



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO.8 OF 2007**

REPUBLIC.....PROSECUTOR

VERSUS

WILLIAM KIPRONO TOWETT *Alias* NDUME.....1<sup>ST</sup> ACCUSED

WILLIAM KIPKURUI SITONIK.....2<sup>ND</sup> ACCUSED

**RULING**

Both accused person are charged jointly that on 15<sup>th</sup> October, 2006 at Koita Village in Keringet, Molo they murdered Simon Nganga. They denied the offence and their trial commenced before Maraga, J (as he then was). Pursuant to **Section 200(1)** of the **Criminal Procedure Code**, I took over the hearing following the transfer of the trial judge to Nairobi. At the close of the prosecution case the evidence presented can be summarized as follows:

The deceased and **P.W.1 Johnson Kamau (Kamau)** had been given Kshs.5,000/= by their employer, **P.W.2, Francis Karanja Mwai (Karanja)** to go to some village where they would meet some people to sell potatoes to them. According to Kamau, together with the deceased they met the two people who were to sell to them potatoes. The two people were joined by a third man as they were led to the alleged potatoes farm. The three instead led the deceased and Kamau to some bush, draw out swords, axes and clubs and attacked the deceased and Kamau. Kamau was able to escape with some injuries while the deceased was not lucky. He was killed. Kamau reported the attack to Keringet Police Station and shortly thereafter to Karanja. The police visited the scene and collected the body of the deceased.

Approximately two months later on 7<sup>th</sup> January, 2007, the first accused was arrested on a tip-off by an informer. The 2<sup>nd</sup> accused was also arrested. A postmortem examination on the body of the deceased revealed that he suffered a fracture on the front and back of the head and bruises on the abdomen region. According to the examining doctor the deceased died of cardio-respiratory failure due to severe head injury.

At the close of the prosecution case, the court must consider the above evidence in order to determine whether or not it discloses a *prima facie* case against the two accused persons. A *prima facie* case was defined in the celebrated case of

**Ramanlal Trambaklal Bhatt V. Republic** (1957) EA 332 to mean:

**“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.”**

To begin with, out of the 9 prosecution witnesses, only **P.W.7, Cpl. Nicholas Ole Sena** has mentioned the 2<sup>nd</sup> accused, William Kipkurui Sitonik and only that the 2<sup>nd</sup> accused was arrested on 5<sup>th</sup> January, 2007. Again, he only received the 2<sup>nd</sup> accused at the station. He could not tell why the 2<sup>nd</sup> accused was arrested. There is therefore absolutely no evidence or *prima facie* evidence linking the 2<sup>nd</sup> accused to the death of the deceased. In the circumstances he cannot be called upon to defend himself.

Regarding the 1<sup>st</sup> accused, the only alleged eye witness, Kamau, only stated that Macharia had sent them to meet two people Kimalel and another man nick-named Ndume. He explained that he did not know the two men and was meeting them for the first time. While he maintained that the two men and a third one who joined them attacked them with swords, axes and clubs and that he gave the police their descriptions; he did not identify the two persons, either in an identification parade or in court as the same ones who attacked them. All the police officers who testified in this trial did not confirm the evidence that they were given the description of the attackers. A description in court that one of the attackers was short and dark is not sufficient.

Turning to the evidence of Karanja, the previous day to the attack, he was approached by the deceased in the company of the 1<sup>st</sup> accused and another man who wanted to sell to him potatoes. They had tea and agreed that he (Karanja) would send the deceased and Kamau with money to buy the potatoes. The next day, he gave the deceased Kshs.5,000/= as agreed. He did not go with them. But later he met Kamau at Kirenget Stage and was informed of the attack.

From that testimony, it cannot be confirmed that, of Karanja’s own knowledge, the deceased and Kamau indeed met the 1<sup>st</sup> accused. Besides, Kamau did not attend the meeting of the previous day and also has not identified the 1<sup>st</sup> accused as one of those who attacked them.

No purpose will be served in calling upon the 1<sup>st</sup> accused to make his defence. The evidence as it stands is incapable of being a basis for conviction if the accused persons were to elect not to call evidence in rebuttal.

For the reason stated, the accused persons are acquitted and shall be set free forthwith unless lawfully held.

**Dated, Signed and Delivered at Nakuru this 29<sup>th</sup> day of December, 2011.**

**W. OUKO**

**JUDGE**