

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Criminal Case 68 of 2003

REPUBLIC PROSECUTION

VERSUS

DAVID K. TONUI ALIAS KIPCHAINIK 1ST ACCUSED

DAVID KIPKOECH KORIR 2ND ACCUSED

RULING

The accused, David Kipkoech Tonui alias Kipchainik (*1st accused*) and David Kipkoech Korir (*2nd accused*) were charged with murder contrary to **section 203 as read with section 204 of the Penal Code**. The particulars of the offence were that on the night of the 1st and 2nd of November, 2003 at unknown time at Kapkelei sub location Bomet District, the accused persons jointly with others not before court, murdered Paul Kimutai Chepkwony (*hereinafter referred to as the deceased*). The accused persons pleaded not guilty to the charge. The prosecution called three witnesses after which it closed its case. This court had granted them a last adjournment. After the close of the prosecutions case, this court reserved its ruling on whether or not the accused persons had a case to answer based on the evidence adduced by the said prosecution witnesses.

PW1 Joseah Cheruiyot Bii testified that on the 1st of November, 2003 at about 5.30pm he saw the accused persons beating the deceased. According to PW1, the accused persons assaulted the deceased as they told him to accompany them home. PW1 testified that he was drunk at the time. He had taken chang'aa at the house of one Lucy Koskei. The accused persons were also drunk. He testified that although the accused persons were beating the deceased, they were using small sticks to beat him. According to him, the accused persons appeared not to intend to seriously harm or injure the deceased.

PW1 further testified that after the deceased had fallen to the ground, the accused persons left him lying on the ground and went away. Similarly, PW1 went to his home and left the deceased lying on the ground. On the following day, he was informed that the deceased had died. He went to where the body of the deceased was found. He saw the deceased had bled from an injury on his stomach. The body of the deceased was lying in the place where PW1 had left him the night before. PW1 further testified that there were many people at the scene who saw the accused persons when they were beating the deceased. He conceded that the deceased at the time was very drunk.

PW2 Johnstone Kibet Bii testified that on the 1st November, 2003, he left his place of work and arrived home at 5.00pm. He passed through the house of Ann Mosonik where he knew chang'aa was being sold. He bought chang'aa and drunk it for about five minutes. He heard noises emanating from outside the house. He went outside to investigate. He saw the 1st accused screaming. PW2 realized that the 1st accused was drunk. PW2 did not see the deceased on that day. On the following day, he heard that the deceased had died. PW2 did not know the cause of death of the deceased.

PW3 Annah Chepkemoi Mosonik testified that on the material day she left her homestead at about 5.00pm to attend a party held within the neighbourhood. She left David Korir, Caroline Kilel, Kenneth

Kipngetch, Julius Koske, Joseph Chumo and Joseph Koskei drinking chang'aa at her house. PW3 testified that at the material time she used to deal in chang'aa. She left Caroline Kilel to be in charge of the selling of the chang'aa to her 'customers'. PW3 saw the 1st accused walking towards the direction of her house as she was leaving her residence. When PW3 arrived home at about 8.00pm, she was informed by her children that the deceased had been beaten. She was however not told who had beaten the deceased. She was told that the deceased had walked away after the beating incident. She was further told that the 1st accused had left a walking stick and the sum of Kshs.130/- with her children with instructions that the two items were to be given to the deceased.

On the following day, PW3 learnt that the deceased's body had been found in a farm of a neighbour called Arap Ruto. She did not go to view the body as she was afraid. She did not know who injured the deceased. The police later visited her house and made inquiries. She was told to keep the walking stick and the sum of Kshs.130/- by the police until when she would be required to produce them.

After the three witnesses had testified, the prosecution adjourned the matter twice without giving any proper explanation. This court granted the last adjournment to the prosecution on the 27th September, 2005. On the 2nd December, 2005, the prosecution, in spite of being put on notice, again failed to avail witnesses. This court declined to grant further adjournments. The prosecution having no witnesses to present to court, closed its case. The issue for determination by this court is whether the three witnesses have established a *prima facie* case that would enable this court put the accused persons to their defence. The evidence adduced by prosecution witnesses was direct evidence. No one saw the person or persons who were alleged to have killed the deceased. PW1's testimony was to the effect that he saw the accused persons beat up the deceased using very thin sticks. It was his evidence that the accused persons were cajoling the deceased with a view of persuading him to go home with them. From the evidence of PW1, it is apparent that the deceased was drunk and had been overwhelmed by the drink. The accused persons were similarly drunk. They were trying to persuade the deceased to accompany them home from the place that he was found lying on ground. According to PW1, the accused persons were unsuccessful hence the beating. PW1 admitted that he was also drunk at the time but he was certain that the accused persons never intended to harm or seriously injure the deceased as they were beating him with very small sticks.

PW2 and PW3 did not see the accused persons administer the beating to the deceased. PW2 however told the court how on the material day he saw the 1st accused shouting and screaming. PW2 came to the conclusion that the 1st accused was drunk. None of the prosecution witnesses other than PW1 mentioned the 2nd accused. There is no other evidence to implicate him in the death of the deceased. Similarly, the evidence of prosecution witnesses did not establish that indeed it is the beating that the deceased sustained at the hands of the accused persons that caused his death.

This court did not have the benefit of reading the postmortem report or considering the evidence of a doctor as to the cause of death of the deceased. In the absence of such evidence, it would be impossible for this court to be certain as to whether it was the accused persons who fatally injured the deceased. The evidence adduced by the prosecution witness is not therefore sufficient to enable this court put the accused persons to their defence. There are so many gaps in the prosecutions case that raises doubt as to the accused persons' guilt.

In the circumstances therefore I find that the prosecution has failed to establish a *prima facie* case that would enable this court to put the accused persons to their defence. They are acquitted of the charge of murder. They are ordered set at liberty and released from prison unless otherwise lawfully held.

DATED AT KERICHO THIS 8TH DAY OF FEBRUARY, 2006

L. KIMARU

JUDGE