



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Criminal Case 15 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

WESLEY KIPROT TELE ACCUSED

RULING

The accused herein, Wesley Kiprot Tele is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence, as stated in the charge sheet, are that; on the night of 27th and 28th day of August, 2005 at K[particulars withheld] village in Bureti District of the Rift Valley Province (*he*), together with others already before court, murdered TNM.

The prosecution closed its case on 13th July, 2009 after calling a total of seven (7) witnesses, all of whom have given their version of the events surrounding the death of the deceased. The Defence has submitted that, based on the evidence tendered, the prosecution has not established a prima facie case to warrant the accused person being put on his defence.

Submitting on behalf of the accused, learned counsel Mr. Kiprono submitted that the only person who alleges to have witnessed the incident is PW5, himself a condemned convict in respect of the death of the deceased. According to counsel, the evidence of this witness, that he saw the accused beating the deceased, is clouded with doubt since the witness stated that he and the deceased consumed a lot of liquor at the accused's premises prior to the death which caused him to sleep in their course of their drinking spree. After the alleged incident PW5 testified that he carried the deceased home, both of them extremely intoxicated and that he may have dropped her on the way home. Counsel submitted that all the evidence led by the prosecution pointed to PW5 as the culprit, particularly since he locked the deceased in the house the following day until 1.00p.m and admitted under cross-examination that he did so knowing very well that the deceased had died.

Mr. Kiprono submitted further that, the fact that PW5 kept quiet when it was put to him, (*again under cross-examination*) that he was the only one who knew what he did to the deceased, went to show that it was he, and not the accused, who committed the murder. In closing, counsel submitted that, save for the fact that the accused sold chang'aa to the deceased and PW5, among others, and that the deceased died thereafter, there is nothing in the prosecution's evidence to prove that the accused had anything to do with the death of the deceased, who, in any event, died in the house of PW5. The State, represented by the learned State counsel, Mr. Mugambi, had nothing to say in reply to the defence submission and left the matter to the court.

A prima facie case was defined in RAMANLAL TRAMBAKLA V.R. [1957] E.A. 322 as

“One on which a reasonable tribunal, properly directing to mind to the law and the evidence could convict if no explanation is offered by the defence”.

As in every other criminal trial the accused herein remains innocent of the charge of murder until proved otherwise by evidence. The evidence must be such that his guilt, in respect of the death of the deceased, TNM is

established beyond all reasonable doubt. The burden is on the prosecution to, firstly, establish a prima facie case as defined above, and secondly, to prove the same. The task before the court, at this instance, is to consider the evidence adduced against the accused and to rule as to whether, on the strength of the same, the guilt of the accused has been established and whether, based on that evidence the accused should be called to defend himself.

There is no doubt at all that the deceased was found dead in PW5's house after the two of them had been drinking chang'aa at the accused's premises for a whole day until late in the night of the 27th August, 2005. The deceased's body was discovered lying in PW5's bed on 28th August, 2005. He himself admitted having carried her there from the accused's premises and that he could have dropped her on the way.

Apart from PW3, Samwel Kipngeno Chepkwony, PW4 Dr. Albin Rono (*who performed the post mortem on the body*) and PW7, who appeared for the Investigating Officer, all those who testified against the accused had their testimonies based on hearsay, namely, what PW5 told them had happened before the deceased's body was discovered in his bed. Some said he had told them that the deceased had been beaten by the accused and others, while other witnesses said that PW5 had told them that the deceased had been gang raped by a group of which the accused was part.

PW1, the deceased's employer, testified that he had heard from one Stephen Mitei (*who never testified*) that he had rescued a woman whom the accused and PW5 had attempted to rape. PW2, the Assistant Chief to whom the incident was first reported, testified that PW3, whom PW2 said had witnessed the rape ordeal had told him of the same. But under cross-examination PW2 stated that

"all that I know about this incident is what Kibet (PW5) narrated to me".

The only other alleged eye witness, PW3 did not testify to having witnessed any rape or other incident involving the accused and the deceased, save that he saw the deceased and PW5 drinking at the accused's premises. Although he testified that he heard the screams of a woman emanating from the accused's drinking den and a voice saying "*Wesley don't kill me*", PW3 stated under cross-examination that he did not know whether the voice was that of the deceased. His closing statement before court was that

"I do not know how Teresia met her death. I only heard it was at Koigi's house. I cannot tell Teresia was killed by Wesley".

PW3 testified that Koigi was PW5.

PW5's evidence was riddled with contradictions. He did not give any evidence touching on an alleged rape committed on the deceased and even denied that he had told the police any such thing when he recorded his statement. He testified in chief, that the accused, together with one Benson Kipkoech and a Isaiah Langat beat the deceased while the couple was drinking at the accused's place. He stated that he had fallen asleep due to intoxication but found the three beating the deceased when he woke up and that he saw the accused kick her when she was on the ground.

After the alleged beating, PW5 testified that he carried the deceased to his house where she refused to eat, complaining that Tele and Benson had beaten her. He testified that the deceased was not injured as they left the accused's chang'aa den. PW5's testimony was that he and the deceased slept together until morning when she complained of pain in the neck. He also testified that he summoned his employer, (*whom he said was a doctor*) that same morning, to come and examine the deceased. According to PW5, the doctor told him the deceased had been injured. PW5 also testified that he also summoned the Area Assistant Chief who found the deceased still alive and complaining of neck pain. The Assistant Chief asked PW5 to name those who had beaten the deceased and PW5 named them.

Under cross-examination however, PW5 changed his story and stated that he never talked to the deceased in the morning and admitted that she had already died when he allegedly went to report to the Assistant Chief. Assuming that the doctor PW5 talked about is PW6, the Clinical Officer Joseph Kipngetch, who was first at the scene, his testimony was that his attention there was drawn by the presence of a crowd and that he found the deceased already dead, the body covered with a blanket. PW6 testified that he is the one who reported the incident to the Assistant Chief, Joshua Kirui. PW2 testified as much and confirmed that when he first went to the house of PW5, the deceased was already dead.

PW7 told the court that the only reason the accused was charged with this murder is that evidence collected

indicated that he was with the deceased before she died and also *“because the post mortem report indicated that she had been murdered”*. Indeed, the evidence of Dr. Albin Rono (PW4) who performed the post mortem on the body of the deceased on 5th September, 2005 was that there were

“bruises in the neck and face.. and grip marks on the neck.

PW4 also found on the body dislocation with displacement of cervical 1 and 2. He concluded that the death was caused by

“Cardio-vascular strangulation with dislocation of C1 and C2”

From the above, it is quite clear that the deceased died not as a result of the alleged beating or rape ordeal, which are not at all established but as a result of strangulation which must have occurred after she had left the accused's premises in the company of PW5, who, admittedly, has already been convicted and sentenced to death in connection with her death. PW5 himself testified that the deceased was not injured as they left the drinking den. His attempt to implicate the accused in the death of the deceased is entirely without basis.

I find not even the thinnest thread of evidence to link the accused before court with the murder herein. That the deceased was at his place prior to her death may have provided the opportunity for him to kill her but considering the evidence adduced herein, all he did is sell her chang'aa which she enjoyed in the company of her already convicted boyfriend, PW5. The evidence before me is such that the accused herein could not have and did not commit the offence with which he was charged. I therefore find him not guilty and accordingly acquit him.

DATED, SIGNED AND DELIVERED at KERICHO this 15th day of July, 2009.

M.G. MUGO

JUDGE