



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 77 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

LORINYEI KEBOTO.....ACCUSED

JUDGMENT

The accused **LORINYEI KEBOTO** faces two (2) counts of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. It is alleged that

“On the 6th day of July 2011 at Lerai area in Narok North District within Rift Valley Province murdered EKAI AKULEI KOLOI and ESTHER ESKEI AKUTEI”.

The accused pleaded ‘**Not Guilty**’ to both counts. His trial commenced before me on 27/1/2016. The prosecution led by the learned State Counsel called five (5) witnesses in support of their case. **MR. GAI** Advocate appeared for the accused.

PW5 SARUNI OLE LETU told the court that he is a boda boda operator within Narok Town. **PW5** testified that on 7/7/2015 at about 6.00am he was at his house. The accused who was known to him came and informed **PW5** that he had killed a man. The accused claimed that he did this because the victim had given his (accused’s) children poison. **PW5** said that he saw the body of the deceased lying outside the accused’s house.

The accused requested **PW5** to take him to the police station to report the incident **PW5** obliged. They went together to the police station. Later they all returned with police to the scene. The police collected the body of the deceased. **PW5** stated that he also saw a woman lying injured outside the accused’s house.

Following police investigations the accused was arraigned in court and charged with two counts of murder.

At the close of the prosecution case this court must analyse the evidence on record and determine whether a prima facie case has been established to warrant calling upon the accused to defend himself.

The definition of what constitutes a ‘**prima facie**’ case was given in the oft cited case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] EALR 332** where it was held

“..... 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”

In this case **PW2 PAUL KOLOI** told the court that on 7/7/2011 he went to Narok Hospital and identified the body of his father whose name he gave as ‘**Ekai Atiokei KoloI**’.

PW3 DR. TITUS NGULUNGU the government pathologist based at Nakuru PGH told that he conducted the autopsies on two deceased persons. On 4/8/2011 **PW2** performed an autopsy on the body of ‘**Esther Eskai**’. He concluded that the cause of death was ‘**chest injury attended by rib fractures, lung lacerations and bleeding in the chest cavity consistent with blunt force trauma**’. He filled and signed the post-mortem report which he produced in court as an exhibit **P. exb 2**.

On the same day 4/8/2011 **PW3** also conducted the autopsy on the body of one ‘**Ekai Atukei**’. He concluded that the cause of death was ‘**severe head injury attended by skull fracture, brain fractures, and raised intracranial pressure due to multiple blunt force trauma**’.

to the head'. The duly filled and signed post-mortem report was also produced **P. exb 3**.

It is strange that although accused is charged with two murders and whereas **PW3** testified and produces reports in respect of two autopsies. **PW2** the identifying witness only made reference to one deceased person. In view of the similarity of the names of the deceaseds, (both bore the name 'Atukei') and given that post-mortem reports gave the name of **PW2** as the identifying witness, in view of the fact that **PW5** spoke of having seen 2 persons lying outside the house of the accused, I would have expected **PW2** who said he was the nephew of the male deceased person to have also identified or at least made reference to the female deceased person. This is an anomaly which remained unexplained yet the autopsies were conducted on the same day and at the same venue.

There was no witnesses who saw the accused or any other person commit the fatal attack on the two deceased persons. **PW2** was not at the scene when the incident occurred. **PW5** also did not witness any assault by accused on the two deceased. He was only alerted of the incident by the accused himself. The only role which **PW5** played was to give the accused a ride to the police station on his motor bike to enable accused report the incident. The police officer who received the report was not called to testify thus the court is not told of the nature of the report that the accused made to the police on that day.

In his evidence **PW5** stated to the court that the accused told him that he had killed a man. Here again reference is made to only one death whereas the accused has been charged with the murder of two (2) people.

Any admission by the accused that he committed the offence in question amounts to a confession. Section 25A of the Evidence Act clearly sets out the circumstances under which a confession made by an accused person will be admissible as evidence in a court of law. Section 25A (i) provides as follows

"A confession or any admission of a fact tending to the proof of guilt made by an accused persons is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than then investigating officer) being an officer not below the rank of Chief Inspector of Police and a third party of the persons choice".

Therefore in so far as this alleged confession made by accused to **PW5** did not comply until the provisions of Section 25A it is not admissible as proof that the accused committed the murders in question.

Aside from the lack of any tangible and/or direct evidence implicating the accused, certain other aspects of this case raise more questions than answers.

PW4 LAWRENCE KINYUA was a Government Chemist. He told the court that he received from the police in connection with this case the following items for purposes of analysis.

- Blood sample of the accused
- Liver sample taken from the deceased – 'Ekai Atukei'.
- A panga
- A rungu
- A walking stick

PW4 proceeded to examine and analyse the items which were submitted to him. His findings are contained in his report dated 15/5/2013 which was produced as an exhibit in the case **P. exb 4**. **PW4** found that the DNA profiles generated from the blood stains on the panga and the rungu all matched the DNA profile of the blood sample taken from the accused. Given that **PW5** said he saw no injuries on the accused and given that these items were allegedly used to assault the 2 deceaseds it is very strange that the blood found on them matches the blood of the accused rather than matching the blood of the deceased persons. Again it is puzzling why police saw it fit to submit body issue from only one deceased and not from the other. Indeed it appears that the charging of accused with the murder of the second deceased was nothing more than an after-thought. In any event the findings of the government analyst serves only to confuse matters further.

No investigating officer was called to testify in order to clarify the anomalies in the prosecution case. **PW5** told the court that the accused had alleged that the deceased had poisoned his children. **PW5** himself never saw those children and has no idea whether such poisoning ever occurred. There is no evidence whether police ever pursued this lead to find out who was poisoned, when and by whom. It would have been important to clarify these facts conclusively.

All in all I find that investigations into this case were very shallow. The police merely dragged the accused into court before ascertaining whether he had actually committed the crime or not. No police officer testified in this case. Even the officer to whom the accused made his report did not testify. Thus this court has no idea what nature of report the accused made to the police. It is as if having charged the accused the police washed their hands off this case and went underground.

With the evidence on record, if the accused decided to exercise his legal option not to present any defence, no conviction would be forthcoming, I find that the prosecution have failed to prove a prima facie case. Accordingly I enter a verdict of '**Not Guilty**' and I acquit the accused on both counts of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 30th day of June, 2017

Mr. Bosire holding brief for accused

Ms Nyakira for DPP

Maureen A. Odero

Judge