



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 15 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

ERICK TAABU KITARI.....ACCUSED

RULING

1. Erick Taabu Kitari 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 7th day of August, 2019, at Ojamii area, in Angorom location South Teso sub County within Busia County, jointly with others not before court murdered Daniel Odhiambo Adala.
3. The evidence of Prisca Adero Atieno (PW1) the widow of the deceased herein, was that at about 3 a.m. the accused made a phone call to the deceased to go and assist to push a motor vehicle that had stalled.
4. Her version was confirmed by Lucas Akadima Amuku (PW3) who testified that the deceased woke him up at about 3 a.m. and both went to Abaoto Bridge in company of Okinyang. They pushed the stationary motor vehicle in company of seven other people they found at the scene but it failed to start. Erick (accused) called his employer and informed him about it. When the employer started quarreling, he left the accused, the deceased and Okinyang at the scene and went back to his house.
5. Charles Odhiambo Owino (PW2) said the deceased was his uncle. His evidence was that the accused reported to him at about 5 a.m. about the stabbing. His evidence was that the accused informed him that they met a thief who was carrying some items and who, on seeing them, started to run away. While chasing him, they heard the deceased cry that he had been stabbed.
6. In his evidence, PC Maurice Onyango (PW6) testified that he was not able to establish who stabbed the deceased. He further said that two sachets of milk, 3kgs of sugar, 250gms Baraka tea leaves, 3litres of cooking oil and a machete were handed to him. This therefore, gave credence to the allegation of a thief that was being chased when the stabbing occurred.
7. The prosecution failed to call Okinyang as a witness and no explanation was offered for the failure. His evidence was very crucial in the case. The Court of Appeal 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.

In the instant case, I can only infer that the evidence of Okinyang

8. PC Maurice Onyango (PW6) testified that he charged the accused on the basis of circumstantial evidence. In the case of **Mohamed & 3 Others vs. Republic [2005]1 KLR 722** Osiemo Judge explained what circumstantial evidence is, as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

9. Earlier the Court of Appeal in the case of **Rep vs. Kipkering Arap Koskei & another 16 EACA 135**, had held:

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and

incapable of explanation upon any other reasonable hypothesis than that of his guilt.

In the instant case, there is no evidence to infer guilt to the accused.

10. Has the prosecution 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.**

11. 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.

12. 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 his 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 him 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