REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Case 2 of 2007

REPUBLIC ……PROSECUTOR

VERSUS

JOAN CHEPKEMOI CHEPKWONY ……1ST ACCUSED

EDNA CHEPKORIR KENDUIYWA……....2ND ACCUSED

WESLEY KIBET CHEPKWONY ……..…3RD ACCUSED

RULING

The three accused persons are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence stated that on 23rd November 2006 at Marangetiti village Sigor location in Bomet District within the Rift Valley province, the three accused persons jointly murdered Joel Chelule. The prosecution relied on the evidence of a total of twelve (12) witnesses in their bid to prove a charge against the accused persons.

Ambrose Kimutai Korir (PW1) testified that on 23rd November 2006 Joel Chelule (the deceased herein) passed by his homestead and requested him to join him later at the home Edna Chepkoriri so that they could indulge in a drinking spree. The deceased was also an Uncle of PW1. At about 3 p.m. PW1 went to the home of Edna and enquired whether the deceased had arrived. He was informed that the deceased was in house of Wesley that is the 3rd accused person. When PW1 joined the deceased at the house of Wesley, he was drinking chaggaa and he was already looking drunk. The deceased was engaged in a conversation with another man who was also drinking chagaa.

PW1 testified that he bought some chagaa for the deceased but did not join them in the drinking because he said he preferred drinking busaa which used to be brewed in another homestead. After about 20 minutes PW1 left for another homestead where there was busaa, he stayed until 7 p.m and then left for his home. This was confirmed by Kipsang **arap Cheriot (PW2)** who testified that he actually met PW1 on 23rd November 2006 while walking to a nearby canteen. PW1 invited him to join him at the house of Chepkochebet where busaa used to be sold and he bought him busaa of ten shillings. PW2 testified that PW1 informed him that he was with his uncle; the deceased herein whom he left behind because he was very drank. PW1 was also seen at the busaa drinking den by **Charles Kiptor (PW3)**, PW1 left the place at about 7pm. The next day he heard from people that the deceased's body was found on the road dead.

The other set of evidence of people who claimed to have heard about the deceased on the material day was by a group of women, namely by **Joyce Korir (PW6),** Joyce **Chemtai Bett (PW7), Janet Cherana (PW10)** and **Sharon Bett (PW11)** These four women testified that on 23rd November 2006 at about 6

p.m. they had gone to the home of Edna that is the 2nd accused person to deliver firewood to Obod Edna as a gift for assisting PW10 during child birth. While at the home of Edna, they were served with tea that is when the 3rd accused person came and spoke to Edna. According to these witnesses, Edna informed them that Wesley wanted Joan that is the 1st accused person, to give him flour to administer first aid on the deceased person who was very drunk. However it is not clear from the evidence of these witnesses whether they saw Joan give the flour or the 3rd accused person administered it as a first aid on the deceased. The following day, they learned that the deceased was found dead and his body was lying on the road side.

The body of the deceased was identified for post mortem examination by Wilson Kiprangat Cherure PW4 and Joseph Towet PW9. The post mortem examination was conducted by Doctor Joseph Kiproto Sitonik, PW12 at the Longisha District Hospital mortuary on the 28th November 2003. On internal appearance of the body of the deceased, the doctor found substances of fine flour in the trachea and the bronchi. The digestive system had food debris with a very strong smell of alcohol. As a result of the examination the doctor formed the opinion that the cause of death was cardiopulmonary arrest due to asphyxia due to chocking by inhalation of flour like substance.

This matter was investigated by Police Constable Charles Mwangi PW5 from Bomet police station. According to the investigating officer, he was assigned the duty of investigating a case of sudden death. He visited the scene and found the body of the deceased along a path by the hill. The deceased's clothes were wet; blood was oozing from the nose with a mixture of maize flour foaming from the mouth. The body was removed to Longishia District mortuary and post mortem was conducted on 28th November 2006. PW5 interviewed the villagers and found out that the deceased was excessively drank and flour was administered as a traditional cure for excessive drunkenness.

It was not clear to the investigating officer who had administered the maize flour but he was able to establish the deceased was drinking in the house of the 1st and 3rd accused persons. That is how the accused persons were arrested and charged with the present offence. After the close of the prosecutions case counsel for the accused persons submitted that the prosecution had not proved the charge of murder to the required standard. None of the witnesses saw any of the accused persons administer the maize flour on the deceased. The deceased was seen drinking illicit brew and on the material day, there was heavy rainfall. His body was found on the road side on his way to his home. The accused persons were merely suspected because the deceased person was last seen drinking at their homestead.

It is clear from the prosecution's evidence that there was no direct evidence to link the accused persons with the death of the deceased. This case is merely based on circumstantial evidence based on the evidence of PW1 who left the deceased drinking illicit brew at the house of the 3rd accused person. The four ladies also who testified said they heard from the 2nd accused person that the 3rd accused person was looking for the 1st accused person to assist him with maize flour to administer first aid on the deceased who was excessively drank. The following morning the body of the deceased was found foaming with maize flour from the mouth, on post mortem examination, the cause of the death was associated with choking due to substance like flour.

That is how the three accused persons were arrested and charged with the offence. No one saw the accused persons administer the flour. It is merely assumed that they succeeded in doing so. For the prosecution to succeed to prove the charged based on circumstantial evidence, the fact in support of the case must be in compatible with the accused person's innocence and incapable of any other hypothesis other than it is the accused persons and no other person were responsible for the death of the deceased person.

The facts in this case leave a lot to be desired. No investigations were carried out to conclusively establish that the accused person administered flour on the deceased. The deceased was left by PW1 at the house of the 3rd accused person at around 6p.m. By that time he was very drunk. There is a possibility that the deceased who was an alcoholic went to another homestead to drink or was helped by

other people other than the 3rd accused person. Indeed there is no evidence whatsoever against the 1st and the 3rd accused persons.

Accordingly, I find no evidence upon which the accused persons can be placed on their defence. As it was stated in the oft cited case of **Bhatt v Republic 1957 EA at page 334** the Court of Appeal explained what is a prima facie case in the following terms.

"***Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is full consideration might possibly be though sufficient to sustain a conviction. This is perilously near suggestion that the court would not be prepared to convict if no defence is made, but rather hoes the defence will fill the gaps in the prosecution case.***

Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough: or can any amount of worthless discredited evidence. It is true, as Wilson J. said that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weightily enough to prove the case conclusively: that that determination can only properly be made when the case for the defence ahs been heard. It may not be easy to define what is meant by a 'prima facie case' but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if not explanation is offered by the defence."

All the evidence that connected the accused person with the murder of the deceased was circumstantial, there was no direct evidence. In case of ***Kipkering Arap Koskei & Another – vs. Republic 16 E.A.C.A 135:-***

"***In order to justify, the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

With all the above doubts and gaps in the evidence by the prosecution, I find they have failed to establish a prima facie case requiring the accused persons to be placed on their defences. Accordingly the three accused persons are found not guilty of the offence of murder and there are acquitted under section 306 of the Criminal Procedure Code.

RULING READ AND SIGNED THIS 25TH DAY OF JUNE 2009.

M.K. KOOME

JUDGE