



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 44 OF 2004

REPUBLIC:::PROSECUTOR

VERSUS

MOSES KIPKEMI CHERUIYOT:::ACCUSED

RULING

The prosecution has called a total of 9 witnesses after which, **Mr. Buluma**, counsel for the accused submitted that a *prima facie* case had not been demonstrated against the accused. Learned Senior State Counsel, **Mr. Chirchir** on his part submitted the evidence so far adduced had clearly made out a *prima facie* case for the accused to respond.

In this case, the accused, **Moses Kipkemoi Cheruiyot**, jointly with another not before the court is said to have murdered the deceased **John Kiptarus Keittany** on 14th May, 2004 at Kipchowatt Village in Keiyo District within the Rift Valley Province. He denied committing the offence.

Briefly, the case for the prosecution was as follows:

Barnabas Kibet (P.W.1), on the material date at 9.30 p.m., was lying on his bed when he heard the sound of someone being whipped from the direction of the road near his house. He went out to investigate and saw three people pulling another from the side of the road to the middle. He recognized two of the people using head lights from a matatu approaching the scene. The two people he recognized were the accused and one **Kipkorir Kandie**. The three left the scene as the matatu approached the scene. He recognized the deceased as his neighbour and raised alarm thereby attracting his neighbours including his parents. He also sent for the deceased's kin. He did not inform his neighbours and the deceased's kin about what he had observed because he feared a revenge reaction against the trio. He then went to sleep.

The next day, he went to the scene and saw the accused standing nearby. In cross-examination, P.W.1 acknowledged that he was initially a suspect and did not know who killed the deceased.

Vitalis Kipruto Rotich (P.W.2) narrated to the court how he had consumed Changaa with the accused and others the evening of the material date - parting company at about 8.00 p.m... He again saw the accused at the scene the next day in the morning.

Wilfred Kipkoskei Keitany (P.W.3), was informed of the death of the deceased by his son (deceased's) early in the morning of the next day. CPL **Kennedy Marin** (P.W.4), did not relate anything with respect to the offence facing the accused but he acknowledged having been with the accused on 1st May, 2004 at

Malala.

Jane Jerotich Kibet (P.W.5) testified about how she sold Changaa to the deceased and others on the material evening. According to her, the deceased consumed changaa from 6 p.m. to 8.00 p.m.

Joseph Kipkemoi Keitany (P.W.6) testified that at about 2.00 a.m. of the material date 15th May, 2004, he was awakened by the deceased's son who informed him that the deceased had been beaten by unknown people. He visited the scene where he stayed until the deceased's body was taken by police to the mortuary.

Sammy Kimeli Kiptarus (P.W.7) merely identified the body of the deceased to the doctor who performed the post mortem on the deceased's body and **Shadrack Kiplimo Tarus** (P.W.8), one of the deceased's sons, was with the deceased before he left for the changaa outfit and saw him again when he had died.

CPL **Samson Kataka** (P.W.9), investigated the case. He visited the scene and interrogated witnesses from whom he gathered that the accused was involved in the death of the deceased. He accordingly arraigned him in court. Asked why the accused was not arrested immediately, he stated that he was looking for his accomplice who had gone under.

I have carefully reviewed the above evidence to determine whether the accused has a case to answer as defined in the case of **Ramanalal Bhat –vrs- Republic [1957] EA 334**. There the predecessor of the present court of appeal stated 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 evidence 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 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 be 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”.

The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The former stipulates as follows:-

“203- Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”.

Malice aforethought is defined in section 206 of the same code as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

- (a) An intention to cause the death of or to do grievous harm to any person whether that person is the person actually killed or not;**
- (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not or**

by a wish that it may not be caused;

(c) **Intent to commit a felony.”**

The prosecution did not adduce medical evidence to establish what caused the deceased's death herein. That evidence was crucial in view of the testimonies of the witnesses relied upon by the prosecution. The only evidence which connected the accused to the offence charged was given by **Barnaba Kibet** (P.W.1). He is the only one whose testimony placed the accused at the scene when the deceased's body was found. His testimony was however, discredited by the witness himself. He freely admitted that he was one of the first suspects of the offence. He also categorically stated that he did not know who had killed the deceased. Further, although he testified that he saw the accused with two others dragging the deceased on the material night, he did not tell those who visited the scene immediately. He did not even tell his own parents or the deceased's kin. His explanation that he feared a revenge attack upon the accused is suspect because he did not disclose what he had allegedly seen even when the accused had long left the scene. He also stated that the accused at the time had no shirt and he observed the goings on for only two minutes. Given that it was at night and the flitting moment, the people he saw were in the vehicle light, he could very easily be mistaken.

There was also abundant evidence that the deceased had consumed Changaa at the house of **Jerotich Kibet** from 6.00 p.m. to about 8:00pm, a period of about two hours on the material evening. The accused had also consumed Changaa at the house of **Phylis**, according to **Vitalis Kipruto Rotich**, (P.W.2). P.W.2 left the accused and others at **Phylis's** house at about 8.00 p.m. No evidence was adduced as to when the accused left the house of **Phylis** and if he did so, whether he could be at the scene at about 9.30 p.m.

Given the testimony of the witnesses offered by the prosecution, medical evidence as to the cause of death was crucial but was not adduced.

In the premises, I have come to the conclusion that the evidence adduced by the prosecution does not establish a *prima facie* case against the accused. I therefore dismiss the case against the accused person and do hereby acquit him under section 306(1) of the Criminal Procedure Code.

The assessors are discharged.

**DATED SIGNED AND DELIVERED AT ELDORET
THIS 10TH DAY OF AUGUST 2011.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

1. Mr. **Chirchir** for the State
2. Mr. **Wabuyabe** holding brief for **Mr. Buluma** for the accused and
3. Assessors – **Noah Kibet Kipchumba & Tabitha Mmedwa Agatsiva.**

**F. AZANGALALA
JUDGE**

10/8/2011