



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Case 114 of 2004**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RAPHAEL KIBICHI KIPKOKEI.....ACCUSED**

**RULING**

The accused, Raphael Kibichi Kipkokei was 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 7<sup>th</sup> of December 2004 at Lolobogishu area Olkokwe, Koibatek district, the accused murdered Samuel Kiporeek. The accused pleaded not guilty to the charge. During the trial, the prosecution called four witnesses in its bid to prove the charge against the accused.

The prosecution's case as evidenced by the testimony adduced by its witnesses is as follows: On the 7<sup>th</sup> of December 2004, PW1 Ambrose Kipkemoi Koech went to the house of one John Korir where a dance had been scheduled to be held. PW1 testified that he arrived at the house where the dance was being held at about 7.00 p.m. and found many young boys and girls at the dance. However some boys who were uncircumcised were milling outside the house where the dance was being held because they had been denied permission to enter the house where the older boys were dancing. He testified that sometimes during the night, he attempted to enter the house where the dance was being held but was thwarted by the accused who canned him using a stick. He was forced to go outside the house. He testified that the accused came outside, and using the cane, chased away the young boys who were still hanging around the house where the dance was being held.

PW1 testified that the reason why they were not allowed inside the house where the dance was being held was firstly, because they were uncircumcised and secondly because they had not contributed to the purchase of the dry cell batteries that were being used to power the record player. He further testified that after some time, he heard someone say that all the boys who were outside the house were to go inside and dance. He stood outside the door when he realized that the accused had again started beating the young boys who had entered the house. A quarrel ensued between the accused and the deceased when the deceased questioned the accused why he was beating the young boys.

He testified that the quarrel degenerated into a fight. Although it was at night, he saw the accused and the deceased wrestle each other to the ground. He recognized that it was the accused and the deceased who were fighting by the sound of their voices. It was his testimony that after a few moments, when the accused and the deceased were still wrestling on the ground, he heard the deceased scream that he had been stabbed. The deceased clutched his stomach and fell to the ground. PW1 then saw the accused ran away from the scene. He called the people who were dancing inside the house to help the deceased who was injured. However, the people who were inside the house immediately scattered. PW1 went to the house of a neighbour called Samson Korir and informed him what had happened. When they came back to the scene with the said Samson Korir, the deceased had already died.

PW2, Moses Chemuna corroborated the evidence of PW1 in so far as it related to what transpired before the fatal stabbing of the deceased. He corroborated the evidence of PW1 as relates to his testimony that the accused chased away the young boys who had come to the dance and wanted to dance without the permission of the older boys. When the deceased was fatally stabbed, he was inside the house and therefore did not witness what transpired outside. He however saw the deceased and the accused pushing

each other at the door of the house after which both of them went outside the house. PW2 testified that after the information of the stabbing of the deceased reached the people who were in the house, the people dispersed. He ran home after the incident and did not know what took place soon thereafter.

PW3 Bureti Kipsimian Toroitich testified that he was informed that the accused had killed the deceased. He went to the home of the accused and inquired as to his whereabouts. He was informed that the accused had not been seen. The police came looking for the accused but did not find him. At about 7.00 p.m., PW3 went to a bush near the house of the accused and found him. He advised the accused to surrender himself to the police. The accused followed his advice. PW3 then escorted the accused to Mogotio Police Station where he was detained by the police. PW4 PC Richard Lobong, recalled that he was at Mogotio Police Station on the 9<sup>th</sup> of December 2004 at 9.00 a.m. when the accused was brought to the police station by the Chief of Sinende Location, Kisanana Division allegedly because he had killed the deceased. PW4 re-arrested the accused and detained him. He testified that the murder weapon was however not recovered. He produced the post-mortem report which was filled by Dr. Gachunga which indicated the cause of death of the deceased was cardiopulmonary collapse due to hyperemic hemorrhage. He observed that the deceased mesenteric vessels were damaged by a stab wound in the gut.

The burden of proving a criminal charge against any accused person is always on the prosecution. In this case, the prosecution called two witnesses who were present when the deceased met his unfortunate death. PW1 testified that he saw the deceased and the accused wrestle each other to the ground after which the deceased screamed that he had been stabbed. The incident took place at night. PW1 conceded that it was dark outside the house and therefore he could not see the accused and the deceased as they were wrestling. He however recognized that it was the deceased and the accused who were fighting by their voices. PW1 and PW2 had prior to the said fight heard the accused and the deceased quarrel over what the deceased perceived to be high handedness on the part of the accused who was beating and chasing away the young boys who wanted to dance.

PW1 and PW2 testified that when the quarrel degenerated into a fight, the accused and the deceased pulled each other out of the house where the dance was being held. It was while outside the house, that the deceased and the accused wrestled each other. The knife which was used to stab the deceased was not recovered. The prosecution did not adduce any evidence as to who owned the knife that was used to fatally stab the deceased. No evidence was adduced as to who between the accused and the deceased owned the knife. PW1 did not see what transpired between the accused and the deceased when the two were wrestling on the ground. He only heard the deceased scream that he had been stabbed. It is not known if the knife that stabbed the deceased was in the possession of the deceased or the accused. All the potential witnesses who were at the scene at the time the incident took place disappeared and the police were not able to trace them.

The evidence adduced by the prosecution, in my opinion, does not establish the guilt of the accused to the extent that this court would be compelled to put the accused on his defence. The said evidence raises doubt that it was the accused who stabbed the deceased. The absence of clear evidence as to who was in possession of the knife at the time the deceased was fatally stabbed raises reasonable doubt as to the circumstances leading to the said fatal stabbing. It could as well be that the deceased had the knife in his pockets, and when he wrestled with the accused, the said knife accidentally stabbed him.

This court cannot be certain that it is the accused who stabbed the deceased. The evidence offered by the prosecution is scanty and has not aided this court in arriving at a decision that would have done justice in this case. The case was not properly investigated to establish the actual circumstances that led to the death of the deceased. In any event, it is not the duty of this court to advise the prosecution on how best it can gather evidence to support its case against an accused person. As an independent arbiter, this court will only act according to the law and where sufficient evidence is not adduced by the prosecution to support its charge against an accused person, this court will have no alternative but to acquit such an accused person.

I therefore find that the prosecution has failed to establish a prima facie case that would have made this

court put the accused on his defence. To put the accused on his defence, would serve no useful purpose other than maybe assisting the prosecution fill up the gaps in its case. The accused is therefore acquitted. He is ordered set at liberty and released from prison unless otherwise lawfully held.

**DATED at NAKURU this 2<sup>nd</sup> day of June 2006.**

**L. KIMARU**

**JUDGE**