



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 59 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PHILEMON TOROITICH *alias* MOSES KEMBOI KIBIWOTT.....ACCUSED**

**RULING**

1. The lifeless body of Samuel Kipkorir Cheptarus was found lying forty metres from Mama Rael's house. Mama Rael's house was torched by the public. The deceased had been shot with an arrow. The entry point was the left anterior chest wall penetrating through the lung and heart.
2. 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 were that on the 28<sup>th</sup> October 2009 at Kapkonder village, Tukurung Sub-Location, Kipkaner Location, Marakwet District within the Rift Valley Province, he murdered Samuel Kipkorir Cheptarus.
3. The accused pleaded *not guilty*. The prosecution called *four* witnesses. The trial opened on 3<sup>rd</sup> July 2012 before Mshila J who heard the first witness. Directions under section 200 of the Criminal Procedure Code were taken on 6<sup>th</sup> May 2013. The accused elected to proceed from where the trial had reached. The trial resumed before Ochieng J who recorded the evidence of the second witness. On 23<sup>rd</sup> July 2014 I got seized of the matter. I explained to the accused his rights under section 200 (3) of the Criminal procedure Code. He again elected to proceed from where my predecessors had left the matter. I proceeded to record the evidence of the last two witnesses.
4. PW1, Patrick Maiyo Kisang, was the Assistant Chief, Tukurung Sub-Location. On 28<sup>th</sup> October 2009, at about 4:00 p.m. he was in his office at Tukurung. He heard some screams emanating from the nearby village. A woman known as Margaret Chebit came to his office. She informed him that Samuel Cheptarus was shot with an arrow by Moses Kemboi (the accused). PW1 found the body of the deceased 40 metres from the home of Mama Rael. The arrow was missing. The family of the deceased had set Mama Rael's house ablaze. PW1 called the police who took away the body.
5. PW1 claimed that he investigated the matter and found out the following: that the accused, his brother Edwin and the deceased were drinking at Mama Rael's house. A disagreement erupted between the accused and his brother Edwin over proceeds of sale of some shoes. The accused shot at Edwin, missed him and shot the deceased.
6. That was classic hearsay evidence. PW1 was not there. Neither the woman known as Margaret Chebit

nor Mama Rael was called to the stand. Edwin Kiplagat, the brother of the accused, did not also testify either.

7. Three other witnesses testified. A clinical officer (PW2) confirmed that the accused was mentally fit to stand trial. The pathologist (PW3) produced a post mortem report made by his colleague (Dr. P. Murie) dated 2<sup>nd</sup> November 2009. The pathologist concluded that the cause of death was cardiovascular collapse due to internal haemorrhage. The bleeding resulted from trauma caused by a sharp object. The entry point was the left anterior chest wall penetrating through the lung and heart.

8. The last witness was Police Constable Fred Ipara (PW4). He arrived at the scene at 19:00 hours. He and his colleagues collected the body and took it to Iten District Hospital mortuary. In the meantime, his colleague, PC Asumbo, got a call from the District Officer that the accused had surrendered. PW4 re-arrested the accused. He said the accused surrendered a bow and arrow. In cross-examination, he conceded that the arrow was not the one used to kill the deceased. PW4 said the accused at first gave his name as *Philemon Toroitich*. However, a brother of the accused who is known as *Philemon Toroitich* later came to the station and said the accused gave the police the wrong name. PW4 stated he was the arresting officer and did not investigate the matter. That closed the case for the prosecution.

9. On 23<sup>rd</sup> July 2014 the court issued a warrant of arrest against Edwin Kiplagat and another witness, Philemon Toroitich. The witnesses had not been arrested when the trial resumed on 20<sup>th</sup> November 2014. On 21<sup>st</sup> January 2015 I summoned Chief Inspector Henry Zumba. He explained the difficulties the police encountered in tracing the witnesses. He said the witnesses had relocated from Ebotut forest to another area. Despite his assurances, and further mentions of the case, the warrants of arrest were never executed.

10. 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*.

11. No eye witness to the murder took to the stand. Like I pointed out, the evidence of PW1 was classic *hearsay*. PW1 did *not* witness the attack upon the deceased. Neither the woman known as *Margaret Chebit* nor *Mama Rael* was called to the stand. *Edwin Kiplagat*, the brother of the accused did not also testify either. As I have stated, the warrants of arrest against two material witnesses, Edwin Kiplagat and Philemon Toroitich, were not enforced by the police. The undertaking given to Court by Chief Inspector Henry Zumba on 21<sup>st</sup> January 2015 that he would arrest the witnesses came to zilch.

12. The evidence of PW1 and PW4 on its own is *insufficient* to place the accused on his defence. The simple truth is that the prosecution was forced by circumstances beyond its control to close the case prematurely. It left the case hanging on a thin strand of circumstantial evidence. Unfortunately there is no *strong* circumstantial evidence pointing *irresistibly* and *exclusively* to the culpability of the accused. 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”*

13. The only *fact* that is *not* in doubt at this stage is that the deceased *died* from a penetrating injury through the lungs and heart. In short, if the accused were to elect to remain mum now, there would be *no* evidence to *convict* him. Granted those circumstances, I am unable to say that a *prima facie* case has been established against the accused.

14. The law on this 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."*

15. On the totality of the evidence, and from my analysis of the legal authorities, I am *not* persuaded that the Republic has established a *prima facie* case sufficient to place the accused 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 is hereby *acquitted*.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 12<sup>th</sup> day of April 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of-**

Accused.

Mr. J. K. Cheptarus for the accused.

Ms. P. K. Mwaniki for the Republic.

Mr. J. Kemboi, Court clerk.