REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 76 OF 2005

REPUBLIC ..... PROSECUTOR

VERSUS

RICHARD KIBOR CHEBOI ..... ACCUSED

JUDGMENT

The accused Richard Kibor Cheboi is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

Particulars of the charge are that on the 23rd of June, 2005 at Embobut Location in Marakwet District within the Rift Valley Province, murdered Patrick Suter Cheboi.

THE EVIDENCE

The prosecution called a total of five (5) witnesses. PW1 Gideon Yego was a clinical officer then based at Chebiemit District Hospital in Marakwet District Hospital in Marakwet District. He performed the postmortem on the body of the deceased Patrick Suter Cheboi on 26th June, 2005. He testified that the death had occurred four days earlier. He observed a deep cut on the neck. He said that only the skin was holding the head and the head was almost severed and that the cervical bones of the neck were exposed. He formed an opinion that the cause of death was due to severe bleeding due to deep cut. He produced the post mortem report as

P. Exhibit 1.

PW2, Cheboi Chebii testified as the father of both the deceased and the accused. He stated that on the material date at about 2.00 p.m., he was going home when he met his son Cyrus who told him that their home was burning and that it is the accused who had burnt the houses. He testified that the deceased had been killed from outside the home and that they brought the body home to avoid it being eaten by wild animals. He said that he did not witness the murder and had no quarrels there before with the accused.

On cross-examination, he stated that he found the houses razed upon going home. He further stated that he ran and hid in the forest for fear that the accused would also kill him.

PW3, Cyrus Kimaiyo Cheboi, the accused's brother testified that he saw smoke coming from his father's homestead which was 3 kilometres from his home. That on reaching there he found the house of his deceased brother burning. That he also found the body of the deceased near the house of the accused and a panga near the body of the deceased which he identified in court.

PW3 further testified that he was told by a herdsman that it was the accused who had killed the deceased. He stated that the accused thereafter went underground for a month and that when he returned home, he presented himself to police. He stated that he reported the matter to the area chief and on the following day at Kapsowar Police Station.

On cross-examination PW3 said he did not see the accused cut the deceased. That he knew the panga that was recovered near the body of the deceased belonged to the accused. He said that his sister-in-law, the wife to the deceased told him that she saw the accused cut the deceased.

PW4 Netty Suter Cheboi testified as the wife to the deceased. He said that on the fateful day at about 2.00 p.m. while at home, he heard people screaming. That at the time, he was with the deceased in the house. That the accused called the deceased and the latter went to the house of the former about 30 - 40 metres away. That after a short while, he heard the deceased screaming. That she rushed to the scene only to find the deceased's neck completely severed. That the body lay in the compound of the accused who was holding a blood-stained panga next to it.

PW4 also testified that the deceased threatened to kill her and chased her with the panga but she ran and hid in the forest near her house. That it was while in the hiding she saw the accused torch her house and that of his mother as well as that of his sister. She said that the accused stayed in the compound until 4.00 p.m. when he went to an unknown destination.

PW5 Eunice Toroitich was a neighbour and sister-in-law to PW4. She stated that at about 2.00 p.m. while in her home situated about 30 metres from that of PW4, heard PW4 screaming. That on rushing to the scene she found the accused cutting his brother with a panga. She said the deceased and the accused were brothers to her husband. She said the accused completely cut off the neck of the deceased and then chased her and PW4 away.

PW5 also stated that before the accused attacked the deceased, he pleaded with him not to cut him but her pleas were fruitless. She said that she and PW4 ran and hid in a nearby forest. That it is then she saw the accused burn the deceased's house and that of his sister and mother.

The accused was put on his defence by Hon. Justice A. Azangalala, as he then was. The prosecution's case was heard by the late Hon. Justice Kaburu Bauni. I took over the conduct of the case at defence hearing.

The accused gave a sworn statement of defence. He stated that he worked at a place called Kapcherop where he also lived. He said his family home was about 100 Km from Kapcherop. That he visited home every two to three weeks. That on 6/7/2005, he travelled home to visit his parents only to find that their house together with the store had been burnt down. He said he found no one at home and he decided to report the incident to the area Chief and thereafter at Kapsowar Police Station. He said that while at the Police Station he was placed in the cells and no reason was given to him as to why he was incarcerated. He said that he was charged on 25th July, 2005 with the murder of his brother Patrick Suter which he denies.

