



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 9 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

GEOFFREY ONYANGO MUKHWAYA.....ACCUSED

RULING

1. Geoffrey Onyango Mukhwaya 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 on the 28<sup>th</sup> day of May 2019, at Lunga village Nasewa Location of Matayos sub County within Busia County, jointly with others not before court murdered Aggrey Wanjala Machehe.
3. According to the evidence of Tylene Nekesa Juma (PW1) Petronila Nasimiya and the deceased went to greet him. This was at about 7.40 p.m. The two were husband and wife who started cohabiting after the marriage between the accused and Petronila had broken down.
4. The duo left at 7.45 p.m. on a motor cycle. It was the deceased who was the rider. When they reached the main road, he heard Petronila raise an alarm saying that they were dying. He then heard the deceased ask twice: “Geoffrey, why are you killing me?” When he went to the scene, he did not find Petronila. He only found the deceased, his motor cycle and phone. The deceased had serious injuries on the head.
5. When this (P.W.1) witness reported to the area chief, he did not volunteer to him what he had heard the deceased say. The question that crosses one’s mind is why he withheld such crucial information that could have led to establishing the identity of the killer.
6. The second issue that is very crucial is the assumption that the Geoffrey, the deceased, was referring to was the accused. This could have been resolved had Petronila been called as a witness. She was not called and no explanation was proffered. In the case of **Bukenya vs. Uganda [1972] EA 549**, (Lutta Ag. Vice President) held:

**The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**

**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.**

7. 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.

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

**It is 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.**

9. 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 opts to exercise her constitutional right hereinabove stated, I cannot enter a conviction based on the evidence on record. This therefore means that the prosecution has failed to establish a prima facie case against her. I accordingly acquit her of the offence of murder under section 306 (1) of the Criminal Procedure Code.

**DELIVERED AND SIGNED AT BUSIA THIS 23RD DAY OF JUNE, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**