



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 42 OF 2015

REPUBLIC.....PROSECUTOR

=VERSUS=

ISAACK ROTICH KIPSANG.....ACCUSED

R U L I N G

1. **Isaac Rotich Kipsang** was on 15th June, 2015 charged with the murder of **Julius Kipkemoi Mabwa** on the 10th June, 2015 at Osigotik Village, Nessuit Location, Njoro Sub County, Nakuru County. When he appeared in court on **15th June, 2015**, the charge was read, he was not required to plead, and he was remanded in custody.

2. On **22nd June 2016**, following the filing of the psychiatrist report he pleaded not guilty to the charge.

3. The matter was fixed for hearing on **26th November, 2015** when the matter was adjourned to **11th March 2016**, then to **6th July 2016, 12th October 2016**, when the state counsel, Mr. Motende told the court that witnesses had not been bonded. Hearing was adjourned to **22nd July 2017**, there were no witnesses. Mr. Wambeyi for the accused objected to the Application for adjournment. The court, noting it was a two (2) year old matter granted prosecution *the last adjournment*. Hearing was deferred to **3rd May 2017**.

4. On **3rd May 2017** PW1 Dr. Titus Ngulungu testified at 2.30 p.m. His testimony was that he conducted the post mortem on 15th June, 2015 on the body of Julius Kipkemoi, whom it was alleged had been killed and dumped in a pit latrine. The body was identified by one Joseph Kiplangat. On examination, externally, the body was embalmed. It was that of a Fifty five (55) year old male, it had a slash wound on upper part of the neck at the back measuring 180mm involving the skin, muscles and nerves, an abrasion on left chest, a sign of dragging. Internally the

- Neck vessels were severed
- Medula oblongata severed
- Severed ligaments on spinal column on upper part

Cause of death

Medula oblongata injury accompanied by blood loss due to severed injuries back of neck, sharp force. He produced the postmortem report.

5. The prosecuting counsel applied for adjournment saying he remained with three (3) witnesses. He applied for witness summons. The Application objected to, on the ground that the previous time a last adjournment had been granted. The Court overruled the objection on basis that one witness had testified, and issued witness summons. The was Matter fixed for **20th July 2017**.

6. On **20th July 2017**, though bonded, no witness appeared. The Court granted the prosecution the *final last adjournment* noting it was a 2015 matter. Hearing was set for **18th October, 2017**, when again, there were no witnesses. The prosecuting counsel told the court that the state was **mind**ed to enter a *nolle prosequi*.

7. The case was mentioned on **23rd October, 2017** when the prosecution told the court that witnesses came to court on 19th October, 2017.

The Court grant the *final and last adjournment* to **25th October, 2017** for hearing. The matter did not proceed and the same was mentioned on **27th October, 2017**, when the accused person was not produced and there was no mention of witnesses. A production Order was issued for **30th October, 2017**. The Accused person was produced and matter fixed for hearing on **13th December, 2017**, when again it was adjourned to **8th March 2018**. Again the matter did not proceed. One witness was said to have come, no names were given but orders were issued for transport refund. Matter was fixed for Hearing on **4th April, 2018**. By this time the trial court was now on transfer and the matter was taken out. There was No mention of witnesses, and it was fixed for hearing on **6th June, 2018**, when again there was no mention of witnesses, and the case was fixed for hearing on **25th July 2018**, no mention of witnesses, and the case was fixed for **17th October, 2018**.

8. On **17th October, 2018** the prosecuting counsel submitted from the bar that the investigating officer was saying he was having challenges because witnesses were from Transmara and Njoro where there was unrest. Adjournment was granted to **23rd January 2019 with an order for** witness summons to all witnesses.

9. On **23rd January 2019**, the prosecuting counsel told the court they would not proceed due to shortage of prosecutors. Hearing was adjourned to **11th April, 2019** when again the matter did not proceed. Hearing was fixed for **18th September, 2019**, when it was adjourned again without any mention of witnesses.

10. The matter was assigned to court 3, for hearing on **18th November, 2019**. On **18th November, 2019** the file landed in my docket. The Defence was ready to proceed. The prosecution was not. The prosecuting counsel Ms. Nyakira submitted that the investigating officer was having tremendous difficulties tracing witnesses. The investigating officer PC Tsanga Tunje had been transferred, and a new investigating officer PC Boniface Rapudo was the one now on board. That given an adjournment he was committed to tracing the witnesses.