The accused advanced an alibi defence stating that on 23rd June, 2005 he was at his place of work and not at home where the murder was committed.

It was the accused's further testimony that his father had two wives. That himself and the deceased came from the first house. That the two houses had disputes over land and livestock but he did not have any grudge with the deceased. He also denied that he went underground after the incident stating that since he lived far from home, he visited home after two to three weeks.

In submissions counsel for the accused, Mr. Obudho submitted that the prosecution had not proved its case to the required standards. He said that, save for PW1, all the other prosecution witnesses were relatives of both the accused and the deceased. He said that, bearing in mind that the accused died a very painful death, the scene ought to have attracted other independent witnesses.

He also submitted that police investigations were shoddy. In this respect he saw that the investigating officer who would have laid the basis against which the accused was charged did not testify. He also stated that the post mortem report was filled one month before the deceased died.

He further submitted that the trial was a nullity as the accused's constitutional rights were violated as he was detained in the police cells for nineteen days before he was arraigned in court.

Mr. Obudho urged the court to acquit the accused.

The prosecuting counsel Mr. Wainaina submitted that the prosecution had proved its case to the required standard. He stated that there were witnesses who saw the accused holding a panga before the deceased's death. He singled out PW4 who heard the accused call the deceased from their house and soon after heard deceased screaming. He submitted that by the time PW4 arrived at the scene, the accused had severed the deceased's neck and he was standing next to the body holding a panga.

Mr. Wainaina further submitted that no evidence was adduced in court to demonstrate that the accused was incarcerated in police cells for nineteen (19) days. That even if he was kept in the cells for more than fourteen, there was justifiable cause to do so. That if the accused felt aggrieved by the long incarceration he has the option of filing a civil suit against the officer who placed him in the cells for recovery of damages arising from the alleged violation of his constitutional rights.

He submitted that the error of dates on the post mortem report was explained by PW1 the clinical officer who conducted the post mortem and produced the form. He further submitted that the accused admitted having killed his brother in his charge and caution statement.

In rebuttal Mr. Obudho submitted that the prosecution did not prove malice aforethought as PW4 and 5 confirmed that there was no existing grudge between the deceased and the accused, hence there was no reason established why the accused should have killed the deceased. He stated that the prosecution did not prove that the accused admitted to the offence as the police officer who recorded his statement did not testify. He urged the court to find that the accused's constitutional rights were violated by dint of having been detained in the cell for a period longer than the law provided. He urged the court to acquit the accused.

ANALYSIS OF EVIDENCE

Upon analysing the evidence tendered before court, it is my view, that the prosecution's case was riddled with many shortcomings.

As rightly submitted by counsel for the defence, the police investigations was shoddy. Shoddy because investigations begin from the moment an accused person is arrested to the moment all prosecution witnesses testify. The prosecution had lined up a total of nine (9) witnesses whereas only five (5) testified. Of the five witnesses none comprised either the arresting or the investigating officer. Either of the two witnesses would have laid the basis as to why the accused was arrested. The failure to call any of them has created a big gap in the prosecution's that could not be filled by the other witnesses who testified.

This gap begs several questions, for instance, to whom was the murder report made? What is the nature of the report made to the police? Why did the police conclude that it is the accused who murdered the deceased? On what basis was the accused charged?

From the record, it is clear that the prosecution was availed several chances to call its remaining witnesses but to no avail. The investigating officer who blatantly failed to testify ought to have known that it was his responsibility to avail all witnesses. It is only he who could explain why he became lax in doing a noble job he was charged with. A charge of murder is a crime of specific intent and therefore investigations ought to have been carried out in a thorough manner.

Further, it is my view that none of the five prosecution witnesses demonstrated that accused had malice aforethought. This is an important ingredient in a charge of murder. PW2 - PW5 testified that to the best of their knowledge the accused had no grudge against the deceased.

