REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 53 OF 2018

REPUBLIC ……PROSECUTION

VERSUS

DAVID KIPLAGAT TARUS……ACCUSED

Coram: Before Justice R. Nyakundi

M/s Sidi Kirenge for the State

RULING

1. The accused person is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code. The particular of the offence being that on the 28th day of July 2018 at Saramek village, Eldoret West Sub County within Uasin Gishu County, murdered Tecla Jepkogei.
2. The accused pleaded not guilty of the offence and as a consequence the prosecution summoned three witnesses in support of the particular of the offence. The lead counsel for the State was Madam Kirenge whereas Mr. Okungu represented the accused.
3. It is at the close of the prosecution case, the court is mandated under section 306 of the CPC to establish whether prima facie case has been made out by the prosecution to warrant the accused person to be called upon to state his defense.
4. The summary of the evidence adduced by the prosecution from PW1 to PW3 shows that this homicide was committed within the family circle. Why do I say so? According to PW1 Mary Maiyo both the accused and the deceased are biological sons. She gave a chronology of events which

culminated in the accused person to arm himself with an axe which was within the compound and used it to cut down his own brother now deceased. The other two witnesses in support of the incident alluded to the circumstantial evidence which placed the accused at the scene of the crime. The State also in this respect produced a postmortem report dated on 1st August 2018 in which the pathologists observed as follows; that the deceased had a stitched cut wound proximal left arm measuring 8cm long. As a result of the examination he formed the opinion that the cause of death was soft tissue hemorrhages due to a cut wound.

5. What is the ultimate goal on homicide offences under Section 203 of the penal code? It is to analyze the evidence by the prosecution that the following elements have been proved beyond reasonable doubt:
    a. That a death occurred in the name of Tecla Jepkosgei.
    b. That her death was unlawful.
    c. That in causing death the accused person had malice aforethought.
    d. The accused was positively placed at the scene of the crime.
6. This is half time legal match between the state and the defense. The predominant issue to be answered is whether there is a case duly established by the prosecution to be answered by the accused person. If the answer is in the negative a motion of no case to answer succeeds. The key touchstone words borrow from the realm of civil law and commonly spoken and written about is whether the prosecution have advanced a successive prima facie case.
7. The Learned Authors **Blackstone's Criminal Practice 2002 at Section D14, 27** advanced and strongly urged upon the trier of the case to keep and check over the following in this respect.
    - *If there is no evidence to prove an essential element of the offence a submission must obviously succeed.*

- *If there is some evidence which taken at face value –establishes each essential element, the case should normally be left to the jury or in our case the trial Judge.*
- *The Judge does however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable tribunal or jury properly directed could convict on it, then a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value.*
- *The question of whether a witness is lying is nearly always one for the jury or as this case for the Judge*

*But there may be exceptional cases (such as **Slippey {1988} CR LR 767**)*

"where the inconsistencies whether, in the witness' evidence needed by itself or between him and other prosecution witness, are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful. In such a case and in the absence of other evidence capable of finding a case, the Judge should make a finding of not guilty and discharge the accused or in the case of the jury system withdraw the case altogether."(underline emphasis mine)

8. The landmark case of **R v Gibraith {1981} 1WLR 1039 Lord Lane C. J.** held as follows:"
    - *If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty, the Judge will of course stop the case.*

- *The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.*
- *Where the Judge comes to the conclusion that the prosecution evidence, taken at its highest is such that a jury or tribunal properly directed could not properly convict upon it. If is his duty upon a submission made to stop the case."*

9. For purpose of this trial I take the view based on the evidence of the three witnesses that a prima facie case has been made out to warrant the accused person to be called upon to tell his side of the story under the doctrine of equality of arms as articulated in Art 50 of the constitution. As a consequence of which the parameters of Section 306 of the CPC shall be complied with by the defense.

GIVEN UNDER MY HAND AND SEAL OF THIS COURT DATED ON 16TH

OF JANUARY 2026

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R. NYAKUNDI

JUDGE