



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 2 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

JACOB KIPROP KORIR.....ACCUSED

JUDGEMENT

The accused **JACOB KIPROP KORIR** faces a charge of **MURDER CONTRARY TO SECTION 203** as read with **SECTION 203 OF THE PENAL CODE**.

The particulars of the charge were that

“On the 25th day of December, 2012 at Kabel Trading Centre of Muchongoi Division, Mariqat District within Baringo County, murdered ‘NJAU MWANO’

The accused pleaded ‘**Not Guilty**’ to the charge and his trial commenced on 12/2/2015 before **Hon Lady Justice Abigael Mshila** who recorded the evidence of the first three (3) prosecution witnesses. Following the transfer of the Honourable Judge to the Nyeri High Court I took over the case and heard the evidence of the remaining four (4) witnesses. A total of seven (7) witnesses testified on behalf of the prosecution.

PW2 APC WILLIAM AMTALE and **PC MARTIM MUTWIRI** told the court that on the night of 24th/25th December, 2012 they were out on normal patrol duties within Kabel Trading Centre. They heard screams and upon rushing to check what was wrong they found the deceased lying under a trailer with his intestines spilling out from a cut wound to his stomach. The deceased told the officers that he had been stabbed one ‘**Jacob**’.

PW1 and **PW2** summoned the brother of the deceased one **NDERITU MWANGI (PW4)** who rushed to the scene. He hired a vehicle and took the deceased to Nakuru PGH. Unfortunately the deceased died on the way to hospital.

Police launched investigations into the incident and eventually the accused was arrested and was charged with the murder of the deceased.

The prosecution having closed its case this court must now analyse the evidence on record with a view to determining whether a prima facie case has been established sufficient to warrant placing the accused on his defence.

The definition of what constitutes a prima facie case was given in the oft-cited case of **RAMANLAL T. BHATT Vs REPUBLIC [1957 E.A.L.R]** 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 the fact of the death of the deceased is not in any doubt. **PW4** the brother to the deceased and **PW7 JOHN MWANGI** the father of the deceased both confirm the fact of his death. The two witnesses confirm that they identified the body of the deceased to the doctor who performed the autopsy. Both witnesses who knew the deceased well identified him as ‘**Amos Njau Mwano**’.

PW6 DR. KARIMI KINYUA told the court that his colleague ‘**Dr. Mwaura**’ conducted the autopsy on the body of the deceased on 1/1/2013. The body was found to have a stab wound to the stomach which exposed the intestine. The cause of death was opined to be a ‘**stab wound in the abdomen**’. **PW6** produced as an exhibit the duly filled and signed post-mortem report **P.exb1**. This was expert medical

opinion evidence and was neither challenged nor controverted by the defence.

Having proved the fact as well as the cause of death the prosecution is required to prove that it was the deceased who fatally stabbed the deceased.

There was no eyewitness to the assault on the deceased. Nobody saw the accused stab the deceased. Indeed there is no evidence from any witness that they saw the accused in the company of the deceased at all on that material day. **PW6 PAUL KIMOI KIPKURUI** told the court that he runs a bar in Muchongoi. **PW6** testified that on the night of 24/12/2012 he sold drinks to the accused. However **PW6** is categorical that he never saw the deceased at all that night. Indeed **PW6** stated that he only heard the following day that ‘Amos’ (the deceased) had been stabbed. **PW6** further states that

“I do not know who stabbed the deceased”

The prosecution sought to rely on the dying declaration allegedly made by the deceased as proof of the guilt of the accused. Both **PW1** and **PW2** testified that they found the deceased at Kabel Centre lying under a trailer with his intestines spilling out of a cut to his stomach. Both witnesses state that the deceased told them that it was ‘Jacob’ who had cut him.

Section 33 (a) of the Evidence Act, Cap 80 Laws of Kenya provides that statements made by a deceased person as to the cause of his death in circumstances in which that cause of death comes into a question is admissible as evidence in a criminal trial. Such a statement is commonly referred to as a ‘dying declaration’.

Thus this statement made by the deceased shortly before his death identifying his attacker would in law amount to a ‘dying declaration’. However the courts have been reluctant to rely solely on such a dying declaration as proof of the guilt of the accused.

In **OLALE & OTHERS Vs REPUBLIC [1965] E. A 555** the court held

“A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely upon the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration”.

Similarly in **DZOMBO CHAI Vs REPUBLIC Criminal Appeal No. 256 of 2006** the Court of Appeal held that

“..... Although the court can in law solely rely on such evidence there is however a rule of practice that a dying declaration must be satisfactorily corroborated to justify a conviction”.

In the present case there exists no evidence to corroborate the dying declaration. No witness saw the accused stab the deceased and no witness saw accused in the company of the deceased. The deceased apparently gave only one name of his attacker ‘Jacob’. The court takes judicial notice that the fact that is a common name for males in Kenya. There is nothing to indicate that the accused was the ‘Jacob’ to whom the deceased was referring.

Aside from the declaration made by the deceased, there exists nothing else to link the accused to the death of the deceased. I find that no prima facie case had been established. I therefore enter a verdict of ‘Not Guilty’ and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 3rd day of August, 2017.

Mr. Tombe holding brief for Mr. Kanyi

MAUREEN A. ODERO

Judge