

where (he), the accused went. The deceased then also left at about 6.30 p.m. of the material date. On his way home, he saw the accused in water and enquired what he was doing, upon which the accused abused him. P.W.2 then went home. The next day, he was informed of the death of the deceased. He visited the scene and saw the body of the deceased. The body was at the spot he had seen the accused the previous evening. The body was later taken by police officers from Loruk Police Station. The accused was then arrested. P.W.2 also testified that the accused had shortly before been arrested for attempting to shoot the deceased.

On Cross-examination, P.W.2 denied seeing the bag of maize flour the night he saw the accused. He only saw the same the next day when the body of the deceased was found in the water. He further denied seeing **Mary Kakandich** or anybody else in the water.

Chakamondo Lopodo, P.W.3 testified that on the material date at about 6.50 p.m., he heard the accused threaten to kill his mother in his presence and that of her daughter P.W.1. The deceased then left together with P.W.1 at about 7.00 p.m. They were followed by the accused five minutes afterwards. The next day, P.W.3 and another saw the body of the deceased in the water. He reported to Loruk Police who later took the body to the mortuary. At about 10.00 a.m., of that morning, P.W.3 and members of the public arrested the accused and handed him over to the police.

P.C. Salim Cherop, (P.W.4), was among police officers who arrested the accused and took the body of the deceased to Kabarnet District Hospital Mortuary. On Cross-examination, he testified that he observed no injuries on the body of the deceased. He also saw no sign of any struggle at the scene and could not tell the cause of death.

P.C. Patrick Okech, (P.W.5), was with P.W.4 when the body of the deceased was retrieved from the water and **P.C. Evans Omondi Ouma** (P.W.6) was one of the police officers who re-arrested the accused from members of the public and escorted him to Loruk Police Station where he was received and locked in the cells by **P.C. George Mwatari**, (P.W.7.)

P.C. Samuel Kamau, (P.W.8) attended the post mortem of the deceased and testified that he observed injuries on the neck of the deceased.

P.C. Wycliffe Nyongesa, (P.W.9) was the Investigating Officer. On Cross-examination, he testified that although the initial report was one of drowning, investigation revealed murder.

The above is a summary of the evidence upon which the prosecution seeks to rely upon to establish a prima facie case. I ask myself whether indeed such a case has been demonstrated. As was stated in **Batt – vrs- Republic [1957] E.A. 332**, 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.

The only evidence which places the accused at the scene is that of P.W.1, **Kamama Tongirei**. She saw the accused slap the deceased and attempt to strangle her. She however, ran into the bush because she was frightened. Her evidence was further weakened in cross examination as she acknowledged that when she last saw the deceased with the accused, she was alive and she did not know how she had ended up in the water.

The prosecution further sought to rely upon the testimony of **Wilson Kamau Kitum**, (P.W.2) who stated that he had seen the accused emerge from water the evening before the deceased body was recovered from the water at the same spot. However, P.W.2 estimated the time to have been about 6.30 p.m. Yet P.W.1 testified that while in the company of the deceased, she met the accused with one **Mary Kakandich** at about 7.00 p.m. That evidence suggests that by the time P.W.2 saw the accused the same evening, the deceased was still alive. That position is buttressed by P.W.3 **Chakamondo Lopodo** who testified that the deceased indeed left the busaa outfit at about 7.00 p.m.

The rest of the witnesses were police officers who were not eye witnesses. It puzzles me that **Mary Kakandich** who was alleged to have been with the accused when he met the deceased and P.W.1 was not

called as a witness.

In view of the above testimony, it was crucial for the prosecution to establish the cause of death. It could only do so through the testimony of the Doctor who performed the postmortem on the body of the deceased. That testimony was however not adduced.

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

Orders accordingly.

**DATED SIGNED AND DELIVERED AT ELDORET
THIS 26TH DAY OF OCTOBER, 2011.**

**F. AZANGALALA
JUDGE**

Read in the presence of
Ms Tutei holding brief for **Mr. Miyienda** for the accused.

**F. AZANGALALA
JUDGE
26/10/2011**