



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 92 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

EMANUEL KIPLETING BETT.....ACCUSED

RULING

1. *Richard Kibet Lagat* was killed; and, his body dumped into a shallow pit latrine. From the evidence of PW3, his leg was broken; the head was covered in a plastic bag; and, a rope was tied around his neck. I am called upon to determine whether there is *sufficient* evidence to place the accused on his *defence*.

2. Initially, the Republic brought information to the High Court charging *two* sons of the deceased: the accused; and, his brother *Julius Kipngetich Bett*. The latter *died* in prison custody. On 25th April 2012, the charge was substituted to reflect the prevailing circumstances.

3. The accused is now charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the night of 19th and 20th December 2011 at Chepkunyuk village in Nandi County, jointly with others not before court, he murdered Richard Kibet Lagat.

4. He pleaded *not guilty*. The prosecution lined up *eight* witnesses. PW1 was Peter Koech. On 19th December 2011, he was informed by his father, David Tallam (PW7) that the deceased was missing. At 6:30 p.m. he went to the deceased's home. It was about 500 metres away. He found Julius Kipngetich (originally the 1st accused). Julius did not tell him anything. On 20th December 2011 at about 4:00 p.m. PW1 met his father and Emanuel Kiplating Bett (now the accused). The deceased was still missing.

5. PW1 later saw Barnabas Kipkoech (PW8) and Joseph Kiprugut disembarking from a motorbike. They proceeded towards a pit latrine in the compound of the deceased. It was an open air toilet surrounded by a flowering hedge. The latrine was covered with soil. They scooped out some soil. It exposed a human leg. The police were summoned to the scene. The body was removed and taken to the mortuary at Kapsabet. Emanuel Kiplating Bett (the accused) was present when the body was dug up. But Julius Kipngetich had disappeared from the homestead. The latter was arrested at Kipsebo Centre.

6. PW2 was Andrea Chepkwony. He is a brother to the accused. While at the scene, he called his other brother, *Rono*. The latter said he was with Julius Kipngetich. PW2 asked Rono to arrest Julius. They locked him up in a house. PW2 and Joseph Busienei later ferried Julius in a car. When they asked him about the whereabouts of the deceased, he feigned ignorance. He said the deceased had gone to get some money from the *NSSF*.

7. PW3 was Joseph Chepkwony, another brother of the accused. On 21st December 2011, he got a call

from Barnabas Kipkoech (PW8). He told him that the body of the deceased was discovered in the pit latrine. When PW3 got to the scene, he found many people. He got *jembe* and started to remove the soil from the pit. He found a human leg. People screamed. Police from Lessos Police Station were summoned and removed the body. He said the leg was broken; the head was covered by a plastic bag; and, a rope was tied around the neck. Upon cross examination, he said that his uncle, *David Tallam* (PW7), told him that he had seen Julius Kipngetich with a *jembe* leaving the pit latrine.

8. PW4 was the area Assistant Chief. On 21st December 2011 he was in the company of the Chief, PW5 (Peter Chesobai). They heard some screams. By the time PW4 got to the scene, the body had already been removed. PW5 went to the scene the following day at 9:00 a.m. He inspected the deceased's house. Clothes belonging to the deceased were burnt. There were blood stains inside and outside the house. The Chief testified that the deceased had made a complaint to his office about Julius (originally the 1st accused). He was unaware of any dispute between the deceased and the present accused.

9. PW6, Julius Lagat, identified the body for postmortem purposes. It was on 29th December 2011 at Kapsabet District Hospital. The autopsy was carried out by a Dr. Limo. From his recollection, the body had a deep cut on left side of the head; a cut on right leg above the knee; and, another on left leg below the knee.

10. PW7 was David Kiptalam Magoi. He is a brother of the deceased. On 20th December 2011 the deceased did not come to collect milk. He found that strange. He went to the house of the deceased. He found Julius Kipngetich (formerly A1) at the house. Julius told him that he did not know where the deceased was. They started to look for him. PW7 testified that he had seen Julius with a *jembe* near the pit latrine. On 21st December 2011 the body was recovered from the same latrine. PW7 was present when the body was retrieved from the pit. He said Julius had by then escaped from the scene.

11. The last witness was Barnabas Kipkoech (PW8). He was at the scene when the body was retrieved from the latrine. He said the body was in a sack; and, had been burnt. Upon cross examination, he said that the accused informed him that his father went missing two days earlier. He said that Julius Kipngetich disappeared from the homestead. PW8 was present when Julius was arrested by the police. PW8 said that Julius said he killed the deceased.

12. I have carefully appraised the evidence. I have also paid heed to the brief submissions by learned counsel. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

13. From the evidence, there is absolutely *no* doubt about the death of the deceased. Although there was no postmortem report, the death was proved. In *Ndungu v Republic* [1985] KLR 487 the Court of Appeal emphasized that medical evidence on the cause of death is vital in a murder trial *unless* the cause of death is *too obvious*. In this case the body retrieved from the pit latrine was that of the deceased. It was identified for postmortem purposes by PW6 at Kapsabet District Hospital.

14. From the injuries described by PW1, PW2, PW3, PW6, PW7 and PW8 I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the accused, of *malice aforethought*, killed the deceased.

15. From the evidence, it is clear that there was no *eye witness* to the murder. The entire case for the prosecution is built upon *circumstantial evidence*. Fundamentally, the evidence of guilt points strongly and *exclusively* to Julius Kipngetich Bett (now also deceased). Like I pointed out, he was originally charged alongside the accused. PW7 saw *Julius* with a *jembe* near the pit latrine. On 21st December 2011 the body was recovered from the same latrine. It is instructive that *Julius* seemed *undaunted* by the

disappearance of his father; and, that he *escaped* from the scene. PW5, the area Chief, testified that the *deceased* had lodged a *complaint* against *Julius*. PW8 said that the *accused* informed him that his father went missing two days earlier. PW8 testified that *Julius* told the police at the scene that *he* killed the deceased.

16. None of the eight witnesses gave any *incriminating* evidence against the present accused. Not even an *iota*. In short, there is *no* direct or circumstantial evidence *linking* the accused to the *murder*. I would then *not* say that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the present accused *killed* the deceased with *malice aforethought*. In a synopsis there is no evidence to *convict if no explanation is offered by the defence*.

17. Granted those circumstances, I am unable to say that a *prima facie* case is established. The law on that subject was well settled in *Bhatt v Republic* [1957] E.A. 332 at 334-

“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.”

18. On the totality of the evidence; and, from my analysis of the legal authorities, I am not persuaded that the Republic has proven a *prima facie* case against the accused *sufficient* to place him on his *defence*. Accordingly, under the provisions of section 306 (1) of the Criminal Procedure Code, I enter a finding of *not guilty*. The accused person is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 21st day of February 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Accused.

Mr. Misoi for Mr. Chepkwony for the accused.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.