



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 26 OF 2017

REPUBLIC PROSECUTOR

VERSUS

JACKSON OUMA ONYANGO ALIAS CHAMIGINGO..... ACCUSED

RULING

1. **Jackson Ouma Onyango alias Chamigingo** 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 11th day of August, 2017 at **Blue York** area, **Mjini** sub-location of Busia Township location in Busia County, murdered **Kevin Wafula Wabwire**.

3. The prosecution case is that the deceased and a boda-boda rider who was ferrying him were attacked by a mob who accused them to have participated in celebrating the Jubilee party win in elections. The deceased succumbed to the injuries. The accused was arrested as one of the attackers.

4. The test as to whether a prima facie case has been established to warrant an accused to be called upon to tender his defence was prescribed in the case of **Ramanlal Trambaklal Bhatt vs. Republic (1957) E.A. 332**. The Court of Appeal defined a 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.

5. The prosecution, it would appear, charged the accused on the purported recognition evidence by Ibrahim Onyango (PW1). In his evidence in chief, he testified that the person whom he saw and registered his face was not known to him prior to the unfortunate incident. The only description he testified to was his shaving style. There was no evidence that this witness had given any description that would have formed the basis of an identification parade.

6. Chief Inspector Mosobin Ngeiywa (PW7) testified that when Ibrahim Onyango (PW1) identified the accused at the parade he conducted, the accused said that they knew each other for they were boda-boda operators. While testifying on the identification parade, PW1 said that he had been asked to identify a person he saw at the scene. He later changed and said that he was asked if he knew anybody. This, according to him was the reason he touched the accused.

7. When he (PW1) recorded his statement when the matter was still fresh, he never mentioned the accused who was well known to him. This witness also sustained injuries. If he had seen the accused, there was no reason why he could not have informed the police at the earliest opportunity.

8. The evidence Chief Inspector Ndege (PW6) was rife with inadmissible hearsay. He certainly failed to conduct thorough investigations in this case. He caused the accused to be charged without sufficient evidence.

9. Article 50 (2) (i) of the Constitution of Kenya provides:

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 this Constitutional right, then no conviction can be founded on the evidence on record.

10. I accordingly make a finding of not guilty and acquit the accused under section 306 (1) of the Criminal Procedure Code. He is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 21st day of February, 2019

KIARIE WAWERU KIARIE

JUDGE