



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL CASE NO. 1 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PACIFICA H KENYANSA SAMUEL..... 1<sup>ST</sup> ACCUSED**

**DENIS OCHOKI NYABUTO alias**

**DENNIS OBITA alias BOY.....2<sup>ND</sup> ACCUSED**

**DOUGLAS NYANDEGO OMWABA.....3<sup>RD</sup> ACCUSED**

**RULING ON A CASE TO ANSWER**

1. The accused persons herein were jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence were that on 25<sup>th</sup> December 2011 at Bomwari village, Botabori Sub-Location, South Mugirango Chache Location in Gucha South District within Kisii County jointly murdered **SAMUEL OTONDI ONG'ANGI**.

2. The accused pleaded not guilty and the prosecution called the evidence of 7 witnesses in support of their case and at the close of the prosecution's case, Mr. Omwega learned counsel for the accused submitted that the prosecution had not established a prima facie case to warrant the accused persons being placed on their defence.

3. In the oft cited case of **Ramanlal Trambaklal Bhatt -Vs- Republic (1957) E.A. 332**, it was held:

***"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.***

***"(ii) The question whether there is a case to answer cannot depend only on whether there is 'some' evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence."***

4. A summary of the prosecution's case was that the deceased herein, Samuel Otondi, was on the material night having supper with his wife (the 1<sup>st</sup> accused) and his children (PW1 and PW2) when at about 9. p.m unknown men attacked them by forcibly entering their house and fatally injuring the deceased.

5. PW1 MARY NYASIOBOKA testified that she was with her parents, the 1<sup>st</sup> accused and the deceased herein, together with her sisters when after taking supper, unknown people came and chased them after which they all ran to different directions but that on coming back to the house, the deceased did not return only for them to wake up the following day and discover his body in the cow shed.

6. PW2 WILFRED ONYIEGO the son of the deceased and the first accused testified that their father and mother chased each other and that he identified the deceased's body at the mortuary for purposes of a post mortem examination.

7. PW3 KENNEDY MAYAKA MAKORI, a nephew of the 1<sup>st</sup> accused testified that the deceased was found murdered. He was declared a hostile witness after which he stated that he recorded his statement with the police under duress and threats. He stated that he did not know the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons herein.

8. PW4 JOSEPHINE OKEMWA testified that the deceased and the 1<sup>st</sup> accused were her father and mother respectively. She stated that on

the material night some people attacked them at home and killed their father, but that she did not witness the killing as she had gone to sleep by the time the assailants came.

9. PW5 MALAKI MAKORI MAYAKA testified that the 1<sup>st</sup> accused informed him that the deceased had died on the morning of 26<sup>th</sup> December 2011. He further testified that the 1<sup>st</sup> accused and the deceased lived peacefully as husband and wife.

10. PW6, DR. LAWRENCE OTENG, conducted the post mortem examination on the body of the deceased and established the cause of death to be cardio-pulmonary arrest secondary to strangulation of the neck.

11. From the above summary of the prosecution's case, I note that none of the prosecution's witnesses tendered any evidence that even remotely linked any of the accused persons to the murder of the deceased. In fact, save for the fact that the 1<sup>st</sup> accused was the wife of the deceased, none of the witnesses made any mention of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, even in passing. The circumstances of this case are such that the court is left wondering why and how the police decided to charge the accused persons with the offence of murder.

12. The reasons for the accused persons' presence before this court could only have been answered by the investigating officer who did not testify as he was reported to be dead and PW7, P.C. DANIEL MUTUA who took over the file from him only bonded witnesses to attend court and did not conduct his own investigations of the case.

13. From the above foregoing, I find that the prosecution's case was founded on mere speculation and conjecture as there was not even a scintilla of evidence linking the accused persons to the murder of the deceased.

14. I find that placing the accused persons on their defence in the face of such weak evidence would amount to assisting the prosecution fill in the gaps existing in their case if at all they had any case in the first place.

15. Consequently, I acquit all the accused persons under Section 306 (1) of the Criminal Procedure Code and direct that they be set at liberty forthwith unless they are otherwise lawfully held.

**Delivered, dated and signed in at Kisii on 21<sup>st</sup> of March 2018.**

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the State
- Accused persons
- Omwoyo court clerk