



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 48 OF 2013

REPUBLIC STATE

VERSUS

KIPKITONY KERTICHACCUSED

RULING

The accused **KIPKITONY KERTICH** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the 4th day of May, 2013 at Kamasai Village in Mogotio District within Baringo County, murdered JOHN TENGOYO KIBARAS”

The accused pleaded ‘**Not guilty**’ to the charge before **Hon. Justice R. Wendoh** on 15/5/2014. The Judge heard the evidence of the first six (6) witnesses. Following her transfer to the Meru High Court, I took over the case and heard the evidence of the remaining three (3) witnesses.

PW1 WILIAM KIBIWOTT PW2, HILARY LOROK MALATIT, PW3 MESHACK KABERKEI and PW4 AMOS KIMOSOP all gave similar evidence. They testify that on 4/5/2013 at about 6.30pm they were in a group conversing by the road side. The accused came up to them brandishing a knife and declaring that he will kill Meshack (**PW3**). Thereafter accused and **PW3** got involved in a fight and began to struggle. Accused was felled to the ground and **PW3** lay on top of him. The deceased went to intervene and pulled **PW3** off the accused. Then the deceased suddenly cried out that he had been stabbed and fell to the ground. The others rushed to call the local chief. The matter was eventually reported to police who came and removed the body of the deceased. Upon completion of police investigations the accused was charged with the offence of murder.

At the close of the prosecution case this court must analyze the evidence adduced and determine whether a prima facie case has been established sufficient to warrant placing the accused onto his defence. In the case of **RAMANLAL BHATT Vs REPUBLIC [1957] E.A 332** the definition of a prima facie case was given thus

“..... it may not be easy to define what is meant by a “prima facie” 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”

In any murder case the prosecution must tender evidence to prove the fact as well as the **cause** of death of the deceased. In this case the **fact** of the deceased’s death was not in any doubt. All the prosecution

witnesses saw his body lying dead at the scene. **PW5 RICHARD KANGOGO** the Assistant Chief confirms that upon receiving news of the incident he rushed to the scene. He too saw the body of the deceased lying dead on its back. **PW6 SAMUEL KIPKURUI ROTICH** a cousin to the deceased confirms that he attended the autopsy and identified the body to the doctor. All these witnesses who knew the deceased person well identify him as ‘**Tengoyo Kibaras**’

Once the fact of death is proved the prosecution must go further and adduce evidence to prove the cause of the deceased’s death. In this case the witnesses state that the deceased was stabbed. **PW6** confirmed to the court that a post mortem examination was conducted on the body of the deceased. Despite this confirmation no post mortem report was produced as an exhibit and the doctor who performed the autopsy was not called to testify.

In the case of **NDUNGU Vs REPUBLIC [1985]eKLR** the Court of Appeal held that

“... where a body is available and the body has been examined, a post mortem (report) must be produced, the trial court having informed the prosecution that the normal and straight forward means of seeking to prove the cause of death is by regularly producing the post-mortem examination report as a result of which the medical officer who performs the post mortem examination is cross-examined....”

Several years later in the case of **CHENGO NICKSON KALAMA Vs REPUBLIC 2015 eKLR** the Court of Appeal sitting in Malindi upheld this view by stating

“..... The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased”

The prosecution here was obliged to prove that it was the stabbing and no other factor which led to the death of the deceased. The only way this can be proved is through medical evidence which will describe the effect that the stabbing had on the deceased’s mortality.

This trial commenced in May, 2014. From then to 13/10/2016 when a last adjournment was given no doctor appeared to testify. It was not alleged that there existed any particular difficulty in securing the attendance of the doctor. As things stand I find that a critical ingredient *ie* the cause of death remains unproved. As such a charge of murder cannot be established.

Even if the cause of death had been proved to the courts satisfaction, the evidence does not point at the accused exclusively as the perpetrator. None of the witnesses saw the accused plunge the knife into the deceased person. The evidence is that accused, deceased and **PW3** were involved in a melee or a struggle. It is not clear how the knife stabbed deceased or who was holding it when this occurred. If the accused elected to keep silent in his defence (as is his right) the circumstantial evidence would not suffice to support a conviction.

Based on the foregoing I find that the prosecution have failed to prove a prima facie case in this matter. I therefore enter a verdict of ‘**Not Guilty**’ and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 10th day of February, 2017.

Mr. Obutu holding brief for Orege

Mr. Chigiti for Accused

Maureen A. Odera

Judge