



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Criminal Case 98 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN KIPCHIRCHIR SUMUNI.....ACCUSED

JUGDMENT

The accused before me and his co-accused, Paul Kimenjo Towet, who was acquitted for lack of evidence, were jointly charged with the **murder** of their nephew, David Kipkoech Sang contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The prosecution called eight witnesses who testified that the accused person, Paul Kimenjo Towet, the deceased and others were drinking *chang'aa* at the home of Paul Kimenjo Towet on the fateful day. As they drunk, the deceased and the accused kept issuing veiled blanket threats, not aimed at anyone in particular.

Two gentlemen, Bett and Paul Langat, who were drinking with them suspected that the threats were targeting them and decided to leave. As they left, the deceased and the accused person pursued them forcing them to take to their heels. Bett fell down and the deceased caught up with him and a struggle ensued between the two of them. The accused was armed with a small axe.

Bett freed himself and ran away after pushing the deceased away. In the course of the struggle Bett's cap fell off his head. The next morning, he returned to the scene of the struggle to look for it. He found the deceased near that scene and noted that he had difficulty in breathing. Bett went to the home of Paul Kimenjo Towet and with the latter's wife, they tried to feed the deceased with porridge but he was too weak.

The 18 year old **P.W.5, Viola Cherotich Towett** and 13 year old **P.W.6 Kennedy Kiplangat**, the daughter and son respectively of Paul Kimenjo Towet were declared hostile after they disowned their statements recorded with the police, maintaining that their father was very drunk and had gone to bed when the deceased, who was also drunk and aggressive chased them, Bett and Paul Langat away; that they were forced to spend the night at their brother's home.

Dr. Samuel Onchere who produced the post mortem report prepared by Dr. Ondari told the court that the body of the deceased had bruises on the forehead, right check region with blood oozing from the left ear; that there was blood in the chest cavity coverings the heart. In the doctor's opinion, death was caused by severe chest and head injuries secondary to assault.

In his defence, the accused recalled how they all drunk *chang'aa* until he blacked-out only coming to his senses the next day when he learnt that his family members had been chased away by the deceased who was equally drunk. He was arrested on the claims that he had killed the deceased. He denied those claims.

That in brief constitutes the evidence presented by both sides during the trial.

There can be no doubt that the deceased and the accused together with other people got very drunk after a day-long *chang'aa* drinking spree. There is also evidence that the deceased and the accused chased away Paul Langat and Bett, in the course of which a struggle ensued between Bett and the deceased. As he chased Bett and Langat, the accused was armed with an axe. Bett was categorical that he freed himself and left the deceased. The deceased was found unconscious the next day near where they had struggled with Bett. He later died from bodily injuries.

The broad question to be determined is whether the fatal injuries were inflicted by the accused and if so, whether he did so with malice aforethought. The only evidence that implicated the accused was the evidence of **P.W.5 Viola Cherotich Towett** and **P.W.6 Kennedy Kiplangat**, the children of the Paul Kimenjo Towet and brother.

In their statements to the police, they recorded that they witnessed a fight in which the accused was beating the deceased with a big stick and that Paul Kimenjo Towet joined the accused in beating the deceased. That the accused and Paul Kimenjo Towet carried the deceased out of the homestead and at the same time chased the two witnesses and their mother away. They spent the night at their brother's home. When they returned the next day, they learnt that the deceased had died.

Upon application by the State Counsel, the two witnesses were declared hostile and subsequently were cross-examined by the State. The Court of Appeal has considered in **Alowo V. Republic** (1972) EA at page 324 and in **Batala V. Uganda** the weight to be given to the evidence of a hostile witness. In the latter, the court said:

“The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any weight.”

In **Abel Monari Nyamamba & 4 others V. Republic**, Criminal Appeal No.86 of 1994, the court went further to state that:

“The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.”

For the reason that the only evidence the basis of which the accused and were charged has been discredited nothing is left of the prosecution case. I find that the charge against the accused person not proved. He is acquitted and set free unless lawfully held.

Dated, Signed and Delivered at Nakuru this 11th day of May, 2012.

**W. OUKO
JUDGE**