



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRC. NO.70 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

BOSCO NTHEI MAWEU.....ACCUSED

RULING

1. At the close of the evidence for the prosecution, the counsel for the accused person filed written submissions on a case to answer. The Assistant Director of Public Prosecution on his part relied on evidence on record.
2. I have perused the evidence on record. I have to state that did not take evidence from any of the witnesses as no witness was availed by the prosecution after I took over conduct of the case.
3. From the record, two witnesses Pw1 Rhodah Mwikali Maweu and Pw2 James Maweu Kisilu testified before Justice L. Mutende. Thereafter, two witnesses Pw3 Rebecca Mwikali Mutungi and Pw3 I.P Thomas Kituku testified before Justice H. I. Ong’udi.
4. In short, the evidence of Pw1 was that on the night in question at 4:am, she heard screams from the house of her son the accused, and on going there found the deceased on a bed with deep cut wounds. She did not see the accused, and she took the children. She was declared a hostile witness.
5. Pw2 James Maweu Kisilu was the brother to the deceased and his evidence was that on 17/01/2011, he was called on telephone and informed that his sister had been fatally injured. He proceeded to his sister’s marital home and saw her lying on a bed with deep cuts on the head, hand, arm and fingers. He stated that his sister and husband had constant disagreements. He said that he saw a panga at the scene.
6. Pw3 was Rebecca Mwikali Mutungi whose evidence was that she was a Pastor and that the accused person was a member of her church (AIC). She stated that she did not know the deceased. She was treated as a hostile witness.
7. Pw4 was I.P Thomas Kituku who took over investigations from I.P Cheruiyot the previous Investigation Officer. It was his evidence that a panga was collected from the scene, the body photographed and taken to the mortuary, and a post mortem examination conducted. He produced the panga and postmortem report as exhibits. He also produced a witness statement of Rhodah Mwikali Maweu (Pw1) and Rebecca Mwikali Mutune (Pw3) as exhibits. Though the statement under enquiry of the accused was ordered by the court to be produced by way of trial within a trial, the prosecution closed their case without calling any further witnesses.
8. At this stage of a criminal trial, the prosecution is required to establish a prima facie case, before an accused can be put on his defence. What constitutes a prima facie case has been the subject of consideration in several court cases.
9. In the case of **R. Bhatt –vs- R (1957) E.A 332** the court noted that as follows –

“a prima facie case is not made out if at the close of the prosecution evidence the case is merely one which on full consideration might possibly be though sufficient to sustain a conviction”.
10. The above position has been followed in subsequent cases, including the case of **Republic –vs- Morris Karani Olando (2012) e KLR.**
11. In my view, the prosecution evidence herein falls far short of establishing a prima facie case against the accused. First, Pw1 the mother of the accused did not even say that the accused slept in that house that night. She went there following screams, but did not find him. No questions were put to her by the prosecution to suggest that he slept in that house that day. She was also discredited as a hostile witness.

12. Pw3 Rebecca Mwikali a pastor, who testified as knowing the accused person, was also declared a hostile witness thus discredited.

13. In addition though Pw2 James Maweu Kisilu the brother of the deceased said that he saw a blood stained panga, no attempt was made by the police either to dust the panga for fingerprints, nor to take the panga for forensic examination to determine the source of blood stains.

14. It is also noteworthy that the prosecution was also not able to call any other additional witnesses to connect the accused to the offence, and closed their case. This court cannot speculate for them as to the reasons for so doing.

15. In my view, with the prosecution evidence on record, the prosecution has not been able to establish a *pria facie* case against the accused, to justify putting him on his defence.

16. Consequently, I find that the accused has no case to answer, and in accordance with the provisions of section 306(1) of the Criminal Procedure Code (cap.75), I find him not guilty. He is thus acquitted.

DELIVERED, SIGNED & DATED THIS 23RD DAY OF MARCH 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE