



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL CASE NO. 55 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ALEX KEMBOI *alias* CYRUS KEMBOI.....ACCUSED**

**RULING**

[1] The accused person herein, **Alex Kemboi *alias* Cyrus Kemboi**, was arraigned before the Court on **7 September 2015** on a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged that on the 28<sup>th</sup> day of August 2015, at Kamokoro Village in Kakiptul Sub-location within Elgeiyo Marakwet County, he murdered **Kitum Kilimo**. He denied the charge and the Prosecution called 5 witnesses in proof thereof; and at the close of the Prosecution case, Counsel for the accused, **Mr. Oburu**, urged the Court to make a finding that no *prima facie* case had been made out to warrant the placement of the accused on his defence, and to acquit him at this stage.

[2] The evidence presented before the Court by the Prosecution is to the effect that the deceased, **Kitum Kilimo**, was the father of both the accused and **PW1, Benjamin Chesabor Kitum**. According to **PW1**, he was at home with the deceased when the deceased came home demanding for the balance of his money, some Ksh. 100/=, for work done for the deceased. That although the deceased pleaded with the accused to be patient with him and wait for payment, the accused could hear none of it. Consequently, he declared that he would kill someone and proceeded to cut **PW1** with a panga, forcing **PW1** to flee to the nearby road. He then heard the deceased cry and on going back to the scene, he found him dead having been shot with an arrow.

[3] After the matter was reported to the Police, postmortem was conducted by **Dr. Kimosop (PW3)** and the same revealed that there was an entry wound on the anterior chest wall measuring 2 cm in length with haemothorax; and that the left ventricle of the heart had been severed. The deceased also had an entry wound which had no exit. The other systems were found normal. Consequently, **PW3** came to the conclusion that the cause of death of the deceased was excessive bleeding occasioned by the penetrating wound; and that the wound was caused by a sharp object. He filled and signed the Postmortem Form which he produced herein as the Prosecution's Exhibit 1. The body had been identified to **PW3** by **PW4**.

[4] The bow and arrow that were allegedly used by the accused to commit the crime were recovered by the Police with the assistance of **PW2, Edwin Kosgei Yego**. The same were produced as the Prosecution's Exhibit No. 2 by **PW5**, along with some clothes recovered therewith.

[5] It was in the light of the foregoing that **Mr. Oburu**, Learned Counsel for the accused person submitted that, whereas the Prosecution had proved the death of the deceased, it had failed to prove beyond reasonable doubt the other two essential ingredients of the charge of murder, namely that the death was caused by the accused and that he committed the act with malice aforethought. He relied **Ngari vs. Republic** [2014] eKLR in support of his submission that, for the Prosecution to secure a conviction on the charge of murder, it had to prove the three ingredients beyond reasonable doubt. On the burden of proof, Counsel cited **Republic vs. Savi Musingila** [2018] eKLR wherein the *locus classicus* case of **Woolmington vs. DPP** [1935] AC 462 was discussed. Counsel also relied on **Sections 63, 107 and 109** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** and urged the Court to acquit the accused at this stage of the proceedings.

[6] The case of **Ramanlal Trambaklal Bhatt -Vs- Republic** [1957] EA 332 is instructive. It was held therein 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.”

[7] Accordingly, I have given careful consideration to the evidence on record with a view of ascertaining whether it is evidence upon which the Court would be prepared to convict if no explanation is offered by the Accused Person. There is credible evidence that the deceased herein, **Kitum Kilimo**, died on **29 August 2015** at his home in Kamokoro Village. There is also no dispute that the cause of death of the deceased was multi-excessive bleeding caused by a penetrating sharp object that severed the left ventricle of the heart. The Prosecution has further demonstrated that, shortly before his death, the deceased had been confronted by the accused, in the presence of **PW1** and that he had declared that he was going to kill someone, before attacking **PW1** and cutting him with a panga. It was thus the evidence of **PW1** that none other than the accused committed the murder. There is therefore credible direct evidence placing the accused at the scene of this crime.

[8] Accordingly, it is my finding that the Prosecution has established a *prima facie* case against the Accused Person to warrant her being placed on her defence to answer the Charge of Murder. He is accordingly hereby placed on her defence pursuant to **Section 306(2)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 5<sup>TH</sup> DAY OF DECEMBER, 2019**

**OLGA SEWE**

**JUDGE**