



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. 19 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

TITITI OLE POTOT.....1ST ACCUSED

LEKISHON MOUWO.....2ND ACCUSED

RULING

The case for the defence.

1. The issue before this court is whether the prosecution has established a *prima facie* against both accused to require them to be put on their defence in terms of section 306 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya.
2. Mr. Kamwaro, counsel for the accused persons has submitted that no *prima facie* has been established against both accused. He has therefore urged the court to enter a verdict of not guilty and acquit them.
3. Based on the eyewitness evidence of the prosecution witnesses (Pw 1, Pw 2, Pw 3 and Pw 4) Mr. Kamwaro submitted that they were not consistent and their evidence is not reliable to the extent that it cannot be relied upon by the court to find that they have a case to answer.
4. Counsel cited a number of authorities including *Miller v Minister of Pensions [1947] 2 ALL ER 372-373*, which deals with the issue as what constitutes the burden of proof beyond reasonable doubt. He also cited among other authorities, the case of *R.T. Bhatt v Regina [1957] EA 332-335*.
5. He therefore urged the court to acquit them of the murder charge.

The case for the prosecution.

6. The prosecution submitted that the a *prima facie* case has been made against both accused so as to require to be put on their defence.
7. Ms. Torosi, counsel for the prosecution submitted that the accused persons were positively identified by the prosecution witnesses as being at the scene of the alleged killing and malice aforethought in terms of 206 (a) of the Penal Code was proved. She submitted that by the nature of the injuries inflicted on the deceased clearly proved malice aforethought.
8. Counsel cited the case of *R.T. Bhatt v Regina, supra*; which also was cited by the defence.
9. She therefore urged the court to put both accused on their defence.

Issues for determination.

10. I have considered the evidence of the prosecution witnesses and the submissions of both counsel including the authorities they cited.
11. I bear in mind that this court sits both as a jury and as a court of law (judge). I also bear in mind that I am not required to finally determine whether the prosecution witnesses are credible or not. This determination will be done after the close of the evidentiary hearing of the case; which stage has not been reached. The case of *Miller v. Minister of Pensions, supra*, is inapplicable, for it relates to proof beyond reasonable doubt, which is not the position here.

12. I find as persuasive the decision of the Eastern Court of Appeal in *R. T. Bhatt v Regina* [1957] EA 332-335, in which that court in part pronounced itself in that regard 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.”

13. Furthermore, in *Wachira v Republic* [1975] EA 262 it was held that: *“a court is only entitled to acquit at the close of the prosecution case if there is no evidence of a material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal properly directing itself could safely convict.”*

14. I have directed my mind to the law and the evidence produced by the prosecution. I find that a *prima facie case* has been made against the accused persons.

15. In the premises, I hereby put the accused on their defence.

Ruling signed, dated and delivered at Narok this 21st day of October, 2020 in the presence of Ms. Torosi for the Republic and Mr. Kamwaro for both accused.

J. M. BWONWONG’A.

J U D G E

21/10/2020