



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CRIMINAL CASE NO. 29 OF 2013**

REPUBLIC.....PROSECUTOR

VERSUS

HILLARY KOECH MAIYO.....ACCUSED

**RULING**

[1] The Prosecution called a total of five witnesses herein with a view of proving that on the **10 March 2013**, the deceased, **Timothy Kemboi Chirchir**, was murdered by the accused, **Hillary Koech Maiyo**; and at the close of the Prosecution case, the Court must satisfy that that evidence is sufficient to disclose a *prima facie* case against the accused. The leading authority in this regard is the often cited case of **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332**, wherein it was held that:

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.”

[2] Thus, **Doris cherotich Kimaiyo (PW1)**, a sister to the deceased, testified that she was at home on **10**

**march 2013** when at about 1.00 p.m. she had the sound of a tractor working on their farm. She immediately went to the scene, fully aware of their mother's instructions not to plough the land. She stated that she found **Jonathan, Kiprotich and Kemboi** (the deceased) on the farm; and that **Jonathan** was driving the tractor; and so, she asked them why they were ploughing the land against her mother's instructions. She added that **Jonathan** proceeded and knocked the deceased at about the same time that the accused, **Hillary Koech** appeared. It was thus the evidence of **PW1** that the accused proceeded to hit **Kemboi** on the head and on the back several times; and that **Kiprotich**, who had been atop the tractor, came down and cut the deceased on the leg.

[3] **PW1** further testified that the father of **Jonathan, John Williams (PW2)**, came from the home of the accused and ordered **Jonathan** to drive the tractor away from the shamba; and that **Jonathan** complied and left. She then went to check on **Kemboi** and noted that he was bleeding from the head. **Kemboi**, the deceased, was consequently rushed to hospital and was referred to **Moi Teaching and Referral Hospital**. She did not accompany the deceased to hospital; and later at 8.00 p.m. she got to learn that the deceased had died and that she was required at **Iten Police Station** to record her statement.

[4] **John Erick Butler William (PW2)**, testified that on the morning of **10 March 2013, Kiprotich**, the brother of the accused person, went to him with a request for the use of his tractor, as they intended to plough for their father. **PW2** stated that he was aware that the family of the accused person and **Kiprotich** had a land dispute with the family of the deceased; and so he asked **Kiprotich** if it was okay for the proposed ploughing to be done as requested. The evidence of **PW2** was that **Kiprotich** went away and later called him to say that it was okay. Consequently, he instructed his son, **Jonathan**, to carry out the task, but only after confirming that all was well. **PW2** further stated that, after about 5 to 7 minutes of the tractor entering the farm, he saw a big crowd at the scene; and he immediately concluded that the feud was still on. So he walked to the scene and instructed **Jonathan** to get out of the farm. That was the time when **Kipkemboi** started slashing the tractor, as **PW1** restrained him (**PW2**) from moving closer to the tractor. Thus, it was the evidence of **PW2** that the next thing he heard was a loud noise; and on turning to check what had happened, he saw **Kipkemboi** lying on the ground and a certain person stood over him; who he got to realize was **Koech**, the accused. He added that the accused was holding something in his hand.

[5] **PW2** further stated that after the tractor was removed from the farm, he went back to check on the condition of the victim and found him in critical condition. He was lying on the ground under a shade. The victim was then rushed to hospital but that he later got to learn that he had passed away. **PW2** explained that, had he known that the dispute was still on, he would not have instructed his son, **Jonathan**, to undertake the ploughing of the disputed land. He denied that **Jonathan** knocked the deceased with the tractor; adding that it was the deceased who was holding a panga, with which he tried to attack **Jonathan**. He explained that all the parties to the dispute are relatives; and that the mother of the deceased is his sister in law.

[6] **Margaret Toroitich (PW3)** testified that on the **10 March 2013**, she had gone to church; and that at about 1.00 p.m. she got a text message on her mobile phone from her husband, **William Kiptoo**, informing her that the deceased, **Kemboi**, had been injured. She proceeded to **Iten District Hospital** with her daughters, **Michelle** and **Sharon**, and found the deceased being attended to. He was then referred to **Moi Teaching and Referral Hospital**; but that he died on the way. She thereafter attended the postmortem along with the deceased's brother, **Edwin Kipchumba, PW4**; and both told the court that the cause of death was found to be head injuries.

[7] The last Prosecution witness, **William Kiptoo Kurgat (PW5)**, a brother of the deceased and a *boda boda* operator in the area, stated that he was at his home shelling maize on the **10 March 2013** when he heard some screams from the direction of Kabir Village, about 3-4 kms away. He proceeded there in his motor cycle and found many people gathered near the road; and the victim was lying down unconscious on the ground near the road. He then put him on his motor cycle and took him to **Iten District Hospital**; from where he was referred to **Moi Teaching and Referral Hospital**; but that the deceased died on the way. He added that the accused, who is alleged to have hit the deceased on the head, is an uncle of theirs.

[8] At the close of the Prosecution case, it was the submission of Counsel for the accused, **Mr. Komen**, that the Prosecution failed to adduced sufficient evidence to prove the key ingredients of the charge of murder. He discounted the evidence of **PW1** and **PW2** who were at the scene, contending that while **PW2** was far away and did not see well the happenings, **PW1** is a close relative of the deceased and therefore lacked the objectivity required to dispassionately relate the events. Counsel further faulted the Prosecution for its failure to call the Pathologist and the Investigating Officer; and therefore that the alleged murder weapon was never produced before the Court.

[9] Counsel relied, *inter alia*, on **Bakari Rashid alias Beka vs. Republic [2016] eKLR**, wherein the Court of Appeal, following the case of **Roria vs. Republic [1967] EA 583** held that whereas conviction can be based on the evidence of a single witness, there are dangers that the court must bear in mind and warn itself of before relying on such evidence.

[10] Having given consideration to the evidence on record there is prima facie proof that the deceased died after a physical confrontation involving him, the accused and two others. These two others were named as **Jonathan Kibet**, the son of **PW2** who was also the tractor driver on the fateful day; and **Kiprotich**, the brother of the accused. According to **PW1**, each of these three persons contributed in assaulting the deceased. She stated that **Jonathan** proceeded and knocked the deceased down with the tractor; while the accused, **Hillary Koech**, proceeded to hit **Kemboi** on the head and on the back several times; and that **Kiprotich**, who had been on top of the tractor, came down and cut the deceased on the leg.

[11] In the premises, there is also credible evidence to show that the death of the deceased was attributable to an unlawful act of assault; and that the person who assaulted him on the head with a stick intended to cause him grievous harm. There is also credible *prima facie* evidence to the effect that it was the accused person who inflicted the fatal blow on the head of the deceased. Hence, it is my finding that a *prima facie* case has been made out by the Prosecution against the accused person. He is accordingly placed on his defence to answer the charge of murder 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**