



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 14 OF 2020

REPUBLIC PROSECUTOR

VERSUS

1. PATRICK WAFULA MARIGA

2. STEVEN ONYANGO OKELLO..... ACCUSED

RULING

1. Patrick Wafula Mariga and Steven Onyango Okello are 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 28th day of June 2020, at Bukiri sub-Location of Samia sub County within Busia County, murdered Pamphil Bwire Moya.

3. The evidence by the prosecution witnesses did not link accused one to the offence. It would appear that he was arrested and charged for being among the last to be seen with the deceased. In the evidence of Peter Wandera Oduori (PW4) the deceased left his (PW4's) house in company of the two accused persons. His evidence was that he did not witness any quarrel between them. This will therefore mean that the first accused was charged on mere suspicion. The Court of Appeal in the case of **Sawe vs. Republic[2003] KLR 354**, the Court of Appeal held as follows:

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

4. Steven Onyango Okello (accused2) was linked to the offence from what is attributed to have been said by the deceased to some witnesses. These witnesses are Paul Sande Odongo (PW2) and Robert Elkana Moya (PW5). They said that he said he was beaten by Boss. Evidence was adduced to the effect that the second accused was commonly known as Boss. This amounts to a dying declaration. In the case of **Choge vs. R [1985] KLR 1** it was held:

The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.

5. Earlier the Court of Appeal in **Pius Jasunga s/o Akumu vs. Regina [1954] 21 EACA 331** on the same subject had stated:

The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case; it is no guarantee of accuracy.

In the instant case, it is unsafe to rely solely on the dying declaration of the deceased implicating the second accused. One has to remember that the deceased and those in his company were imbibing alcohol the better part of that evening and we may not know how drunk they were. There is no evidence that was adduced that can assist the court to gauge the deceased's accuracy.

6. After considering these authorities and the evidence on record, the question is whether the prosecution has established a *prima facie case* against any or both accused persons. 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.**

7. 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 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.

8. 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 two 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 both of them. I accordingly acquit each one of them of the offence of murder under section 306 (1) of the Criminal Procedure Code. Each is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 15th day of December, 2020

KIARIE WAWERU KIARIE

JUDGE