



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 39 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

MARK LIMO.....ACCUSED

RULING

1. On Christmas day 2004, *Tarkok Tarbano* suffered a fatal blow to her skull. According to the pathologist, the fracture; and, the resultant haemorrhage caused *coning*. That in turn led to loss of *functions* of her vital organs.

2. A witness (PW2) pointed an accusing finger at *Mark Limo* (the accused). He said the accused threw stones at him and the deceased as they left a drinking joint that night. The joint was inside a house owned by one *Kendagor*. He said the accused had earlier pushed the deceased inside *Kendagor's* house.

3. I am now called upon to determine whether there is *sufficient* evidence to place the accused on his *defence*.

4. The Republic brought information to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 25th December 2004, at about 7:00 p.m., at Kapcherebet village, Kabarnet Soi Location, Baringo District of the Rift Valley Province, he murdered *Tarkok Tarbano*.

5. He pleaded *not guilty*. The prosecution called *four* witnesses. The first to take the stand was Dr. Chrispin Ngelechei. He produced a postmortem report prepared by his colleague, Dr. Mwangangi. The autopsy was carried out on 31st December 2004 at Kabarnet District Hospital. The body was identified by William Chepyegon (PW4) and Alfred Kiptoo Chesire (PW3).

6. The autopsy revealed the following: The deceased was a 60 year old lady. There were abrasion wounds on the stomach, skin, face and upper limbs. There was a fracture on the left side of the skull. In the opinion of the pathologist, the cause of death was head injury to the left parietal bone; subdural haemorrhage causing *coning*; and, which led to loss of function of her vital organs. The report was produced as exhibit 1.

7. PW2 was Wilson Chemjor. He is a watchman. On the evening of 25th December 2004, at about 7:00 p.m., he found the deceased taking *busaa* at *Kendagor's* house. There were other customers. The deceased later requested that they walk home together. When the deceased rose, someone pushed her and she fell. PW2 could not remember the name of the person who pushed the deceased. He said it was a young man. He identified him at the dock as the accused. He said they left the bar shortly after 7:00 p.m.

8. As the deceased and PW2 left the bar, the young man started throwing stones at them. When they got to a junction, he and the deceased went separate ways. At that point the stones had stopped being thrown at them.

9. PW2 testified that when he got to the hills or the other ridge, he heard screams from a woman. It was at night. He proceeded on his way home. The following day, he informed the brothers of the deceased about the incident. PW2 later learnt from one of the brothers that the deceased died. PW2 stated that the stones were being thrown by one person. The person throwing the stones was behind them.

10. Upon cross examination, he said they left the bar at about 7.30 p.m. It was dark. He said he could remember how the person who threw stones looked like. He said the person throwing stones was moving parallel to the road in the bushes. He testified that when he crouched to avoid being hit by the stones, he saw the aggressor.

11. Like I stated, PW3 was Alfred Kiptoo Chesire. He and William Chepyegon (PW4) identified the body of the deceased for postmortem purposes. Both witnesses confirmed that the deceased had an injury on the head. That marked the close of the prosecution's case.

12. Learned counsel for the Republic; and, learned counsel for the defence elected *not* to file final submissions. I have considered the *circumstantial* evidence surrounding the homicide.

13. 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.

14. From the evidence, there is absolutely *no* doubt about the death of the deceased. PW3 and PW4 saw the fracture on the head of the deceased. According to the *pathologist*, the fracture and resultant haemorrhage caused *coning*. That in turn led to loss of functions of vital organs. From the injuries described by the three witnesses, 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*. In *R v Kipkering arap Koske & another* 16 EACA 135 (1949) the court held-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

16. The first key question relates to identification. The material evidence was from PW2. At about 7:00 p.m., he found the deceased taking *busaa* at Kendagor's house. There were other customers. The deceased later requested that they walk home together. When the deceased rose, someone pushed her and she fell down. The person who pushed her is the same one who started throwing stone missiles at them as they exited the joint. It is material that PW2 did *not* know that person or his name. But he remembers how he looked like. He was emphatic that it was the person in the *dock*.

17. The evidence of PW2 on identification has material gaps. It was at *night*. PW2 had taken some *alcohol*. He said the person throwing stones was moving *parallel* to the road but hiding in the *bushes*. He testified that when he ducked to avoid being hit by the stones, he saw the aggressor. It was *dark*. PW2 was trying to avoid the missiles. The conditions of identification were very *difficult*.

18. Dock identification in this case was worthless. In *Maitanyi v Republic* [1986] KLR 198 it was held that even where the dock identification is preceded by a properly conducted identification parade the

evidence of a single identifying witness must be tested with the *greatest care* before a conviction is entered. See also *Wamunga v Republic* [1989] KLR 424, *Republic v Turnbull & others* [1976] 3 All ER 549, *Kiarie v Republic* [1984] KLR 739, *Joseph Ngumbao Nzaro v. Republic* [1991] 2 KAR 212. I am in the end *not* satisfied that the identification of the accused was positive.

19. The next key question is on the *actus reus*. PW2 did *not* witness the fatal blow. When they got to a junction, he and the deceased went separate ways. At that point the stones had stopped raining on them. When he got to the hills or the other ridge, he *heard* screams from a woman. It was at night. He proceeded on his way home. I *cannot* say with certainty that the person who was originally throwing the missiles is *same* one who later attacked the deceased. It may be presumed. There are strong suspicions. But they remain just that. There is no concrete evidence that the accused perpetrated the heinous crime. Our criminal justice system places the burden of proof on the prosecution. See *R v Kipkering arap Koske & another* 16 EACA 135 (1949), *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

20. I am fortified there by the complete lack of *motive* in this case. Why did the young man push the deceased in the bar or throw missiles at her and PW2? Of course, the prosecution was *not* obliged to prove motive. But its absence casts some of doubt on the *intention* of the accused. The prosecution is obliged to *prove* the *mens rea* for murder: that the accused was of *malice aforethought*.

21. In *Nzuki v Republic*, Court of Appeal, Nairobi, Criminal Appeal 70 of 1991 [1993] eKLR, the accused walked straight into a bar, pulled out the deceased without uttering a *single* word, and stabbed him to death. The Court of Appeal found those facts to be *unnerving*. The court found that the requisite *mens rea* was *not* proved.

22. Granted the evidence, I am hard put to say there is *incriminating* evidence against the accused to the required *standard of proof*. 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 accused *killed* the deceased with *malice aforethought*. In a synopsis there is no evidence to *convict if the accused opts to keep mum*.

23. 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.”

24. 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 9th day of May 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Accused.

Ms. Miyianda holding brief for Mrs. Orina for the accused.

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.