



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL CASE NO. 5 OF 2008**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**SIMION NGENY.....ACCUSED**

**RULING**

The accused is charged with the felony of murder contrary to **Section 203** as read with **section 204** of the Penal Code, **Chapter 63** of the laws of Kenya. The particulars of the charge against the accused are that the accused;

***“On the 2<sup>nd</sup> day of February, 2008 at Kiplel gutik village, Iraa location in Kericho District within the Rift Valley Province murdered HILLARY KIPLANGAT”***

**Hillary Kiplangat**, the deceased, was a boy of about 9 years. The evidence adduced shows that the accused was his father and that his mother was one **Lorna Ngeny**. Six prosecution witnesses testified in support of the charge. None of them saw the deceased being killed. The evidence adduced was circumstantial.

**PW1, Jeremiah Kipsigei Bett**, the grandfather of the accused, was informed by telephone on 2<sup>nd</sup> February, 2008 by one **Geoffrey Ngeny** that his son’s son (*the deceased*) had been killed. He proceeded on that day to the accused’s house where he found the accused outside the house with his hands tied with a rope. When he entered the house, he saw the deceased lying on the floor covered with a blanket. He uncovered the deceased and saw the body which he recognized as that of his grandson, the deceased. He observed an injury on his head which was fresh and blood on the floor. The deceased’s body was near the door. He did not know when or how the deceased had been injured or by whom. PW1 does not appear to have talked to the mother of the deceased or any one else who was there. She would have been able to throw light as to what had happened to the deceased. This omission was peculiar. The accused was talking gibberish and PW1 took him to the police station. PW1 said in Cross-examination that when he spoke to the accused, the latter was calm and kept quiet and was not violent.

**PW2, Simeon Kipngeny Arap Koech**, a farmer at Kiptere in Kericho, was at home on 2<sup>nd</sup> February, 2008 when he heard screams at about 8.00a.m from the neighbourhood. He got information that the screams were from the house of **Simion Ngeny**, the accused. He went there. He found the accused outside the house. He was tied. When he got inside the house, he saw and recognized the body of the deceased

lying on the floor with an injury on the head. He meekly told the court that the accused told him that he had killed the child. There was no corroboration to that evidence. It did not appear to me to be true judging from the conduct of the witness.

The area chief, **Andrew Kimutai Langat** gave evidence as PW3 and produced a jembe which he collected from the scene of the crime. It had blood stains and was marked for identification as MFI.1. His evidence was that he saw the body of the deceased and that he called the Police.

The police corporal, **Augustine Kipkorir Cheruiyot**, who gave evidence as PW4 witnessed the post mortem on the body of the deceased which was identified by the deceased's mother and grandfather, Lorna and Jeremiah Bett respectively to Dr. Ochieng who performed the post mortem. Dr. Ochieng did not himself give evidence. Instead, it was Dr. Noah Murbiy (PW6) who did. He was not a qualified doctor at the time of the post mortem of the deceased. All that he could say was that the post mortem report was filled and signed by Dr. Ochieng whose handwriting he was familiar with. The investigating officer, **P.C. Dadira Douglas (PW5)**, on his part, said in evidence that he did not conduct investigations.

The mother of the deceased who PW1 said was in the home did not testify. She would have been a key witness. She would have illuminated the mind of court as to who hit and injured the deceased. The blood stains on the jembe were not proved to be from the blood of the deceased and the jembe was not produced as an exhibit and even if it was, it would have made no difference without proof as to whose blood was on it. No one testified that he saw the accused hit the deceased. The wife of the accused was in the house as were other family members. None of the people who tied the accused before he was ferried to the police station gave evidence. What has been placed before the court is evidence to the effect that the accused's son was killed and that the accused was the number one suspect. This, without more, is not sufficient evidence to establish a prima facie case against the accused to warrant him to be put on his defence. The investigations were shoddy and this is to be deplored. To put the accused on his defence on the basis of this evidence would amount to shifting burden of proof to the accused because that would require the accused to fill in the gaps left gaping by the prosecution. That would be a misdirection.

In the circumstance, I acquit the accused. Unless otherwise lawfully held, the accused shall be released and set free forthwith.

**DATED at KERICHO** this 23<sup>rd</sup> day of November, 2010

**G.B.M. KARIUKI, SC**

**RESIDENT JUDGE**

**COUNSEL APPEARING**

Mr. E.M. Orina Advocate, instructed by Messrs Orina & Co. Advocates appeared for the accused  
Mr. Kiprop, State Counsel from the Attorney General's Chambers appeared for the State  
Court Clerk – Mr. Koech