



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 86 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

JOHANA WAIRINDI CHEGE ALIAS SIMBA.....1ST ACCUSED

BENSON MAINA NDUNGU ALIAS WASERAH.....2ND ACCUSED

JOSEPH NJUGUNA KARIUKI.....3RD ACCUSED

RULING

The accused were jointly 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 nights of 15th and 16th September 2005 at Mwenge village in Mochongoi Division of Baringo District within the Rift valley Province, they jointly murdered Samuel Kimutai Chelimo and Kiplagat Cheptoo.

The prosecution evidence briefly stated was as hereunder:-

PW1, Josephine Chepkoskei Kiprono was a sister to **Samuel Kimutai Chelimo** hereinafter referred to as "**the first deceased**". The first deceased was staying in the home of PW1 and was in partnership with the first accused in a business of buying and selling maize and beans. PW1 told the court that she had a kiosk which was opposite Mwenge Primary School and the first accused and the first deceased used to sleep in the said kiosk sometimes. PW1 had employed **Kiplagat Cheptoo** hereinafter referred to as "**the second deceased**". On 16th September 2005 at about 1 a.m. PW1 heard screams from the direction of the said kiosk which was about 400 metres from her home. Shortly thereafter, she was called by the first accused and she opened the door for him. She said that the first accused had blood on his hands and when she asked him what had happened, the first accused explained that they had been attacked by robbers when they were asleep in the said kiosk. The first accused told her that the robbers wanted money but they did not manage to get the same. When they went to the kiosk, they found the two deceased persons having been killed. The first deceased lay on the ground with an injury to the mouth and the nose but PW1 did not see any injury on the second deceased. PW1 went out and screamed but nobody came to the scene. She tried to call the third accused who was the watchman at Mwenge Primary School but there was no response. While they were still at the kiosk, the first accused gave PW1 Kshs.8,500/- which he said he had removed from the first deceased's pocket after the attack. Of that money, the first accused told PW1 that Kshs.4,800/- belonged to him. PW1 further said that they decided to go back to her house and on their way they met the third accused. She asked him why he had not come to their aid when she screamed and the third accused answered her that it was too late as the assailants

had already attacked the victims. The matter was later reported to the Administration Police and the bodies of the deceased persons were removed to Kabarnet District Hospital.

In cross examination by Mr. Kahiga for the accused persons, PW1 said that her late brother had not complained to her about his relationship with the first accused. She further stated that the first accused told her that the first deceased was hit on the head with a stick that had a big metal bolt at the end and that the first accused had not been injured because he was in the inner part of the kiosk. The kiosk consisted of two small rooms.

PW2, Paul Kiprono Chepkurui, was the husband to PW1 and he testified that on 16th September 2005 at about 6 a.m. he was at Kabarak when he was telephoned by PW1 and informed that the two deceased persons had been killed in the aforesaid kiosk. He decided to travel to his home and found that there was a lot of tension between the Kikuyu and the Tugen communities, the two main tribes that were living in the area. The tension was due to the fact that the two deceased persons were Tugens by tribe and the first accused person who was with the deceased persons at the time of the attack was a Kikuyu and had not been injured. He said that there were nearly two thousand people who had gathered at the scene and he decided to go and call the Officer Commanding Mochongoi Police Station. The O.C.S. came with the area District Officer and the District Officer addressed members of the local community and calmed them. PW2 also attended the post mortem of the bodies of the deceased and he told the court that a bullet was removed from the body of the first deceased.

PW3, Richard Kiprono Kimaru, testified that he knew the first and the second accused as well as the first deceased. He told the court that on 8th September 2005, while he was at a shopping centre known as "**Plot Ten**" the first deceased went there carrying a bag of beans and he met the second accused. The second accused wanted to buy the said beans but the first deceased refused to sell them. PW3 further told the court that he heard the second accused tell the first deceased that since he had refused to sell the beans to him he would not manage to buy maize. According to PW3, what the second accused said to the first deceased was like a threat but the first deceased did not respond. However, when the witness was cross examined by Mr. Kahiga regarding the alleged threat, he said that neither himself nor the first deceased took it seriously and no report of the same had been made to the police.

PW3 went on to say that on the night of 15th and 16th September 2005 at about 1 a.m., he was asleep in his house when he was woken up by a neighbour known as Kiptisia and PW1 who were accompanied by the first accused. They went to the kiosk of PW1 and saw the bodies of the deceased persons.

PW4, Njenga Karangi Kiongera, testified that on the night of 15th and 16th September 2005 at about 1 a.m. he was woken up by his wife who told him that she had heard gun shots. When he woke up he heard some gun shots about 100 feet away from his house but did not know where the gun shots came from and he went back to bed. Later on he heard that the two deceased persons had been killed at the kiosk of PW1.

PW5, Paul Gicheha Njoroge, also testified that on the material night he heard some gun shots but thought that it was game wardens who were chasing away elephants from the area. He learned about the deaths of the deceased persons in the morning.

PW7, Luka Chelimo, identified the body of the first deceased for purposes of post mortem in the presence of PW8, Police Constable Johnson Ole Chomakai.

