**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 35 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FREDRICK KIBET KIPCHIRCHIR.....ACCUSED**

**RULING**

1. This is a ruling on submission of "no case to answer" in the matter wherein the accused was charged with murder contrary to section 203 as read with 204 of the Penal Code on 12/11/15, the particulars of the charge being that the accused had on 14/9/2015 at Tuluongoi Sub-location in Baringo Central Sub-county within Baringo County murdered Joseph Cheptoo. The court has considered the evidence presented by the prosecution and the submissions by the advocate for the accused and for the DPP.

2. In accordance with section 306 (1) and (2) of the Criminal Procedure Code, this court is required to examine the evidence presented by the prosecution and determine whether or not there is evidence that the accused committed the offences as follows:

> ***"306. Close of case for prosecution***
>
> *(1) When the evidence of the witnesses for the prosecution has been concluded, the court,* ***if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.***
>
> ***(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court,*** *either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.*
>
> *(3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence. [Act No. 33 of 1963, First Sch., Act No. 20 of 1965, s. 33, Act No. 5 of 2003, s. 86.***"**

3. At this interlocutory stage, the court can only determine whether a *prima facie* case has been established by the prosecution against the defence to warrant him being called to make the defence under section 306 (2) of the Criminal Procedure Code. If no *prima facie* case is established the accused is released under section 306 (1) of the Criminal Procedure Code.

4. *Prima facie* case has been accepted as evidence upon which a reasonable tribunal, properly directing its trial to the law and the evidence may convict if no explanation is offered by the defence. ***See Ramanlal Trambaklal Bhatt v. R (1957)*** EA 332, ***Murimi v R*** (1967) EA 542 and ***Antony Njue Njeru v. R,*** Court of Appeal at Nairobi Criminal Appeal No. 77 of 2006. In similar terms, negatively cast, the High Court in ***R v. Wachira*** (1975) EA 262 has counselled against an acquittal upon consideration of evidence at the interlocutory stage unless *"there is no evidence of a material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict"*.

5. In explaining *prima facie* case, the Court of Appeal for Eastern Africa ***Ramanlal Trambaklal Bhatt v. R.*** [1957] EA 332, 334 said:

> *"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that 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 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. [in R v. Jagjivan M. Patel and Others 1 T.L.R. (R.) 85] said, that the court is not required that 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 done 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."*

***Issue for determination***

6. The question before the court is whether there is evidence upon which the court, which must at all time, be a reasonable tribunal, safely convict the accused if no evidence is given by the Defence. It is signified to note that the accused has under Article 50 (2) (i) of the Constitutional Right to remain silent which he may exercise even after being placed on his defence. Placing the accused on his defence must never be an occasion to call on the defence to give evidence so as to fill the gaps in the prosecution's case as that would be requiring the accused to prove his innocence. The accused has, in addition, a right to refuse to give self-incriminating evidence. Article 50 (2) (l) of the Constitution.

7. If there are credibility gaps in the prosecution story as presented before the court, the benefit of incredibility must be given to the accused person. What the prosecution does not provide the accused shall not be required to provide, he shall be acquitted for want of sufficient evidence to proof the charge in accordance with the principle that the burden of proof in criminal cases belongs with the prosecution and never shifts to the accused. **See section 111 of the Evidence Act provides as follows:**

***"111. Burden on accused in certain cases***

*(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:*

*Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.*

*(2) Nothing in this section shall—*

***(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or***

*(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.***"**

***Analysis of the evidence***

8. The fact of recovery of the body of the deceased herein was testified to by PW1, the accused's school mate and relative; PW3, the accused's cousin; PW4, the kumi kumi households village security chairman and uncle to the accused and cousin to the deceased; PW5 the Assistant Chief; PW6, the son of the deceased who identified the body; and PW7 the pathologist doctor who conducted the post-mortem on the body of the deceased confirmed injuries on the body's head, face and chest and the cause of the death as *"acute head injury due to blunt force trauma following assault"*. PW8, the Investigating Officer confirmed the retrieval of the body from a small dam some 30 metres from the main road with blood traces along footpaths from the road to the dam. From his evidence, the court must conclude that the accused met his death following a fatal assault. I find the fact of killing by fatal blows with blunt object to the head, face and chest and abdomen, and the recovery of the body at a dam by River Chemutwa proved beyond reasonable doubt.

