



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 6 OF 2007

REPUBLICPROSECUTOR

VERSUS

FRANCIS KIPKEMBOI ACCUSED

RULING

The accused Francis Kipkemboi is charged with the offence of murder contrary to section 203 as read with S. 204 of the Penal Code.

Particulars of the offence are that on the 22nd of October, 2006 at Chagaya Farm in Uasin Gishu Province jointly with another not before court, murdered Richard Kiplagat Chirchir.

The prosecution called a total of six witnesses. PW1 John Kipchirchir Arap Sugut testified that on 22nd October, 2006 at 4.00 p.m. the deceased informed him that he had noted some footsteps behind his house and it appeared like two people had slept there. He called two other persons, with whom they proceeded to the scene. At the scene, they noted shoe marks. The grass was also lying low, an indication that someone had laid on it. The deceased told them that he recognized shoes prints to belong two persons he knew – Francis (the accused herein) and Kiptiony. They saw the two standing nearby. When they approached them to ask them what they were doing, the accused brandished a panga from his pocket and cut the deceased on his throat. The accused and Kiptiony then ran away. The four gave the deceased first aid and carried him away with a view to taking him to hospital. They raised a matatu but by the time it arrived, the deceased had already died.

PW1 testified that they informed the area chief who in turn informed the police from Ndarakwa Police Station. The body of the deceased was taken to Moi Teaching & Referral Hospital.

PW2, John Kipletich Koros testified that he was in the company of the deceased when the accused fatally cut the deceased with a panga. At the time, he and the deceased had gone to the home of one Boaz to tell him that his shoes had made shoe prints at the deceased's home. The accused then approached them and without an explanation cut the deceased with a panga.

PW2 said they reported the incident to the Chief who in turn raised the police. The police took the body to Moi Teaching and Referral Hospital.

PW3, James Kipleting Lelei corroborated the evidence of PW1 and 2. He stated that he was present when the accused cut the deceased with a panga.

PW4, Simon Chelule, the Assistant Chief of Changaiya, Timboroa testified that on 22nd October, 2006 at about 5.00 p.m., he received a call from Abraham that 'Franco' had killed Richard. He visited the scene

and confirmed the deceased had died. He in turn called police from Tarakwa Police Station who visited the scene and carried away the body of the deceased.

PW5, Abraham Kipketer testified that the deceased was his neighbour. On 25th October, 2006 he went to the mortuary where he identified the body of the deceased for purposes of conducting a post mortem exercise.

PW6, Dr. David k. Chumba produced the post mortem report on behalf of Professor S. K. Kozlova. The latter conducted the post mortem on the body of the deceased on 25th October, 2006. She formed the opinion that the cause of death of the deceased was excessive loss of blood due to cut of the right neck by sharp heavy object with damages of great blood vessels of the neck, cut of the 6th cervical vertebra and severance of spinal cord.

All the evidence crystalized together point a guilty finger at the accused. It is gainsaid that PW1-3 were eye witnesses whose evidence constitute direct evidence. There is also no doubt that the cause of death of the deceased was consistent with cut wounds as witnessed PW1-3.

But again, even with the direct evidence of PW1-3, questions abound as who reported the matter to the police? Who arrested the accused? Who concluded that the accused should be charged? These are questions that could only be answered by either the arresting or investigating officer. Unfortunately, none of them testified. This created a huge gap in the prosecution's case that renders it fatal. The evidence with respect to how the matter was investigated is so crucial to the prosecution's case such that its omission renders other evidence adduced as a mere story. Even if I were to put the deceased on his defence, I would be calling on him to prove his innocence for lack of evidence on how he landed in court.

Prima facie therefore, I find that the prosecution has not satisfied the threshold of the definition of what constitutes a prima facie case as defined in the case of **BHATT -VS- REPUBLIC (1957) E.A., 322** that ***“the question whether there is a case to answer cannot depend only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on defence”***. The evidence must be such that, even if the accused was put on his defence and he opted to remain silence, the court would nevertheless found a conviction against him.

The record clearly shows that on several occasions, the prosecution was accorded an opportunity to avail the investigators but failed to. This is a trial that began seven years ago. No justification was given as to why the investigating or arresting officers could not come to court to testify. And as was held in the case of **BUKENYA & OTHERS -VS- UGANDA (1972) C.A. 549** ***“that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent”***, and further 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”***.The prosecution gave no adequate reason for not availing the aforementioned crucial witnesses for reasons best known to them. It then behests the court to infer that probably, had those witnesses testified, their evidence would have crushed their case. It is for this reason I must find for the defence.

In the result, I rule that the prosecution has not established a prima facie case against the accused. I find him not guilty of the charge of murder and I acquit him accordingly under Section 306 (1) of the Criminal Procedure Code.

DATED and DELIVERED at ELDORET this 10th day of July, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Kipnyekwei holding brief for Miyienda for the Accused

Ms. Mwaniki for the State