REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 95 OF 2009

REPUBLIC.....STATE

VERSUS

DAVID MOROGO.....ACCUSED

RULING

The accused **DAVID MOROGO** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

> ***"On the 8th day of November, 2009 at Kibuswa Village Kisanana Division in Koibatek District within Rift Valley Province murdered JOSEPH CHEBII"***

The accused pleaded **'Not Guilty'** to the charge and the matter proceeded to a full trial. This is a matter which started in May, 2010. The first trial Judge **Hon. Justice William Ouko** (as he then was) heard six (6) witnesses. On 29/10/2012 the learned Judge ruled that the accused had a case to answer and placed him onto his defence.

Following the elevation of Hon. Justice Ouko to the Court of Appeal the accused exercising his rights under Section 200(3) of the Criminal Procedure Code opted to have the trial begin *de novo*. As a result on 10/6/2014 the trial commenced a fresh before **Hon. Lady Justice Hellen Omondi** who heard three (3) witnesses. When the Hon. Judge was transferred to Bungoma High Court I took over the case and heard one (1) witness. Thus a total of four (4) witnesses testified in the retrial.

PW1 DAVID KOMEN told the court that on 8/11/2009 at about 7.00pm he was with the deceased at his home. The accused came armed with a knife and demanded to be paid some Ksh 30/= which he claimed the deceased owed him. The deceased on his part countered that the accused owed him Ksh 10/= The two men began to quarrel.

The witness then said the accused pulled the deceased out of the house where he proceeded to stab the deceased with a knife which he had. The matter was reported to authorities. The accused was eventually arrested and charged with the offence of murder.

The prosecution having closed its case this court must determine whether the evidence on record is sufficient to establish a prima facie case to warrant the accused being called upon to give his defence to the charge.

The definition of what constitutes a *prima facie* case was given in the oft cited case of **RAMANLAL**

BHATT Vs REPUBLIC [2006]eKLR where the court held that

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

In this case the fact of the death of the deceased is not in any doubt. **PW1** told the court that he witnessed the deceased being stabbed with a knife. **PW3 SAMWEL KIPSAMI KIMALIT** the area chief told the court that he saw the body of the deceased whom he knew very well lying at the scene.

PW2 FRANCIS KORIR a brother to the deceased testified that he identified the body of the deceased to the doctor who performed the autopsy. All three witnesses knew the deceased very well identify him as **'Joseph Chebii'**.

Aside from proving the fact of death the prosecution must go further and adduce evidence to prove the cause of death of the deceased. It is not enough to say that the deceased was stabbed. The effect of that stabbing on the life of the deceased must be proved by way of medical evidence.

Ordinarily the cause of death is proved by the evidence of the doctor who performed the autopsy on the body of the deceased and by production of a post mortem report. In this case no doctor testified and no post-mortem report was produced as an exhibit.

In the case of **NDUNGU Vs REPUBLIC [1985]eKLR** the Court of Appeal held that

> ***"..... where a body is available and the body has been examined, a post-mortem must be produced, the trial court having informed the prosecution that the normal and straight-forward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the Medical Officer who performs the post-mortem examination is examined....."***

In this case **PW2** confirmed that an autopsy was conducted upon the body of the deceased. Therefore the post-mortem report ought to have been produced by the Medical Officer who conducted the autopsy.

Similarly in the case of **CHENGO NICKSON KALAMA Vs REPUBLIC 2015 eKLR** the Court of Appeal sitting in Malindi held that

> ***"The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post-mortem examination report of the deceased...."***

Thus it is clear that the failure to produce a post-mortem report or to call a doctor as a witness is fatal to the murder charge as it means that the cause of death remains unproven.

In the circumstances notwithstanding the weight of any other available evidence I find that a *prima facie* case has not been proved. If the accused elected to keep silent in his defence, then no conviction could be rendered. As such I enter a verdict of **'Not Guilty'** and I acquit the accused of this charge. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 31st day of March, 2017.

Mr. Nyamwange holding brief for accused

Mr. Motende for State

Maureen A. Odero

Judge