



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 40 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL KIPSANG

MZEE.....ACCUSED

RULING

Daniel Kipsang Mzee, (hereinafter “the accused”) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The allegation is that on 2nd August, 2007 at Kapkagaron Sub – Location in Nandi District within the Rift Valley Province the accused murdered **Thomas Kipngetich Arap Kosgei** (hereinafter “the deceased”). The prosecution called six (6) witnesses in support of its case. In outline their evidence was as follows:-

Vincent Kiprono Kebenei (PW1) testified that on 3rd August, 2007 in the evening the accused went to his (PW1’s) house and asked for food. He was served with the same. After the meal, he left PW1’s house saying that he was escorting the deceased to his house since he (deceased) was drunk. PW1 did not however see the deceased. Shortly afterwards the accused went back to PW1’s house and told him that he had killed the deceased. He took his bicycle and left saying he was going to report to the police. PW1 and his wife decided to go to the house of the deceased to check. On their way, they met **Wellington Kirwa** (PW2) who lived with the deceased and told him of the accused’s report. PW2 went to the deceased’s house and indeed found the deceased lying dead outside his house. He observed cut wounds on the deceaseds’ forehead. He went back to PW1 and reported his findings. Together with PW1, they reported to the Assistant **chief Abednego Samoei** (PW3).

The Assistant Chief (PW3) looked for the accused who was his watchman without success and returned home to sleep. He visited the scene the next day and found members of the public threat. He rang the OCS Kabiyyet Police Station who sent his officers to photograph the scene and take the body of the deceased.

Pius Barabara Arap Chumo (PW4), the father of the deceased, the accused and PW1 also visited the scene the next morning on being informed that the deceased had been killed. That was before the body was taken away. He observed that the body of the deceased had a cut wound on the head.

A search for the accused was mounted. The search team included **Stephen Murei Kirwa** (PW5). He testified that on 3rd August, 2007 at about 4.30pm they traced the accused in a maize farm and before they arrested him he said he had killed his brother. The search team was led by **Jonah Kimutai**

Taiti (PW6). He was also the Assistant Chief of Lolkeringet Sub-location. He told the court that when the accused was arrested he told him that he had cut his brother on the head.

The above is a summary of the evidence upon which the prosecution seeks to demonstrate a prima facie case. Has it succeeded? A prima facie 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 -Vs- Republic (1957) E.A. 332)**. There is no direct evidence that the accused killed the deceased. PW1, PW5 and PW6 are the only witnesses who alleged that the accused admitted having killed the deceased. The prosecution however adduced no medical evidence on the cause of death of the deceased. There is evidence that the body of the deceased was taken by police officers after the scene had been photographed. There is however no evidence as to where the body was taken. None of the police officers who purportedly took the body of the deceased were called to testify. There is no evidence of any of them identifying the body of the deceased at any post mortem operation. To compound it all the investigating officer was not called to testify on the basis upon which the accused was arrested and charged.

In the premises, I find and hold that no prima facie case has been established against the accused. Accordingly, by virtue of the provisions of section 306(1) of the Criminal Procedure Code (Cap75 Laws of Kenya), I hereby acquit the accused, and order that he be forthwith set at liberty unless he is otherwise lawfully held.

Order accordingly.

**DATED SIGNED AND DELIVERED AT ELDORET
THIS 27TH DAY OF OCTOBER, 2011.**

**F. AZANGALALA
JUDGE**

Read in the presence of:

- 1. Mr. Kabaka for the state,**
- 2. Mr. Bichange for the accused.**

**F. AZANGALALA
JUDGE
27TH OCTOBER, 2011**