REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL CASE 30 OF 2005

REPUBLIC..……..…..……PROSECUTOR

VERSUS

WILSON TOO YONGAA ……..…….....1ST ACCUSED

DAISY CHEPKOSGEI KURGAT.....…….……2ND ACCUSED

RULING

The two accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence is that on the night of 18th and 19th July 2005 at Kalyet Village in Kericho District of the Rift Valley Province, jointly murdered Bernard Kipkemoi Korir.

K.C PW1 a girl aged 13 years testified that on the 19th July 2005, she used to live with Daisy Chepkosgei Kurgat the 2nd accused person. She was helping Daisy with house work and also used to go to school. Daisy was cohabiting with the 1st accused person as man and wife. PW1 used to sleep in a separate room with Daisy's child. On the night of 19th July 2005, the 1st accused person arrived in the wee hours of the morning. Daisy opened the door for him and when the 1st accused person entered the house, PW1 heard the 1st accused person telling Daisy that he had killed somebody by cutting his ears and legs. Daisy replied by saying that it is better the person has now died because he was disturbing her.

PW1 learned the next day that the body of Benard Kipkemoi Korir the deceased herein was found outside the shop murdered. PW1 did not reveal this information to any body until when the chief called a meeting of the villagers, that is when PW1 revealed to her friend what she heard on the night of 19th July 2005, being discussed between the 1st accused person and Daisy. Apparently this is the only evidence that led to the arrest of the 1st and 2nd accused persons and that is why they were charged with the offence of murder.

The other evidence by Michael Kiprono Ngetich, PW3 and Joyce Munge, PW6 is complete hearsay not worthy restating or considering. PW2 Nelson Korir was unable to testify and was stepped down and never recalled to give evidence. No explanation was given for his inability to testify, he was completely inaudible. The court did not understand why this witness was put to a stand and could not utter a word.

The body of the deceased was discovered outside the shop which used to be operated by his brother Julius Kimtai Arap Boyoi. He testified that on the 18th July 2005 they ate supper with the deceased at 8 p.m.

They separated with the deceased at 9.p.m. when he went to sleep at the shop. The following morning he was informed that the shop had been broken into, he rushed to the shop and discovered the body of his brother lying 50 meters from the shop. The body had dip cuts and the ears were cut.

Reuben Kimutai Rotich the assistant chief of Lemotik Location visited the scene when he heard that somebody had been murdered outside the shop. He also confirmed the body had injuries on the head. He is the one who called a public meeting so that people could give information on whether they knew the person who murdered the deceased. It was during those deliberations when it was revealed that PW1, knew the person who murdered the deceased.

The charge against the accused persons was merely based on the sketchy evidence by a minor which was not collaborated. The veracity of that evidence cannot also pass the test, according to Pw1, she heard the 1st accused person telling Daisy he had murdered somebody at the dead of the night. PW1 did not come forth with that information until much later.

To compound this problem further, even the evidence to certify the death of the deceased and the cause was not produced, the doctor who performed the postmortem examination did not testify and no attempts were made even to produce the postmortem report by other witnesses.

The issue for determination is whether the prosecution have established a prima facie requiring the accused persons to be placed on their defence. Borrowing the principles in the oft cited case of **Bhatt Vs Republic 1957** at page 334, the court of appeal explained what is a prima facie case as follows:-

"***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: nor 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."

The prosecution failed miserably to establish a prima facie case requiring the accused persons to be placed on their defence. Accordingly, the accused persons are found not guilty of the offence of murder. They are hereby acquitted under provisions of section 306 of the Criminal Procedure Code.

RULING READ AND SIGNED THIS 25th DAY OF JUNE, 2009.

M.K. KOOME

JUDGE