

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.98 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

PAUL KIMENJO TOWET.....1st ACCUSED
STEPHEN KIPCHIRCHIR SUMUNI.....2ND ACCUSED

RULING

The two accused persons are brothers. They are charged jointly with the murder of their nephew, David Kipkoech Sang on 15th September, 2008. The prosecution has called eight witnesses to prove the charges. The effect of the prosecution evidence presented by the eight witnesses is that the two accused persons and the deceased had been drinking *Changaa* at the home of the 1st accused on the day in question. They were later joined by **P.W.4, Kipkurui Philip Bett (Bett)** and his friend Paul Langat.

In the course of drinking, the deceased and the 2nd accused began to issue blanket threats, not aimed at any one in particular. Bett and his friend, Paul Langat, being apprehensive that they may have been targeted by the threats decided to leave. As the two were leaving, the deceased and the 2nd accused followed them, forcing them to take to their heels. As the deceased and the 2nd accused chased the two, Bett fell and the deceased caught up with him. A struggle ensued between the two before the 2nd accused joined in. The 2nd accused was armed with an axe. Bett freed himself and ran away after pushing the deceased away.

In the course of the struggle, Bett's cap dropped. The next morning he decided to go for it. Near the scene of the previous night's struggle, he found the deceased lying on the ground and having difficulties in breathing. Bett went to the 1st accused person's home which was about 100m from the scene but only found the wife. Both Bett and the 1st accused person's wife tried to feed the deceased on porridge but he was too weak to take.

The 1st accused person's daughter (**P.W.5, Viola Cherotich Towett**, 18 years) and son (**P.W.6, Kennedy Kiplangat**, 13 years) were declared hostile and all they stated in their testimony was that their father was very drunk and slept that afternoon; that the deceased was equally very drunk and aggressive; that he chased Bett and his friend Paul Langat away; that when the deceased became aggressive, Viola, Kennedy and their mother went to the neighbour's home and later on to the home of their elder brother. The next morning they learnt that the deceased was dead.

The police got the report of the incident, went to the scene and collected the body of the deceased. **P.W.8, P.C. Juma Kisera**, the investigating officer confirmed that from his observation the body must have been dumped where it was found lying because the surrounding was not disturbed. He also observed that there were signs of struggle at the home of the 1st accused person.

According to Dr. Samuel Onchere who produced the post mortem report on behalf of Dr. Ondari, the body of the deceased had bruises on the forehead, right cheeks region, blood was oozing from the left ear; that there was blood in the chest cavity covering the heart and bleeding over the skull. In the opinion of the doctor, the deceased died of severe chest and head injuries secondary to assault. The accused persons were subsequently arrested and charged with the present offence.

At this stage, the court is called upon to consider if the foregoing evidence discloses a *prima facie* case against the accused persons; whether that evidence is such that a conviction may be entered if the accused persons were to offer no evidence in rebuttal. See **Ramanlal Trambaklal Bhatt Vs. Republic** (1957) EA 332. The prosecution evidence confirms that the 2nd accused, Bett, Paul Langat and the deceased had *changaa* at the home of the 1st accused. There is also evidence that throughout this period, the 1st accused was drunk and was sleeping. Even as Bett and Paul were being chased from his (the 1st accused person's) home, he was still asleep. The only reason, it appears from the evidence presented, why he was arrested was because the drinking was in his home, the fight took place a few meters from his home and the body found near his home.

Without any evidence, direct and circumstantial linking him with the fatal injuries inflicted on the deceased, it would be futile to put him on his defence as the evidence against him cannot be a basis for a conviction if he did not call evidence in rebuttal. For these reasons, he is acquitted of the charge of murder. He is hereby set at liberty forthwith unless held for any other lawful cause. I however find that the evidence against the 2nd accused shows that he was the last person seen with the deceased as they chased away Bett and Paul Langat. That evidence discloses a *prima facie* case to warrant the 2nd accused person to make his defence.

Dated, Delivered and Signed at Nakuru this 21st day of March, 2011.

**W. OUKO
JUDGE**