

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 14 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

1. JOYCE ADEKE OBWANA

2. AGGREY OBWANA OKEMER.....ACCUSED

RULING

1. **Joyce Adeke Obwana** and **Aggrey Obwana Okemer** 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 14th day of June, 2017 at **Akichelesit** village **Teso North** Sub-county, in **Busia** County, jointly murdered **Charles Nelson Osia**.

3. At the close of the prosecution case, I was urged to find that the prosecution had failed to establish a prima facie case against any of the accused persons. The Court of Appeal in the case of **Ramanlal Trambaklal Bhatt vs. Republic (1957) E.A. 332 at 335** 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.

In the instant case, this is what I will endeavour to find if the prosecution established.

4. According to the report of Government analyst (prosecution exhibit 1 (b), Amitraz was detected in the stomach content sample that was taken from the deceased. The report went on to explain that Amitraz is an acaricide and insecticide which is effective against a wide range of phytophagous mites and insects and is poisonous if ingested. The samples were received on 27th June 2017. This contradicted the findings of Dr. Ombongi who performed the post mortem on 22nd June 2017 and was of the opinion that the cause of death was alcohol poisoning. Dr. Ombongi's conclusion had no scientific basis. It would appear he was influenced by the history provided at page one of the post mortem form.

5. It would appear that the investigating officer did not know how to go about this case. He never took any samples from the house of the accused persons so as to either confirm the theory or rule it out altogether. The only reason he visited the scene was to ascertain the distance between the home of the accused and that of the deceased. He never told the court the importance of the distance in his investigations. There was no evidence to link either of the accused to the administration of the poison to the deceased. What we had was mere suspicion. The Court of Appeal in the case of **Sawe vs. Republic [2003] KLR 354**, stated as follows:

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

6. If the accused persons in this case opt to exercise their Constitutional right to remain silent, as provided for under Article 50 (2) (i) of the Constitution, no reasonable tribunal can convict from the evidence on record. This therefore means no prima facie case has been established against either or both accused persons. I accordingly acquit each one of them under section 306 (1) of the Criminal Procedure Code and set each one of them free unless if otherwise lawfully held.

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

KIARIE WAWERU KIARIE

JUDGE