9. The court must now examine the alleged involvement of the accused in the murder of the deceased as detailed alone. The evidence purporting to link the accused appellant with the killing of the deceased was given by two witnesses only, namely his school mates and relatives PW1 and PW2 who testified principally as follows:

***PW1 MINOR AGED 17 YEARS OLD SWORN AND STATES IN KISWAHILI-***

***On 14/9/2015, at 6.30 pm, I had come from school and upon reaching home, my auntie send me for milk. I went to the Tulongoi center and bought milk. As I was at the center after buying the milk as I prepare to go back home, Fredrick came to me and asked me whether I had seen an old man named Mashariki. I knew the man Mashiriki as Arap Cheptoo. I knew Arap Cheptoo before this date. He is a relative to my mother. He lived in the same village Tuluongoi. I replied that I had not seen the old man. Then Fredrick told me that he had just seen the old man in hotel. He was outside the hotel window watching T.V. I then left Fredrick and went on my way. I left Fredrick from the spot where we had seen Mzee Mashriki.*** *On the way I realized that I had*

*forgotten a mobile phone battery at Kiplagat's shop in the same center. I went back to pick the battery and stayed at the centre for 30 minutes before I left for home. This was in the night.*

***On my way home, as I reached Chemutwa River, I saw some substance that looked like water on the road where it crosses the river. I used a torch to find out what it was. I followed the trail of the substance to the river and when I got to the river, I found a body of a person in the water in the river. The body's head was in the river and it had no clothes on it. I went home and I told my uncle Charles Komen. He informed Peter Kipchumba another uncle.*** *I was very scared. They left that night.* ***On the following day I learnt that it was the old man named Mashariki whose body was in the river. That is all I know.***

***PW2 MINOR AGED 17 YEARS CHRISTIAN SWORN AND STATES IN KISWAHILI -***

***On 15/9/2015 at 7.30 am, we were going to school together with the accused. He told me he had killed an old man.*** *On arrival at the school, the teachers sent us for firewood. All the school pupils were sent for firewood.* ***We saw a crowd of people on the way walking towards the river. This is river Chemutwa. We went to the river. I saw police officers removing a body from the river. I did not go near the body. I did not know whose body it was.*** *Fredrick was with us when we were sent to go to fetch firewood. We went back to school after fetching firewood.* ***The following day, the accused told me that if I told anyone what he had told me, I would follow the man or we would be jailed together with him. That is all.***

10. On cross-examination, PW1 said deceased was at the centre watching the 7.00pm news on TV through the window of a hotel but that it was the accused who had seen the deceased and pointed out the fact to the PW2 as follows:

*"The deceased was watching the T.V through the window. He was watching the 7.00pm news. I do not know why he stayed out and not go into the hotel. When the news was being read it was dark. I saw from a distance of about 10 metres. I saw the deceased as he watched the T. V. through the window. I was behind Mzee Mashariki. I did not identify the deceased. It was Frederick who said that we were looking for Mashariki and he was just there. It is difficult to identify a person who is facing the other way in the dark. I did not go into the hotel."*

Clearly, PW1 was not certain that the man at the window was the deceased, and he had only restated what the accused allegedly told him that he had seen the deceased at the hotel's window.

11. Simply, the allegation at the centre of the prosecution's case is the narration by the two relatives of the accused, PW1 and PW2, that the accused had on the material day enquired from PW1 whether the latter had seen the deceased, Mzee Mashariki as he was said to be commonly known, and at the moment he was informed that the PW1 had not seen the Mzee, he saw him watching the 7.00pm news on TV through a window of a hotel at the Tuluongoi centre and that the said PW1 left the two at the centre only to shortly thereafter on his way home to find a dead body in a dam on river Chemutwa, which body he later learns belonged to the said Mzee Mashariki when it was recovered by police the following day, and that the accused had on the following morning told PW2 that he had killed an old man and threatened him not to tell anyone or risk his being killed like the old man or jailed together with the accused.

12. The story-line by the Prosecution would therefore appear to be that the accused after having found the old man Mzee Mashariki, at about 7.00pm when he was watching TV news at a hotel at the shopping centre then persuaded the old man to accompany him to a secluded place where he attacked him and killed him and dragged the body for hiding at a dam on River Chemutwa, only to be discovered later by the PW1 on his way home and another witness PW3 when he went to fetch water from the river that evening, and retrieved by the police with assistance of the members of the public the following morning. To seal the evidence against the accused, the Prosecution presented his class-mate and cousin who he allegedly confided into about his killing an old man whom the cousin learnt the following day to have been Mzee Mashariki.

13. This simple plot, however, belies a complex web of inconsistent events, glaring gaps and contradictions in the prosecution case in three material respects, on timing of the alleged killing, and the implausibility of the events narrated by the witnesses.

