REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 49 OF 2012

REPUBLIC ………………………………. RESPONDENT

VERSUS

AMOS GICHUHI KIMERIA ……..................…ACCUSED

RULING

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

> **"On the 28th day of June 2012 at Tetu Farm in Subukia District within Nakuru County, murdered SAMUEL EPOLISIT LOPOKET.**

The accused entered a plea of **'Not Guilty'** to the charge and his trial commenced on 13/6/2013 before my learned senior brother **Justice Anyara Emukule** who recorded the testimony of the first nine (9) witnesses. Following the transfer of the Honourable Judge to the Mombasa High Court I took over the hearing and recorded the evidence of the remaining four (4) witnesses. Therefore a total of thirteen (13) witnesses gave evidence on behalf of the prosecution.

PW1 THOMAS LOCHICHO LUKUTOI told the court that the deceased was his brother. On 29/6/2012 **PW1** called for his brother so that they could go together to cut grass for the cattle. **PW2 JANE NAKITALA NANOK** told the court that on 28/6/2012 the deceased who was her husband left their home at 5.00pm saying that he was going to purchase flour to prepare the evening meal. He never returned home. **PW1** became alarmed and began to search for his missing brother. He found the deceased blood stained cap and some maize lying on the road next to a pool of blood. Upon searching further they found the accused hiding in a thicket. The witness and members of public arrested the accused and took him to the police station. The search for the deceased continued and a badly mutilated body was found hidden in a maize plantation. The body had been gutted and the intestines, heart liver and testicles were cut out. Later the search led to an animal shed in the farm where the accused worked. Police searched the animal shed and found hidden inside the ceiling partially cooked body parts of a human. These were collected and kept as exhibits. Upon conclusion of police investigations the accused was arraigned in court and charged with the offence of murder.

At the close of the prosecution case this court is required to determine whether a prima facie case has been made out sufficient to warrant the accused being placed onto his defence.

In order to establish prima facie case evidence must be adduced which points exclusively at the accused and no other person as the perpetrator of the offence in question. Mere rumours and/or supposition will

not suffice. The prosecution evidence must be such that if the accused elected to keep silent in his defence a conviction could be rendered. The scope of a prima facie case was clearly set out in the case of **RAMANLAL T. BHATT –VS- REPUBLIC [1957] E.A 332 at pages 334 – 335** where it was held as follows

> ***"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 raise hope 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.... 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 it no explanation is offered by the defence. (Own emphasis)***

On the question of the fact and cause of death of the deceased there is no dispute. Several witnessed testify that they saw the mutilated body lying in the maize plantation. **PW1** identified the remains as those of his brother.

Evidence regarding the cause of death was tendered by **PW10 DR. TITUS NGULUNGU** who performed the autopsy on the remains. He testified that the body had been badly mutilated and the stomach, pancreas, kidneys and intestines were all missing. Parts of flesh on the thighs had been cut away and the penile shaft and testicles had also been removed. **PW10** opined that the cause of death was excessive haemorrhage. He filled and signed the post-mortem report which was produced in court as an exhibit **P. Exb 1**.

There is therefore sufficient proof regarding the fact and cause of death of the deceased.

The prosecution called a total of thirteen witnesses in support of their case. Out of these thirteen witnesses none saw the accused attack, assault and/or murder the deceased. Indeed not a single witness testified to having seen the accused in the company of the deceased on the material night. The last witness who saw the deceased alive was **PW5 JAMES GICHUHI GATHENJI**.

PW5 told the court that he works as a bar attendant. On 28/6/2012 at about 5.30pm he was in his bar attending to customers. The deceased and two others came to the bar that night and had a couple of drinks. The deceased then left saying that he was going to purchase food to take to his family. **PW5** says the deceased never returned to the bar indeed he never saw the deceased alive again.