PW6, Chief Inspector John Githitu testified that on 17th September 2005 he received the report regarding the killing of the deceased persons. He visited the scene on 19th September 2005. According to his evidence, the deceased persons were sleeping in a timber kiosk together with the first accused when they were attacked. PW6 saw a small hole on the door of the kiosk which hole appeared to have been made by a bullet. He was informed by PW1 what had transpired on the material night when the first accused went to call her. PW6 explained to the court the grounds upon which the police charged each of the accused persons. With regard to the first accused, he said that he questioned him and the first accused

told PW6 that the two deceased persons and the first accused were sharing a bed at the time of the attack. The first deceased was sleeping on the part of the bed that was closest to the entrance door of the kiosk with his head facing the door and the second deceased was in the middle with his head facing the rear part of the kiosk and the first accused was at the extreme end with his head facing the door. PW6 further explained that when he enquired from the first accused what had happened, the first accused told him that the first deceased was called by some people who were speaking in Tugen language. He was further told that the first deceased opened the door while he was still on the bed and was immediately hit and died instantly. The first accused further explained to PW6 that he came out and held the door to prevent the attackers from entering into the kiosk. He then heard the cry of the second deceased. The attackers said in Tugen language, **“let us go”**. PW6 said that he was not satisfied with the explanation as was narrated to him by the first accused because if his account was true, then he would have been shot as he held the door.

Regarding the third accused, PW6 said that he was a watchman in the nearby school yet he said that he did not hear any gun shots. The witness further explained that PW1 had told him that the third accused said that he did not respond when she screamed because the attackers had already completed their mission and left by the time she was screaming.

Regarding the second accused, PW6 said that he was a suspect because of the alleged threat which PW3 testified about. He said that the second accused was a business rival of the first deceased.

On the basis of the evidence that was tendered by the prosecution witnesses, Mr. Kahiga submitted that the prosecution had failed to adduce sufficient evidence to warrant placing of the accused persons on their defence. He urged the court to acquit the accused persons under Section 210 of the Criminal Procedure Code. He further submitted that the evidence that was adduced by the prosecution witnesses did not connect any of the accused persons to the commission of the alleged offence. According to him, the prosecution case was premised on circumstantial evidence which was so weak as to sustain a conviction. He cited the Court of Appeal decision in R **VS KIPKERING ARAP KOSKE AND ANOTHER V REPUBLIC (1949) 16 EACA 135** where, in considering the weight of circumstantial evidence, it was stated as follows:-

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

Counsel also cited several other decisions in support of his submissions. Mr. Gumo, Assistant Deputy Public Prosecutor urged the court to find that a prima facie case had been established against each of the accused persons and proceed to place them on their defence. At the same time, Mr. Gumo conceded that the circumstances under which the offences were committed required further investigations.

In considering whether the prosecution has established a prima facie case as against each of the accused persons, I wish to refer to the case of **RAMANLAL TRAMBAKLAL BHATT V REPUBLIC [1957]EA 332** where it was held as follows:-

“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 will convict if no explanation is offered by the defence.”

In the same decision the court also held as follows:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we can not agree that a prima facie case is made out if at the close of the prosecution, the case is merely one ‘which on full consideration might possibly be thought sufficient to sustain a conviction,’ this is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hope 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 the accused on his defence.”

I have carefully examined and considered all the evidence that was adduced by the prosecution witnesses as well as the submissions made by both Mr. Gumo for the prosecution and the learned defence counsel. From the evidence of PW1, it was clear that the first deceased and the first accused were business partners and were also fairly close to one another to the extent that they used to share the same bed occasionally. She told the court that there was no evidence of any bad blood between the two of them. It was the first accused who rushed to the house of PW1 to alert her about the attack and he even gave her Kshs.8,500/- which he had removed from the pocket of the first deceased. PW6 suspected that the first accused was among the people who murdered the deceased persons because of the first accused’s miraculous escape on the material night. However, in my view, the suspicion by PW6 as against the first accused was not sufficient to connect him to the killing of the deceased persons. The first accused may just have been lucky to escape miraculously. There was no other evidence that pointed to his involvement in the commission of the offence as charged.

The third accused was suspected to have been involved in the commission of the offence because he did not respond when PW1 screamed. He was a school watchman in the vicinity of the kiosk where the murders were committed. He also said that he did not hear any gun shots. In my view, those allegation alone were not sufficient to conclude that the second accused was involved in the commission of the said offences. He may have been at the far end of the school compound and may not have heard any gun shots and even assuming he had heard them and heard PW1 screaming, which he denied, he cannot be faulted for not having shown up to assist PW1 because he may have been afraid.

Regarding the second accused, the alleged threat to the first deceased was not established. Both PW3 and the first deceased never took the alleged threat seriously as they never made any report to the police or other authorities. There was nothing else to connect the second accused to the commission of the said offences.

All the evidences that was adduced by the prosecution witnesses was largely based on suspicion but as was held in ***SAWE V REPUBLIC [2003]KLR 364:-***

“Suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

I find that the prosecution did not establish a prima facie case as to enable this court to place the accused persons on their defence and as was held in ***MURIMI V REPUBLIC [1967] EA 542***, it would amount to a miscarriage of justice for this court to refuse to acquit the accused if at the close of the prosecution case it is not satisfied that a prima facie case has been established. I therefore acquit each of the accused persons under Section 210 of the Criminal Procedure Code. They should be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 29th day of June, 2006.

D. MUSINGA

JUDGE

29/6/2006

Ruling delivered in open court in the presence of Mr. Korch for the state and Mr. Kahiga for the accused.

D. MUSINGA

JUDGE

29/6/2006