*Timing of the killing*

14. PW1 said he had seen the deceased at a hotel window watching 7.00pm TV news when the accused who had just asked him whether he had seen the deceased attracted his attention to the presence of the deceased. PW1 left the deceased with the accused and left for his home but came back to the centre having forgotten to collect a mobile phone battery which he had taken for charge. He stayed at the centre for 30 minutes before proceeding home the second time when he found the dead body of the deceased Mzee Mashariki at a dam on River Chemutwa. He informed his uncle **Charles Komen** who informed his other uncle Peter Kipchumba

15. PW3 Peter Kiprotich Kiprono, a Quarry Miner and cousin to the accused said he found the body at the dam on river Chemutwa when at 7.30pm he went to fetch water for cooking. He had informed the village security team chairman, PW4.

16. PW4 said he was informed of the discovery of the body by Jonathan Kiprop and Kiprop Rono and another at about 9.00pm, and he went to the river and found many people at the river.

17. Assistant Chief PW5 was informed of the incident by PW4 at 9.17 pm.

18. It is not clear what was happening for the one and half hours between the discovery of the body at 7.30pm by the accused's cousin PW3 and the report of the matter to the security team chairman at 9.00pm and thereafter to the assistant Chief. In addition, the said Charles Komen to who PW1 first reported of his discovery was not called as a witness. He would have been crucial to confirm the information given to him by the PW1 including any report that the witness may have given as to his earlier sighting of the deceased watching TV at the hotel at the centre and his having left him there with the accused. These gaps in the evidence are discussed below.

*Extensive Injuries of the deceased*

19. The injuries of the deceased according to the examining pathologist doctor (PW7) were extensive as follows:

> *"On examination of the external aspect of the body, there were various injuries as follows:*
>
> ***Injuries on the head –***
>
> *A large laceration on the back of the head where the brain was exposed and rendered to be coming out through that opening.*
>
> *There were multiple other lacerations on both sides of the head and the face. There were also bruises on the lips and the chin.*
>
> ***The rest of the Body***
>
> *The front trunk: There were large bruises on the chest and the abdomen.*
>
> ***On internal examination of the head:***
>
> ***There were multiple skull fractures involving all the bones of the skull .*** *There were no other significant findings on the body.*
>
> ***The cause of death was therefore acute head injury due to blunt force trauma following assault.****"*

20. It is unlikely that the assault necessary to occasion the extensive injuries could have been inflicted by the accused in the span of the 30minutes allocated to the crime by the evidence of the prosecution witnesses, with no reference to any weapons used or other facilitating circumstances.

*Glaring gaps in the evidence*

21. There was no evidence by any independent witness who saw the accused and the deceased at the Tuluongoi centre. PW3 said that had the two been at the centre members of the public would have seen them. PW1 gave a disclaimer that he did not positively identify the deceased at the centre and only relied on the statement allegedly made by the accused that he had sighted the Deceased watching TV at the hotel window.

22. No evidence was led as to any commotion when the accused having found the deceased at the hotel may have forced the deceased to go with him to the scene of the killing or how the accused managed to entice or lure the deceased away from his watching TV and to follow him to his killing.

23. No evidence was called as to whether the scene of the killing, where it was alleged the assault had been committed before moving the body to the dam on the river Chemutwa, had signs of struggle, footsteps or disturbance from which it could show that the accused had alone or with others struggled with the deceased before overpowering and killing him. Indeed, describing the scene PW8 the Investigation Officer only states that –

> *"At the scene there were blood stains from the road upto where the body was lying. I produce the sketch. The suspect may have pulled the body up to the dam where the body was found. The road along which the body was pulled is a foot path and there were blood stains on the foot path from the road to the area where the body was found."*

24. The son of the deceased, one Daniel Kipsogei who the Investigating Officer said was the one who led the police to arrest the accused was not called to record a statement with the police and as a witness to testify on his knowledge of the matters surrounding the killing leading to the arrest of the accused.

*Implausibility of the prosecution case*

25. The deceased's son Daniel Komen (PW6) when informed by his father's cousin and Kumi Kumi village security team chairman, PW4, that his father had been killed and put into a stream in Chemutwa forest, he suspected someone else as follows:

> *"When I received the call from Jonathan Boit (PW4), I asked asked whether he had been killed by Lawi Komen because the said Lawi Komen was not in good terms with my father. I suspected that it could be Komen because my deceased father and Lawi had a shamba boundary dispute. The shamba boundary dispute has been on for about 10 years. The shamba in dispute has no quarry."*

26. However, the prosecution sought to supply a motive for accused's killing of the deceased through the mouth of the cousin brother PW2 who on cross-examination conceded some disagreement in the clan and said –

> *"It is true that the accused's grandmother did not agree with the deceased's family. I heard the accused's grandmother say that the deceased had killed the accused's father."*

The Investigation Officer also referred to such a dispute alleging without a formal confession in accordance with section 25A of the Evidence