PW5 stated that the deceased came to the bar with two youths. He names one of the youths as **'Edonga'** **PW5** does not mention the name of the second youth who was with the deceased but is pertinent that **PW5** makes no mention of having seen the deceased with the accused inside the bar or anywhere else for that matter. Given that the deceased left the bar alive the attack could only have occurred thereafter.

PW1 told the court that he and other members of public arrested the accused on **'suspicion'** that he had a hand in the murder of the deceased. This suspicion was fuelled by two main factors

i. The fact that the accused was holding a blood stained panga and had blood stains on his clothes
ii. Recovery of partially cooked body parts inside an animal shed next to the accused's room

Regarding the first reasons for suspicion **PW1** stated in his evidence that

> ***"We found Amos (accused) hiding in the thickets. We asked him who had killed the deceased and he denied. We effected a citizen's arrest and took him to Tetu police station and I reported that Amos was suspected to have killed a person.... The accused's clothes were blood stained including the clothes he was wearing....."***

PW1 was the prosecution witness who claimed that the accused was found wearing blood stained clothes. **PW3 LUCAS THARAKUS EDOKET** a nephew to the deceased who was also involved in the search for the deceased directly contradicted the evidence of **PW1** when he stated

> ***"When we arrested him (the accused) his clothes were clear. He had a green trouser and T-shirt, I cannot remember the colour. He was wearing gumboots. I can identify the trouser. That is the trouser he was wearing. It is not very clean...."***

Thus **PW3** makes no mentions of blood stains on the clothes of the accused. All he noticed was that the accused's trouser was not clean. Given that the accused was said to be employed as a farmhand having dirty clothes is not unusual given the type of work that he would have been engaged in.

PW1 also claimed that the accused had in his possession a blood-stained panga. **PW1** whilst under cross-examination by defence counsel stated that

> ***"We saw accused with a panga. It was blood stained but he ran and hid it. I do not know where he hid it...."***

Once again the testimony of **PW1** is directly contradicted by **PW3** who states

> ***"The accused had no weapon at all, not even a club ......"***

It is evident that **PW1** was not an entirely honest witness. He was embellishing his testimony in order to justify his suspicion of the accused as the murderer. No panga blood stained or otherwise was produced in court as an exhibit. The fact that all **PW1** was a less than honest witness is evidenced by the fact that he insisted that his late brother never took alcohol. **PW1** however had to eat his words under cross – examination when his statement revealed that he had asked **'Gichuhi'** **PW5** whether his brother had been drinking in his bar. Why ask such a question if as he insisted deceased never drank alcohol. In any event **PW5** did confirm to the court that the deceased had been drinking in his bar on the evening in question similarly **PW2** the wife of the deceased confirmed that

> **"My husband used to drink beer"**

All this puts the veracity of the evidence of **PW1** into question. Evidence from the witnesses was that the body of the deceased was recovered inside a maize plantation. There is no evidence as to who put the body there certainly there is no evidence linking the accused to the body found inside the maize plantation. There is evidence that the accused was an employee of one Dr. Karanja who owned that shamba. However accused was not the only employee and he was not the only person who had access to that shamba. **PW6** **ANNE WANJIKU MWANGI** told the court that she too lived in the same compound as the accused and she confirmed that she also farmed the land in that shamba which belonged to her brother Joseph Waguru.

PW6 did confirm to the court that

"The accused usually carried a panga at night a normal thing for a man to do in the area. The accused was a shamba boy. It was normal to carry a panga. He would conduct rounds within the farm...."

The area where the body was recovered was not an area exclusively visited by the accused. It was an open field accessible to anyone. **PW3** in his testimony told the court that there was a path across the shamba commonly used by people in the area – similarly **PW 12 PC NICK MUINDE** one of the officers who visited the scene told the court that the path was used by members of public. Under cross- examination by defence counsel **PW1** also admitted that the body was recovered in a public path used by many people. Therefore the fact of deceased in that maize plantation would not implicate the accused as he was not the only person who had access to that maize plantation.

