

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 7 OF 2016

REPUBLIC.....PROSECUTOR

=VRS=

1. ALFAYO ORINA NDEGE.....1ST ACCUSED

2. VICTOR OMAE OMARIBA.....2ND ACCUSED

RULING

The accused persons are charged with two counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars in Count I are that on the 17th and 18th day of March 2016 at Kabora village, Bokeira Location in Nyamira North District within Nyamira County in the Republic of Kenya, jointly with others not before court the accused persons murdered Paul Nyanumba Ondieki.

In Count II it is alleged that on the same dates and place jointly with others not before court they murdered Nyangaresi Nyamboga.

The accused persons maintained their innocence throughout the trial. The prosecution, in order to prove its case, called six witnesses and produced documentary evidence and one spent cartridge.

At the close of the case for the prosecution Mr. Kaburi, Advocate for the accused persons submitted that the prosecution had not established a prima facie case against the accused persons sufficiently to warrant them to be put on their defence. He submitted that the prosecution witnesses 1, 2, 3 and 6 confirmed they were with the accused persons when another group attacked them. He contended that the deceased in Count II was shot and died instantly and that the accused persons were also at risk of being shot. He submitted that when gun shots rang everybody including the accused persons ran away but as good citizens the accused persons still went to the Administration Police Camp and reported how they almost died. Counsel contended that the investigations done in this case were shoddy. That no weapon was recovered and that no investigations were carried out to find out who shot the deceased. Counsel contended further that the deceased died from gunshot wounds which were not fired by anybody in this court. Counsel submitted that this is not an inquest but a murder trial. He submitted that the prosecution witnesses had exonerated the accused persons and there is no reason why they were charged. He urged this court to find they have no case to answer and acquit them.

Principal Prosecution Counsel Mr. Jami Yamina who had conduct of this case preferred to rely on the evidence on record and did not submit.

Section 306 (1) of the Criminal Procedure Code enjoins this court to consider and determine whether there is evidence that the accused persons committed the offences before it can put them on their defence.

The case against the accused persons revolves circumstantial evidence that: - firstly, they were found roaming at night at a time when there was a lot of insecurity in the village where they hail from; secondly, when they saw members of the Nyumba Kumi led by the deceased in Count I they fled to their houses and thirdly when they were apprehended and as they were being escorted to the police camp/post they shouted to another group to rescue them following which there were gunshots.

I have considered the evidence against the accused persons carefully and whereas there is no doubt in my mind that the deceased were murdered, I could not find evidence to connect the accused persons to the murder. The witnesses testified that the accused persons were not armed and that their hands were tied. When they reached a certain place on their journey to the police post to deliver the accused persons the witnesses saw another group of people. There is no evidence that the accused persons knew the members of that gang. To the contrary the gang members would not have shot at the entire group of Nyumba Kumi as they risked shooting their friends. The fact that the prosecution should have established was who the members of that group were and whether they were known to the accused persons. That was necessary to demonstrate a nexus between the accused persons and the persons who were the actual perpetrators of the offences. Without the nexus there is nothing to prove that the accused persons who were not armed and were tied up were themselves not targets of the attack but were acting in concert with the offenders. There is no evidence that they had jointly with those other offenders formed a common intention to kill the deceased. One of the witnesses testified that the accused persons arrived at the police post almost immediately he got there. It is probable therefore that they too ran away when the shots rang out. Other than stating that the accused persons called out to the other group for help no evidence was adduced to prove that they knew that group was there or that they were there for the purpose of rescuing the accused persons. The evidence of the prosecution witnesses seems to suggest that the shooting was random – not targeted at any one of them in particular. It just happened that the deceased in Count II was hit by a bullet and the others were not. It could have been any other member of Nyumba Kumi or even the accused persons. As for their roaming at night there is no evidence that they were breaking any law unless of course there was a curfew and they had breached it which is not the case here. When the 1st accused fled to his house the “Nyumba Kumi” members followed him there and when they called him out he readily obeyed and agreed to take them to the house of the person he was with – the 2nd accused.

It is always the duty of the prosecution to prove its case beyond reasonable doubt and never the duty of the accused person to disprove the case or to prove his innocence. To put the accused persons on their defence would be tantamount to asking them to do exactly that – prove that they did not kill the deceased. Accordingly, I find that as there is no evidence that they committed these offences they ought to be acquitted at this stage. They are acquitted under Section 306 (1) of the Criminal Procedure Code. They are to be freed forthwith unless otherwise lawfully held.

Signed, dated and delivered in Nyamira this 29th day of March 2019.

E. N. MAINA

JUDGE