Act that –

> *"The family of the deceased were not there at the time I went to arrest the accused. The accused's and the deceased's families are neighbours. They may be related. I remember the accused telling me that the family of the deceased killed his father. I did not talk to the grandmother when we went to arrest. There was no one in the household. He was living with a friend. Daniel Kipsogei is the son of the deceased. He is the one who led us to arrest the accused. It is not true that it was the said Daniel who pressurised me to arrest the accused."*

27. Although the accused may have had a motive to revenge the killing of his father, if it were true that the deceased had killed his father, the serious charge of murder must be proved by cogent evidence presented before the court not by conjecture and surmises as suspicion no matter how strong cannot found a criminal conviction. The Investigation Officer should have secured a formal confession in accordance with section 25A of the Evidence Act, if it was sought to prove any confession against him. Section 25A of the Evidence act is in the following terms:

> ***"25A. Confessions generally inadmissible***
>
> ***(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.***
>
> *(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court. [Act No. 5 of 2003, s. 99, Act No. 7 of 2007, Sch., Act No. 19 of 2014, s. 28.]"*

28. The alleged confession to the killing by the accused made to his cousin PW2 is, of course, of no legal import not being a confession technically in terms of section 25A of the Evidence Act, and could only be examined as part of the evidence presented by the prosecution for its credibility and weight, and could be destroyed by contradictions and inconsistencies with other evidence in the matter.

29. The dearth of independent evidence by persons outside the clan members, the principal witnesses PW1, PW2, PW3 and PW4 all being cousins and uncle creates a gap of corroboration by disinterested members of the society. The killing incident having alleged taken place at a public road side on Tenges town – Tiani road according to PW8's sketch map, and the body having been dragged for hiding at a dam where members of the public drew water, and the timing having been early evening, it is inconceivable that no independent witnesses were secured.

30. When this matter was put to the cousin PW3 who was apparently the first person to find the body, he answered that *"the witnesses had been asked to go and write their statements"*. When asked whether Tuluongoi centre was populated with people of different clans, PW3 said

> *"The Centre has many people. The deceased could have been seen if he were at the centre. He could have been seen by many people and the accused could have been seen by many people. If the accused was at the centre, the people could have seen him. When we left to go to the river to see the body we were with persons who were not members of our clan*."

PW4 also confirmed when he went to the river upon the discovery of the body he found many people at the river.

31. That the prosecution did not call independent witnesses who were apparently available according to PW3 would suggest that their testimonies may have been adverse to the prosecution case. See ***Bukenya & Others v. Uganda*** (1972) EA 349 where he Court of Appeal for East Africa held that *"where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."*

**Conclusion**

32. The Court finds it difficult to believe that the accused, a school child then aged 17 years whom the court has observed to be of slender built could persuade the deceased to accompany him to his slaughter some 500 metres from the centre and single-handedly overpower and kill the able bodied 63 year old man of medium built, according to PW3, in good nutritional status according to the Post-mortem report produced by PW7, and who was not shown to have been drunk but indeed who lucidly following TV news at a hotel window, and after killing him drag his body some 30 metres to a dam by River Chemutwa, and whose body the Investigating officer required the help of three members of the public to recover from the dam, and all this in under 30 minutes between the deceased watching 7.00pm TV news and when his body is discovered by PW3 at 7.30pm. It would take a Hercules! I find the evidence presented by the prosecution improbable and insufficient to establish a prima facie case against the accused and, accordingly, give the benefit of the doubt to the accused.

33. The Investigating Officer alluded to the lack of clarity as to the circumstances of the killing of the deceased herein when in cross-examination he was referred to his own sketch plan marked as being under **Inquest No. 2 of 2015** said:

> *"In many cases where you are not clear [as to circumstances of death] you open an inquest file which I did and forwarded the file to DPP, Eldoret for advice. I opened the file as Inquest No. 2 of 2015. "*

34. In conclusion, I find that the prosecution evidence does not prove a *prima facie* case for the offence of murder against the accused to warrant the court calling upon him to make his defence. To place the accused on his defence would be to call on the defence to supply evidence to fill the gaps in the prosecution case, which may unconstitutionally interfere with the accused's fair trial rights to remain silent and to refuse to give self-incriminating evidence.

**Orders**

35. Accordingly, for the reasons set out above, I find the accused not guilty of the offence of murder contrary to section 203 as read with 204 of the Penal Code, and acquit him of the said charge pursuant to section 306 (1) of the Criminal Procedure Code.

36. There shall, therefore, be an order for the immediate release of the appellant unless he is otherwise lawfully held on account of any other criminal proceeding.

***Order accordingly.***

**DATED AND DELIVERED THIS 4TH DAY OF OCTOBER 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Chebii for the Accused.

Ms. Macharia, Ass. DPP for the Prosecutor.