



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 26 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

1. BONIFACE ONYANGO ADUOL ALIAS BONNY

2. RONALD ODUOR ADUOL

3. CAROLINE ATIENO NGESA ALIAS CARO

4. CHRISTINE APONDI ALIAS TINA

5. GILBERT ODHIAMBO ONONO ALIAS ODHIAMBO MECHANIC..... ACCUSED

RULING

1. Boniface Onyango Aduol alias Bonny, Ronald Oduor Aduol, Caroline Atieno Ngesa alias Caro, Christine Apondi alias Tina and Gilbert Odhiambo Onono alias Odhiambo Mechanic are charged with six counts of murder contrary to section 203 as read with section 204 of the Penal Code.

2. The particulars of the offences are that on the 15th day of November, 2019, at Masebula village, in Butula sub County within Busia County, jointly with others not before court murdered William Omondi Oriwa, David Okeyo Odhiambo, Philip Kwach Omware, Elvis Otieno, Nickson Adera and Evans Onyango.

3. Misfortunes never come singly, so says the English idiom. This is what was unfortunately playing out in this case. When Johannes Okoth died and before he could be buried, six other people died on the day his body arrived home. Some of them were his relatives from his second wife's family. The six were brutally killed on allegation that they had a hand in his death. As a result of these six deaths, the accused persons were arrested and charged for their deaths.

4. After the close of the prosecution case, I was urged to make a finding that the prosecution has not established a *prima facie* case against any of the accused person. What is the meaning of a *prima facie* case? In the **Black's Law Dictionary, 10th Edition** *prima facie* case is defined as follows:

1. 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.

5. 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.

In the instant case, this is what I will endeavour to find whether the prosecution discharged its onus.

6. The scene of the gruesome killing of the six people who are the subject of this case was at the football pitch of Masebula Primary School. We gather from the evidence that there was a mammoth crowd of mourners. Maureen Atieno (PW2) and Gedion Ochieng (PW3) in their evidence testified that the football field was full to the brim.

7. The unfortunate incident erupted while mourners were viewing the body of the deceased.

8. Mercy Awuor (PW1) testified that she was the second wife of Johannes Okoth, the deceased whose body mourners were viewing. Before the eruption of chaos, she testified that she was seated near the coffin with her sister, Maureen Atieno (PW2). Her evidence was that her late husband's relatives raised an alarm and said that "the Kisumu people be killed for they had killed Johannes." This is when a mob started to beat the people. From the mob she identified seven people. Among the seven were, accused 5 and accused3.

9. In her evidence, Maureen Atieno (PW2) testified that the six were killed by about forty people. Out of these people, she said she identified accused3 and accused5.

10. When these two witnesses said they recognized accused3 and accused5 as part of the mob that killed, one is left wondering if they actually recognized anybody in the melee. According to the evidence of Maureen Atieno (PW2), near the coffin during the viewing, there were many people who were not orderly. She further said that there was only one queue of the viewers.

11. This witness (PW2) testified that there were people seated beside them and that the noises started behind them. This evidence raises doubts whether indeed these two witnesses recognized anybody in the melee that followed, if it started behind them given the big crowd of mourners that was present.

12. Gedion Ochieng (PW3) is another witness who testified that he recognized accused2, accused3 and accused5 as part of the attackers. His evidence is however doubtful for he said that when he went to the scene, he found Maureen Atieno (PW2) bending down and when he left, he still left her in that state. PW2 did not testify anything to this effect.

13. According to the evidence of Gedion Ochieng (PW3), David Okeyo was beaten when he lay on William Oriwa to shield him. This is conspicuously absent in the evidence of PW1 and PW2.

14. PW1, PW2 and PW3 are members of the family on one side of the divide, while the accused persons are the relatives of Johannes Okoth except accused three who was his first wife. Though there is no law that prohibits relatives being witnesses in the same case, when the animosity is as clear as in this case, the investigating officer ought to look for independent witnesses to avoid a scenario where one may be implicated by reason of belonging to the other divide of the feuding family.

15. In this case, the only independent witness who was called is Charles Odhiambo Otega (PW4). He testified that when Oria approached him and informed him that there were some suspicious people, he approached two of them who were in suits. They told him that they had accompanied the hearse. He sensed some tension and called the police who unfortunately did not respond.

16. This witness said that it was Oria who started the fight. He was categorical that the five accused persons who were known to him were not at the scene when the fight started. This evidence introduced further doubts in the prosecution case.

17. 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 persons opt to exercise their 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 any one of them. I accordingly acquit each of them of the offence of murder under section 306 (1) of the Criminal Procedure Code.

DELIVERED and SIGNED at BUSIA this 4th day of August, 2020

KIARIE WAWERU KIARIE

JUDGE