



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL CASE NO. 22 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**VICTORIA JEPKEMEI LETING.....ACCUSED**

**RULING**

[1] The Information filed herein on **17 March 2015** charged that the accused person herein, **Victoria Jepkemei Leting**, had committed the offence of murder and therefore contravened **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the Laws of Kenya. The particulars were that on the **26<sup>th</sup> day of February 2015** at **Chebarbar Junction** in Chepterit Location in Nandi County, she murdered **Benjamin Kimutai Lagat**. The accused person denied those allegations and thereby put the Prosecution to proof thereof. The Prosecution called 6 witnesses who testified herein between **11 July 2018** and **13 May 2019**.

[2] At the close of the Prosecution Case, it a requirement of the law that the Court be satisfied that a *prima facie* case has been established by the Prosecution before the accused person can be placed on her defence to answer the Charge against her. Hence, in **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332** it was held thus:

**Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot 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 hopes 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.”**

**A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. 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 could convict if no explanation is offered by the defence.”**

[3] **Section 203** of the **Penal Code, Chapter 63** of the **Laws of Kenya**, is explicit that any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder. Thus, the ingredients that the Prosecution needed to show, albeit on a *prima facie* basis are: the fact of death; that the death was caused by the Accused by an unlawful act; and malice aforethought on the part of the Accused Person. What constitutes malice aforethought is set out in **Section 206** of the **Penal Code** thus:

**Malice aforethought shall be deemed to be established by the evidence proving any one or more of the following circumstances—**

**(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person,**

**whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) An intent to commit a felony;**

**(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

[4] With the foregoing in mind, I have carefully considered the evidence presented herein by the Prosecution. That evidence shows that **PW1, Paul Machii Birgen (PW1)** and his wife, **Rael Cherono Arusei (PW2)** had gone to **Julius' Bar** in **Chebarbar Junction** to look for one **Esther Ngetich** who had promised them financial assistance in respect of one of their children who had qualified to go to secondary school. They explained that it was in that connection that they found themselves at **Julius' Bar**; and that having looked around and failed to see the said **Esther Ngetich**, they opted to leave immediately. However, before leaving, **PW1** borrowed some **Kshs. 100/=** from his wife to buy some alcohol to take home with him; and that it was in that process that deceased, **Benjamin Kimutai Lagat**, also known to them as **Maina**, confronted **PW2**, demanding to be paid a debt of **Kshs. 100/=** owed to him by **PW2**.

[5] It was further the evidence of **PW1** and **PW2** that the deceased, who was visibly drunk, confronted **PW2** with a stick and a bottle in the other hand and menacingly demanded immediate settlement of the debt she owed him, thereby causing commotion in the bar. That it was that juncture that the accused person, an employee at the bar who was locally known by the name **Sussy**, intervened and pleaded with the deceased for patience and asked him to wait to be paid the following day. In the course of that intervention **PW1** and **PW2** found an opportunity to exit the bar. **PW3** who also happened to be in the same bar at the time, told the Court that, as the accused was removing the deceased from the bar, they both fell on a table; and that he approached them and separated them as the deceased was holding onto the accused and was not letting her go. That he thereafter noted that **Maina** was shivering and he helped him get out of the bar and placed him on the ground, from where he was taken to **Kapsabet Hospital**. He concluded his evidence by stating that he did not know what caused the deceased death; adding that at no time did he see the accused hit the deceased.

[6] The father of the deceased, **Francis Kiplagat Ruto (PW4)**, was one of the persons who identified the deceased's body to the doctor for purposes of postmortem examination; while **PW5, CI Sylvester Olale**, was the investigating officer in the matter. His evidence was that the murder report had been made to the **Kapsabet Police Station** by one **Obadiah Kiprotich** and **Joyce Cheptoo**; and that the body had been found lying near **San Zero Bar**. He caused the accused to be charged with the offence of murder at the completion of his investigations. The Prosecution's last witness was **Dr. Kennedy Otieno Mayanga (PW6)** of **Kapsabet County Referral Hospital**. He produced the Postmortem Report on behalf of **Dr. Momanyi** who was away on further studies outside the country. According to that report the cause of death of the deceased was respiratory failure due to lack of oxygen. It was also noted that the neck was twisted and that there was cyanosis of the tongue, upper limbs and the lungs. The other body systems and organs were normal save for a chronic wound on the left knee. In cross examination, **PW6** was of the opinion that the twisting of the deceased neck could have been due to manual strangulation, leading to asphyxia.

[7] From the foregoing therefore, since **PW1** and **PW2** left the bar before any physical confrontation took place between the accused and the deceased, the only eye witness to the occurrence was **PW3**. According to his testimony, as the accused was dragging the deceased out of the bar, they both fell on a table; and that it was the deceased who was the first to fall and that he did so while holding the accused by her clothes. He was categorical that the accused did not fall onto the deceased on the table and added that he did not see the accused hit or beat the deceased. He accordingly conceded that he did not know what caused the deceased's death.

[8] The Investigating Officer mentioned **Obadiah Kiprotich** and **Joyce Cheptoo** as the people who reported the death to **Kapsabet Police Station**. According to that report, the body had been found lying near **San Zero Bar**. The evidence of **PW3** was to the effect that the bar in which the accused was working was known as **Julius' Bar**. He gave no indication that it was the same bar called **San Zero Bar**. Thus, the Prosecution evidence did not rule out any intervening circumstance from the time **PW3** left the deceased and the time of his death and/or intervention by **Obadiah Kiprotich** and **Joyce Cheptoo**. It is noteworthy that neither **Obadiah Kiprotich** nor **Joyce Cheptoo** were called as witnesses herein.

[9] There was, therefore, no evidence that the accused was responsible for the deceased's twisted neck; or the respiratory failure that he evidently experienced, and which ended up terminating his life. It is noteworthy that in cross-examination, **PW6** explained that the twisting of the neck was likely caused by manual strangulation, leading to asphyxia. He further conceded that he could not rule out the possibility that the state of drunkenness in which the deceased was said to be in could have caused his death. **PW6** further testified that samples were taken from the body of the deceased for further analysis but no result was availed to the hospital that could aid in ascertaining the presence of other toxins, other than alcohol, in the body of the deceased.

[10] In the light of the foregoing, it cannot be said that the Prosecution has made out a *prima facie* case against the accused person. There was no evidence of malice aforethought; there was no proof that the accused hit or beat the deceased; or that she held the deceased's neck or physically twisted it. To the contrary, **PW3's** evidence was that she did not hit or beat the deceased at all. In the premises, I am not satisfied that a *prima facie* case has been made out herein by the Prosecution against the accused to warrant her being placed on her defence. Accordingly, I find the accused not guilty of the offence of murder and acquit him thereof pursuant to **Section 306(1)** of the **Criminal Procedure Code**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 17<sup>TH</sup> DAY OF JULY, 2019**

**OLGA SEWE**

JUDGE