left alone. In her subsequent statement of 8th December 2009, she said the deceased left with Kimutai and the accused; and, that Kimutai had a gun. She could not identify the gun. On re-examination, she confirmed that in the original statement, she did not state that the accused; or, his accomplice called out the deceased. She also made no reference to the donkey.

8. PW2 was Benjamin Chebusal. On 24th August 2009, he received a report that the body of the deceased was lying in the forest. He proceeded in that direction. On the way, he was informed that the body had been collected and transferred to the mortuary. He said that PW1 told him that the deceased left the previous night with the accused and David Kimutai.

9. PW2 testified that the accused and his family relocated from the area. David Kimutai also disappeared from the area. He said he suspected *"the accused because he left the area which is a customary requirement"*. Upon cross examination, he conceded that he wrote two statements: one on 25th August 2009; the next on 7th December 2009. His testimony was in tandem with the latter statement.

10. PW3 was Thomas Yano. He is the Assistant Chief Korou Sub-location. On 24th August 2009, members of the public informed him that they heard gunshots in the night. He went to the scene. He saw the body of the deceased. It had gunshot wounds to the head. He collected seven spent cartridges at the scene (*MFI 1*). He called the police; and, gave them the exhibits. Upon cross examination, he stated that many people in the area carry fire arms.

11. I have considered the *circumstantial* evidence surrounding the homicide. I have also considered the submissions by the learned defence counsel filed on 20th February 2017. The Republic did *not* file submissions.

12. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

13. From the evidence, there is absolutely *no* doubt about the death of the deceased. Although there was no postmortem report, the death was certain. In *Ndungu v Republic* [1985] KLR 487 the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial *unless* the cause of death is *too obvious*. In this case the lifeless body of the deceased had gunshot wounds to the head. It was transferred to Kapsowar Mortuary. Seven spent cartridges were recovered at the scene. From the injuries described by PW1 and PW3, I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the accused, of *malice aforethought*, killed the deceased.

14. From the evidence, it is clear that there was no *eye witness* to the murder. The entire case for the prosecution is built upon *circumstantial evidence*. In *R v Kipkering arap Koske & another* 16 EACA 135 (1949) the court held-

> *"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"*

15. The evidence of PW1 has material gaps. She made *two* conflicting statements to the police several *months* apart. The memory of a witness is at its prime *soon* after an incident. PW1 did *not* mention the accused or Kimutai in her *original statement* to the police made on 25th August 2009. That was at Kapsowar Police Station; two days after the murder. She explained that it was because she was crying; and, that she had informed her uncle, Kiplimo.

16. In the original statement she stated that the deceased left the homestead *alone*. In her subsequent statement of 8th December 2009, she said the deceased left *with* Kimutai and the accused; and, that Kimutai had a *gun*. She could not identify the gun. On re-examination, she confirmed that in the original statement, she did not state that the accused or his accomplice *called out* the deceased. She also made *no* reference to the donkey. Those are *material* discrepancies.

17. PW2 was relying on information from PW1. PW1 testified that the accused and Kimutai *"were the ones who went out with the deceased and killed him"*. Those are *strong* suspicions. But I cannot state for certain that the accused was the *last* person to be seen with the deceased; or, that he perpetrated the heinous crime. Our criminal justice system places the burden of proof on the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

18. On his part, PW2 suspected *"the accused because he left the area which is a customary requirement"*. Upon cross examination, the witness conceded he also wrote *two* contradictory statements: one on 25th August 2009; the next on 7th December 2009. His testimony was more in tandem with the latter statement. PW2 did not shed any further light on the circumstances leading to the murder. Fundamentally, both PW1 and PW2 confirmed that there were *no* grievances between the accused and the deceased. The *motive* of the murder remains a distant mirage. PW3 on the other hand only saw the body at the scene; and, gave the spent cartridges to the police.

19. Granted the evidence, I am hard put to say there is *incriminating* evidence against the accused to the required *standard of proof.* In short, there is *no* direct or circumstantial evidence *linking* the accused to the *murder*. I would then *not* say that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the accused *killed* the deceased with *malice aforethought*. In a synopsis there is no evidence to *convict if the accused opts to keep mum.*

20. Granted those circumstances, I am unable to say that a *prima facie* case is established. The law on that subject was well settled in *Bhatt v Republic* [1957] E.A. 332 at 334-

> *"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one-*
>
> *'which on full consideration might possibly be thought sufficient to sustain a conviction.'*
>
> *"This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is-*
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> *'some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.'*
>
> *"A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. 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."*

21. On the totality of the evidence; and, from my analysis of the legal authorities, I am not persuaded that the Republic has proven a *prima facie* case against the accused *sufficient* to place him on his *defence*. Accordingly, under the provisions of section 306 (1) of the Criminal Procedure Code, I enter a finding of *not guilty*. The accused person is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of February 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Accused.

Mrs. Chelashaw holding brief for Ms. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.