11. The defence objected submitting that state had wanted to enter *nolle prosequi* because witnesses were unwilling to testify. The prosecuting counsel responded that the new investigating officer was committed to avail witnesses.

12. The matter was given three hearing dates in anticipation that all the witnesses would now be availed, on **27th, 28th and 30th January 2020** with a mention on **18th December, 2020** to confirm availability of witnesses.

13. On **18th December, 2019**, the prosecuting counsel submitted that investigating officer had traced two (2) witnesses, and the court confirmed hearing dates with directions that witnesses be notified in good time.

14. Come the hearing on **27th January, 2020**. There were no witnesses. The prosecuting counsel told the court that the investigating officer was present and told her that there was now **no chance of getting witnesses**, and on that basis she proceeded to close the case for the prosecution.

15. The issue now, is whether by the evidence on record the prosecution has established a prima facie case sufficient to warrant the accused being placed on his defence as required by section 306(2) of the Criminal Procedure Code.

16. The only thing PW1 established was that the deceased died an unnatural death. The cut wound at the back of his neck was so severe that it led to his death. It could not have been a lawful death. Nevertheless, the state is expected to establish, both *actus* and *mens rea* as required by s. 203 as read with 206 of the Penal Code ;that a person was the killer and there was malice aforethought. Nothing in the evidence before me points to the accused person as the person who cut the deceased so viciously and killed him. Neither is there evidence that he was one who alleged dragged the deceased into the pit latrine, a fact that was only alleged by PW1 and not proved by any other evidence.

17. Going by **Bhatt v Republic** the state fell completely short of establishing a prima facie case against the accused person.

18. It is evident that even at the time of bringing the accused to court the state **did not have a list of witnesses**, that part of the charge sheet is blank. Clearly, the accused person was arrested as a suspect; the state did not have the evidence, conducted nil investigations but still proceeded to present him in court. Why? What is the role of the ODPP if it is not at least to ensure that no person is charged with an offence when there is nothing upon which to hold the charge?.

19. The authority of the DPP is donated by the Kenyan people, under **Article 157 of the Constitution of Kenya 2010**. The DPP was given autonomy, as at **Article 157(10)** which states:

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority”.

This, and guided by the Constitution generally and specifically provisions of **Article 157(11)**

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”.

20. In the case of this accused person, that mandatory duty set out under **Article 157(11)** was not exercised. By preferring charges when there was no evidence available? That was in violation of the accused’s rights as an accused person.

21. The accused has been in custody since **15th June, 2015**, four (4) years going to five (5) years. Doing what? Waiting for witnesses to be

availed. This is unacceptable in the light of the provisions of **Article 50 of the Constitution**, in particular on fair trial and the right to an expeditious trial. Now that courts are signing Performance Management and Measurement Understanding (PMMU's), and the expected life expectancy of a criminal, case in any court in Kenya is three hundred and sixty (360) days, perhaps this is the time that all agencies in the Criminal Justice System set various timelines together. Workloads, notwithstanding, this may be the path where an accused person's right to an expeditious trial will not remain a myth, but sit on some known parameters.

22. Here the question, why bring a person, who is presumed innocent into the system without evidence ? remains unanswered. Now we have prosecutors who are lawyers and who are expected to review the evidence before making the decision to charge, and admitting the charge. This duty should not be exercised routinely, but with the necessary due diligence because at its door stands the right to a fair trial, nay the right to access justice by any person suspected of committing an offence. To just accept a charge sheets, register it and make the decision to charge, and yet there is nothing to support the same, locks that door. The culture of arresting persons, charging them with offences without any basis must now be questioned; why one would be made to take plea for an offence where the state has no evidence in the first place?.

23. In the upshot, I find that no prima facie case has been established against the accused person.

24. I make a finding of not guilty under **Section 306(1) of the Criminal Procedure Code** and order that the accused be set at liberty forthwith unless otherwise legally held.

Delivered, Dated and Signed at Nakuru this 9th day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of: Via zoom

Edna Court Assistant

Ms Mburu for state

Mr. Wambeyi for accused

Accused present