REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 16 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

DOMORITA LODIR *alias* LODUR.....ACCUSED

RULING

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on 31st July 2008 at Chepkok area in Kipsaraman Division of Baringo District within Rift Valley Province, jointly with others not before the court, he murdered Siwakamar Kiptiyor.

2. The accused pleaded not guilty. The prosecution called six witnesses. One witness (PW2) was stood down. PW1, Mark Chepkangor, is a brother of the deceased. He testified that on 30th January 2008 at about 7:50 p.m., he was resting at home. He heard a gunshot. He made some enquiries. He learnt that the gunshot was fired from Chepkok area. It was *six* kilometers away. At 3.00 a.m. he heard a scream. He and other villagers went towards Lochomir. Before they got there, they saw footsteps of *eight* people. PW1's livestock had scattered but other villagers herded it back. He was told that his brother had been killed. He saw the body. It was at Chepkok area.

3. PW1 reported the matter to the Administration Police who notified the Anti-Stock Theft Police. The body was taken to Kabarnet District Hospital. He identified it for postmortem purposes. The autopsy was carried out on 31st January 2008 by Dr. John Otieno. PW1 said the body had gunshot wounds. PW1 did not know the accused. On 18th February 2008, he received a report from elders from East Pokot that a suspect had been arrested. He was told that it was Rita Lodir.

4. PW3 and other herders were in the company of the deceased on the material night. When the gunshots rang out, they took off in different directions. PW3 stayed in the forest until 8:00 a.m. the following morning. He said the gunshots were from East Pokot. In the morning he went to look for the cattle. He reunited with three of his colleagues. He saw the body of the deceased. The body was lying in the place they had escaped from the previous night. It had gunshot wounds on the leg and arm-pit. He was later told by the Chief that the accused killed the deceased. He first saw the accused at Nginyang Police Station.

5. PW4 is the Chief Sirare Location. He received a call from Joshua Agerio, Chief Positai Location, about the incident. The latter suspected that the *eight* attackers were from the jurisdiction of PW4. He gave some names of suspects including Domorita, the accused. PW4 could not remember the other names he was given. Acting on a tip-off from an unnamed informer, he arrested the accused. He got assistance from Administration Police at Kabendo Centre. They took the accused to Nginyang Police Station. PW4

testified that the accused had gone into hiding.

6. PW5 was in the company of PW3 and other herders when the shots rang out. He said the shots were fired from a distance of 10 metres. There were several gunshots. He lay down. He waited for about one hour. He said he saw the person who killed the deceased. He said he is called Rita Lodir. He was short and big. His accomplices had a torch. They were about eight. He did not identify the others. He had not seen the accused before then. He attended an identification parade on 11th April 2008 or thereabouts. There were eight people in the lineup. He picked out the accused.

7. PW6, Chief Inspector Alex Chirchir, is a ballistics expert. He produced a report (exhibit 2) which was authored by his colleague, Alex Mwandawiro. He also produced the exhibit memo form (exhibit 1). The Fire Arms Examiner had examined two spent cartridges caliber 7.62 by 39 mm (exhibits 3 (a) and (b)) collected from the scene. He formed the opinion that they were fired from two different AK 47 rifles.

8. PW7 was Chief Inspector Judah Muthee. He did not visit the scene. He instructed Senior Sergeant Mwangi to investigate the matter. The latter is now posted to Tana River District. He was not called to the stand. PW7 attempted to produce the postmortem report made by Dr. John Otieno. The effort could not pass the test under the Evidence Act. The autopsy report was thus not produced. That marked the close of the prosecution's case.

9. 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*.

10. Although Dr. Otieno did not take to the stand; and, his post mortem report was not produced, I entertain *no* doubt about the *death* of the deceased. The lifeless body was seen by PW1 and PW3 at Chepkok area. It was riddled with bullets. PW1 was a brother of the deceased. He was present on 31st January 2008 when Dr. John Otieno carried out the autopsy. The cause of death in this case is thus obvious. 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. The Court stated at page 493 as follows:-

> *"Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post- mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced."*

11. I will now turn to identification of the accused. It is evident that the charges were founded on the evidence of a single identifying witness, PW5. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

> *"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*

12. There is a plethora of decisions on the subject. See for example *Joseph Ngumbao Nzaro v Republic* [1991] 2 KAR 212, *Richard Gathecha Kinyuru & another v Republic* Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. In *Obwana & Others v Uganda* [2009] 2 EA 333, the Court of Appeal of Uganda stated as follows at page 337;

> *"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth, but he might as well be mistaken. This need for*

corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence"

13. In *Maitanyi v Republic* [1986] KLR 198 at 201, the Court of Appeal delivered itself as follows-

"*It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?"*

14. When I juxtapose those authorities against the evidence, I find further as follows. PW1 did *not* know the accused person before the incident. He did not identify *any* of the eight people whose footsteps he had seen earlier. The events were taking place *six kilometres* away.

15. PW5 was thus the only *eye witness*. Like PW1, he did not know the accused. It was dark. The *locus in quo* was a *forest*. He did not have a torch. He was lying down in the bushes to hide from the armed attackers. Under cross-examination, he conceded that he could not see the attackers *properly*. He said he identified the accused from the light emanating from torches held by the attackers; and, that one of the attackers asked the accused why he had killed *"one of [their] people"*. He said the accused is a *Pokot* while the deceased was a *Tugen*. However, the mother to the deceased was a *Pokot*.

16. PW5 did *not* identify any of the other *seven* attackers. The conversation he referred to took place well after the deceased was shot. He did *not* know the accused before the incident. I have reached the conclusion that the identification took place under *very difficult* and unreliable circumstances. The identification parade was not conducted until 11th April 2008 or thereabouts; well after *two months*. By that date PW5 had been told by the Chief, on 3rd March 2008, that *"the thieves had been caught"*. The identification was thus *not* water tight. I *cannot* then say with confidence that the identification by the *single* witness was positive. See *Maitanyi v Republic* [1986] KLR 198 at 201, *Joseph Ngumbao Nzaro v Republic* [1991] 2 KAR 212.

17. PW3 on the other hand arrested the accused purely on information received from the Chief, Positai Location. The latter merely gave three names of *suspects*. He did not testify at the trial. It thus remains a mystery how he zeroed in on the suspects. PW6 confirmed that the two spent cartridges found at the scene were fired from *two* different AK 47 rifles. It follows that the deceased was attacked by more than one attacker.

18. Although PW1, PW3 and PW5 identified the accused at the dock, it was *worthless* in view of the circumstances of identification. In *Ajode v Republic* [2004] 2 KLR 81, the Court had a very dim view of dock identifications-

"*It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness*

should be asked to give the description of the accused and the police should then arrange a fair identification parade (see case of Gabriel Kamau Njoroge v Republic [1982 – 88] 1 KAR 1134)."

19. I have said the eye witness account was doubtful. There is also no *strong* circumstantial evidence pointing *irresistibly* and *exclusively* to the culpability of the accused. See *R v Kipkering arap Koske & another* 16 EACA 135 (1949), *Sawe v Republic* [2003] KLR 364. So much so that if the accused were to elect to remain mum now, there would be *no* evidence to *convict* him.

20. Granted those circumstances, I am unable to say that a *prima facie* case has been established. The law on this 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-

'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 established a *prima facie* case sufficient to place the accused 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 is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of April 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Accused.

Mr. Kigamwa for Mr. Okara for the accused.

Ms. K. Mwaniki for the Republic.

Mr. J. Kemboi, Court clerk.