There is evidence that police did recover a bloody skirt and blouse. Both **PW1** and **PW3** told the court that they found a skirt and a blouse oozing blood at the scene where the body was recovered. These exhibits were never produced in court. It is not known whom they belonged to. Suffice to say a skirt would belong to a female and not a man (as accused was). There is no evidence that the skirt and blouse were ever taken to a Government Chemist for analysis in order to establish whose blood was on those clothes. It is not known whom this skirt and blouse belonged to. However their presence at the scene indicates that there was a female at the scene of the attack. It is not lost to the court that the compound was said to have been shared between the accused and a lady called **'Ann'**.

Finally evidence was adduced that following the recovery of the badly mutilated body, in the maize plantation police proceeded to search a goat shed next to the room where accused lived. Hidden inside the ceiling in that goat shed police made the gruesome recovery of a *sufuria* containing partially cooked body parts. There are two important and pertinent observations to be made regarding this discovery. Firstly the police led by members of public recovered these human parts. The accused did not lead police to that shed nor did he point out to them the *sufuria* containing partially cooked body parts. Indeed the evidence is that the accused had already been arrested and was locked up in police custody when this discovery was made.

Secondly these items were **not** found inside the residence of the accused *ie* inside the room where he resided. Indeed the witnesses state that they broke into the accused's house and searched but recovered nothing. **PW4** claimed that blood stains were seen at the door to the accused's house. However **PW12** the officer who visited the scene made no mention of this. Neither did the officer who took photographs **PW13** capture any print with these alleged blood stains. This therefore remains mere unproven allegation. **PW3** and **PW4** testify that they found the goat-shed locked. It is not known who locked it. No keys for the lock were recovered on the person of accused or inside his house. **PW12 PC ALEX MULINDE** confirms under cross-examination that

"The body parts were in the cowshed not in the house of the accused" (own emphasis).

Suspicion fell upon the accused because he was the herder employed by the owner of that farm. However there is no evidence that the accused was seen carrying any suspicious items into that goat shed and no witness saw him lock up the shed. The mere fact, that accused have had access to that goat shed does not amount to proof that he was responsible for the items found therein.

It has not been demonstrated that it was only the accused who had exclusive access to the goat shed. **PW12** admitted that there was a path running through the farm which path was accessed to all members of public.

It is important to note that no investigating officer testified in this case. **PW12** was categorical that he did not investigate the matter. It is my view that failure to call the investigating officer was fatal to this case. As demonstrated earlier several anomalies and contradictions exist in the prosecution case. Only the investigating officer would have been able to tie up the loose ends. The court was told one **PC Phillip Ongeri** who investigated the case was a security officer attached to the Nakuru West Member of Parliament. That officer was based in Nakuru. It would have been relatively simple to secure his

attendance to court. It appears no genuine efforts were made to have this officer come to court to testify. This was a fatal omission by the prosecution.

On the whole the evidence against the accused is evidence based on suspicion. There is no tangible evidence to link the accused to this murder. It is a well established principle that suspicion alone no matter how strong cannot form the basis for a conviction. In the case of **SAWE –VS- REPUBLIC (2003) KLR 364** the Court of Appeal held that

> ***"The suspicion may be strong but this is a game with clear and settled rules of engagements. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of MARY WANJIRU –VS- REPUBLIC (Criminal Appeal No. 17 of 1988) (unreported). Suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence" (my emphasis)***

In this case the suspicion against the accused may admittedly be strong. However the evidence falls woefully short in establishing his involvement in this crime. There is no evidence that the accused had any motive or reason to attack or kill the deceased.

Given the contradictions noted in the prosecution evidence and the lack of concrete evidence identifying the accused as the perpetrator of this offence I find that no prima facie case had been established to warrant calling upon the accused to defend himself. I therefore enter a verdict of **'Not Guilty'** and I acquit the accused of this charge of murder.

Dated in Nakuru this 16th day of May 2016.

Mr. Mongeri holding brief for Mr. Wambeyi

Ms Ngovi for State

M. A. ODERO

JUDGE

6/5/2016