



**REPUBLIC OF KENYA**  
**IN THE HIGH COUR OF KENYA AT ELDORET**  
**CRIMINAL CASE NO. 17 OF 2005**

REPUBLIC.....PROSECUTOR

VERSUS

NICHOLAS IRISHA.....ACCUSED

**RULING**

The accused, **Nicholas Irisha**, is charged with murder contrary to Section 203 as read with section 204 of the Penal code. The allegation is that the accused, on the 21<sup>st</sup> January, 2005, at Kibabet Location in Nandi District of the Rift Valley Province murdered **Brian Kipkogei** (“hereinafter the deceased”).

The prosecution called a total of eight (8) witnesses. A summary of the evidence is as follows:-

**Irene Chemtai** (PW1) is the mother of the deceased and was, at the time of the alleged offence, the wife of the accused. She testified that on the material date she went to hospital and on return she found the deceased playing. The accused left to buy a soda for the deceased. He went to the local shop with the deceased. They returned with the soda. She was invited to take the soda but replied that she would take her share later. Shortly afterwards the deceased informed her that his father had given him poison. When she enquired of the accused about the charge the deceased had made, he denied stating that he could not poison the deceased. The deceased’s condition deteriorated and he was taken to hospital where he died while being treated.

PW1 further stated that they had kept diazinon bottle in a box in the house but when she checked the bottle she found it empty.

The police were informed and the accused arrested.

On being cross examined, she stated that the soda the deceased took was not poisoned. In her view the deceased could have taken the poison first before the soda. She further stated that at the material time they stayed with another family in the same house.

**George Barasa** (PW2) testified that on the material date he saw the deceased with the accused as they went to buy soda and on their return from the local shop. Later he was informed by **Grace Chebet** that the deceased was poisoned by the accused. He arrested the accused and handed him to the police when they arrived.

**Marcella Cheptum** (PW3) was the shop keeper from where the accused purchased the soda. Shortly after the purchase the accused returned to the shop for milk and informed him that the deceased had taken poison. Later he heard that the deceased had died.

**Grace Chebet**, PW4 testified that while at a dispensary, she was joined by PW1, the accused and the deceased. She left them at the dispensary and went home. Later PW1 informed her that the deceased could have taken poison. She then witnessed the accused take the deceased to hospital.

**Caroline Chebor** (PW5), is a grandmother of the deceased and attended the post-mortem being performed on the body of the deceased.

**PC Benard Simiyu** (PW6) received a report of the murder of the deceased. He visited the scene, recovered the bottle alleged to have had poison and arrested the accused.

**Dr. Nehemiah Angwenyi Onger** (PW7) performed the post mortem on the body of the deceased. He could not determine the cause of death and therefore took samples from the deceased's system for further analysis.

**CPL. Simon Cheruiyot** (PW8) attended PW7 perform the post mortem. As the doctor could not determine the cause of death, specimens were taken from the deceased for further analysis.

However, the report of the Government analyst was never produced since he never testified.

The above, in outline, is the evidence upon which the prosecution seeks to rely upon to demonstrate a prima facie case.

So, does the testimony establish a prima facie case. A prima faie case is 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 accused. (**See Bhatt -V- Republic [1957] E.A 332**)

I ask myself, if the accused were to say nothing can I convict him on the basis of the testimony adduced by the prosecution? There is no direct evidence that the accused administered any poison to the deceased. PW1 suspected him to have done so. Suspicion alone however cannot translate to a prima facie case. The suspicion to my mind remains just that suspicion. The suspicion is weakened by several circumstances. Firstly, the allegation that the deceased died of poisoning was not proved. The prosecution adduced no evidence that the bottle which was alleged to have had the poison indeed had the poison.

Secondly, and as already observed the results of analysis of the specimen removed from the deceased's body were not produced as the Government Analyst was not called to testify,

Thirdly, PW1 admitted in cross examination that besides the accused and the deceased, she lived with another couple in the same house. The couple were not called as witnesses, yet they had equal opportunity to administer the poison to the deceased or at least expose the poison to him.

Further, the investigating officer was not called. The prosecution could not therefore explain on what basis such a serious charge was laid against the accused.

In all those premises I find and hold that there is no prima facie case established against the accused and accordingly by virtues of section 306 (1) of the Criminal Procedure Code. (Cap 75 Laws of Kenya) I hereby acquit the accused and order that he be forthwith set at liberty unless he is otherwise lawfully held.

Orders accordingly.

**DATED SIGNED AND DELIVERED AT ELDORET  
THIS 4<sup>TH</sup> DAY OF AUGUST, 2011**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of :-**

**Mr. Kabaka for the State and  
Mr. Wabuyube H/B for Mr. Miyenda for the Accused.**

**F. AZANGALALA**

**JUDGE**

**4<sup>TH</sup> AUGUST, 2011**