It is also my view that only PW4 may have witnessed the accused cutting the deceased. I use the word "may" because her testimony that she saw the accused cutting the deceased and pleaded with him not to cut him is doubtful and unascertained. Firstly, after the deceased left the house, it is then that she (PW4) heard the screams and on arrival at the scene found the deceased body lying on the ground lifeless. Further on in her evidence, she states she arrived at the scene as the accused was cutting the deceased. Obviously, there is a possibility that the deceased screamed as he was being cut. Therefore, doubts abound as to whether PW4 saw the accused cutting the deceased.

Second, in the same spirit, PW5 rushed to the scene after PW4 screamed. PW4 screamed upon allegedly seeing the accused cutting the deceased. Therefore, PW5 must have arrived at the scene after the deceased had been cut.

Although, the circumstantial evidence strongly points a guilty finger at the accused, the gaps left in the prosecution's case could only be filled by either the investigating officer or consistent evidence of other witnesses. The latter threshold has not been met as explained above, further rendering the prosecution's case a fatal blow.

In any case, although the accused was found at the scene with the panga alleged to be the murder weapon, the same was not produced as an exhibit in court. This further casts doubts as to whether the panga that was identified in court by some of the prosecution witnesses was the murder weapon.

It is trite law that the slightest doubts established in the prosecution's case must be resolved in the favour of an accused person. I hold in the circumstances, that this case tilts best in favour of the accused.

On the discrepancies noted in the dates on the post mortem form, PW1 offered a plausible explanation. He did explain that the date 26th May, 2005 on the front page of the form was erroneously written by the police and the same should have read 26th June, 2005. I uphold his explanation in the circumstances.

As to whether the accused's constitutional rights were violated, I have noted that throughout the trial neither the accused nor his counsel brought to the attention of the court that the accused was detained in police custody for nineteen days.

The accused was arrested at a time when the old Constitution was operational. Under the then Section 72 (3) (b) of the Constitution a person charged with a capital offence would be detained for up to fourteen (14) days. In the instant case, if indeed the accused was detained for nineteen (19) days, he ought to have brought this fact to the attention of the court. The court would in turn call for an explanation from the officer who detained him. If the court finds the explanation unsatisfactory and forms an opinion that indeed the accused's constitutional rights were violated, it frames constitutional issues for determination.

The accused not having brought this fact to the attention of the court and the investigating officer not having testified, the trial court would not have addressed itself to the pertinent issue as to whether the accused's constitutional rights were violated. In any event, no facts have so far been brought before this court showing the date the accused was arrested and the date he was charged. Thus, his assertion that he was detained in the police cells for nineteen (19) days has not been ascertained.

The above notwithstanding, whereas courts of concurrent jurisdiction have held that the mere fact that an accused is incarcerated in cells for more than the period the law requires nullifies the trial, I am of a different opinion.

I particularly concur with the finding of the Court of appeal in **DOMINIC MUTIE MWALIMU –VS- REPUBLIC (2008) e KLR** when S.E.O Bosire, E. M. Githinji & J. A. Aluoch, JJA held as follows:-

"The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity".

In the circumstances I am disinclined to hold that the trial is a nullity on grounds that the accused's constitutional rights may have been violated. My considered view is that, if the accused strongly feels that his rights were violated, he may seek redress by filing a suit for recovery of damages against the person he deems violated his constitutional rights.

CONCLUSION

It is the duty of the prosecution in criminal cases to discharge its burden, the burden of prove beyond all reasonable doubts. This burden cannot be shifted to the shoulders of the accused as doing so would be to ask him to prove his innocence. In the instant case, even if the accused had opted to keep quiet, the court would nonetheless have acquitted him.

The prosecution's case was flawed to irredeemable levels. The evidence adduced was insufficient to prove the case to the required standards. Even if the accused may not have given a convincing defence, the burden still lies with the prosecution to prove its case as the law requires. It is my view that this burden was not discharged and I accordingly acquit him. I hereby order that he be forthwith set free unless he is otherwise lawfully held.

DATED and **DELIVERED** at **ELDORET** this 1st day of October, 2013

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Obudho Advocate for the Accused

Mr. Omwega for the State