



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 14 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

KENNEDY CRUSE OCHOLA.....ACCUSED

RULING

1. Kennedy Cruse Ochola is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that at unknown date between 10th and on the 14th day of June, 2019 at Oyoma village, Genga sub location in Rangwe Sub County within Homa Bay County, murdered James Otieno Okadhwo.
3. The deceased herein was found dead on 14th June 2019. Kennedy Cruse Ochola, the accused was connected to his death due to two reasons; being allegedly in possession of the deceased's gumboots and the alleged threats he had issued to the deceased.
4. According to the evidence of Judith Atieno Odhiambo (PW3) and Kassim Odhiambo Nyambara (PW4) the accused was found wearing the gumboots of the deceased after the deceased was found dead. The two said that they identified the gumboots from the manner the deceased had repaired them.
5. Judith Atieno Odhiambo (PW3) testified that the deceased had repaired the pair of gumboots using a wire and a thread while her husband (PW4) said that the gum boots had been repaired using a wire. It is therefore doubtful if indeed the pair of gumboots allegedly recovered from the accused belonged to the deceased, owing to the contradiction between these two witnesses as to how the pair of gumboots they claimed was repaired.
6. These two witnesses gave contradictory evidence about the conduct of the accused when police officers visited the scene. Kassim Odhiambo Nyambara (PW4) testified that when he went to the scene in company of police officers, the accused ran away on seeing the police vehicle. His wife (PW3) whom he said was present at the scene at the time, testified that the accused was not at the scene. Kassim Odhiambo Nyambara (PW4) further said that when the accused ran away, police officers asked if he (accused) was known. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence.

I find that it is unsafe to rely on the evidence of these two witnesses for they do not portray themselves as trustworthy witnesses.

7. The second issue that connected the accused to the death of the deceased herein is the alleged theft of the deceased's items and subsequent threats to kill the deceased. The alleged theft and the threats were not reported to the police. This evidence is therefore mere suspicion. Suspicion alone however strong is worthless. The Court of Appeal in the case of **Sawe vs. Republic[2003] KLR 354**, held as follows:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

8. The remaining question is whether the prosecution has established a *prima facie* case against the accused. In the **Black's Law Dictionary, 10th Edition** *prima facie case* is defined as follows:

***Prima facie case.* (1805) I. The establishment of a legally required rebuttable presumption. 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.**

9. The Court of appeal in the case of **Ramanlal Trambaklal Bhatt vs. R** [1957] E.A 332 at 334 and 335, defined *prima facie* case as follows:

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.

10. Article 50 (2) (i) of the Constitution of Kenya provides:

(2) Every accused person has the right to a fair trial, which includes the right-

(i) to remain silent, and not to testify during the proceedings;

In the instant case, if the accused person opts to exercise his constitutional right hereinabove stated, I cannot convict him based on the evidence on record. This therefore means that the prosecution has not established a prima facie case against him. I accordingly acquit him of the offence of murder under section 306 (1) of the Criminal Procedure Code. He is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at HOMA BAY this 29th day of July, 2021

KIARIE WAWERU KIARIE

JUDGE