REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 12 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

VALERIAN AMAHALA PONGITA.....ACCUSED

R U L I N G

Introduction

1. This is a case of murder. It is alleged that on the night of 23/24th day of February, 2012 at Mungakha Village Lusumu Sub-Location in Navakholo District within Western Province, the accused herein Valerian Amahala Pongitah, murdered Tobias Wanjala Wawire. The charge is brought under Section 203 as read with Section 204 of the Penal Code.

2. When the accused appeared before this court for plea on 16th May, 2012, he denied the charge, and his case was then set down for hearing. The case has been ongoing since then. For a long while, the prosecution was unable to avail witnesses in court, but eventually, the hearing took off on 13th November, 2013. In total, the prosecution called four witnesses.

Prosecution Case

3. The case for the prosecution is brief. On the evening of 23rd February, 2012, the deceased herein Tobias Wanjala Wawire was in the company of Stanley Barasa Sisa, a school teacher, who testified as PW2. They were together with the village elder Fredrick Mutenyo who testified as PW1. They were taking chang'aa and according to PW2 (Stanley).He bought some chang'aa for the deceased. Stanley left the chang'aa den at the home of one Martin at about 8.00pm. PW`1(Fredrick) did not say at what time he left Martin's home.

4. Sometime in the afternoon of 24th February, 2012, the body of the deceased was discovered in a sugarcane plantation. The body had many bruises and was covered in blood. When John Opiro Khamala Namwitako, PW3 (John) received the report of the deceased's death, he rushed to the scene and later made a report to the local administration as well as the police of Navakholo Police Station. The police arrived at the scene and took away the deceased's body to Kakamega General Hospital Mortuary for preservation. John Later witnessed the post mortem examination. Following the death of the deceased, a number of people were arrested. Among those arrested were Martin and his wife as well as Stanley. There is no evidence as to how the accused in this case was arrested.

Submissions on No Case to Answer

5. At the close of the prosecution case, Mr. Nandwa Advocate appearing for the accused submitted that the prosecution had not established a prima facie case to warrant the accused being placed on his defence. The gist of Mr. Nandwa's argument was that all of the three witnesses called by the prosecution only learnt of the death of the deceased after the event and that none of them pointed a finger at the accused as the suspect or culprit. Counsel also submitted that since the prosecution had failed to produce the post mortem report to confirm that indeed the deceased died and what the cause of that death was, the prosecution case must surely fail. Finally, counsel submitted that even if the accused were to be placed on his defence, and if he chooses to say nothing in his defence, it is not possible that the court can proceed to convict on the evidence that is before it.

Applicable Principles

6. The principles applicable in this case at this stage were set out in the case of **Bhatt – vs – R [1957]EA 332**. In the case, the appellant was charged in the district Magistrate's court in Bukoba on two counts of official corruption. He was initially discharged of both courts, as the

learned trial magistrate had found there was no sufficient evidence to put the appellant on his defence. On appeal by the Attorney General, the case was remitted to the same trial magistrate with directions to put the appellant on his defence. After hearing the defence case The appellant was found guilty on both counts, convicted and sentenced to twelve months imprisonment on each count. The sentences were to run concurrently.

7. The appellant appealed to the High Court. His appeal was not only dismissed but the sentence was enhanced to three years on each count. The sentences were to run concurrently. The appellant filed a second appeal to the Court of Appeal for East Africa against both conviction and sentence. The Court of Appeal 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."*

8. Citing a passage from the judgment of **WILSON J, in R- Vs- Jagjivan M. Patel & others IT.L.R (R) 85**, The court of Appeal went further and stated that

> *" ….all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of opinion that the case made out in one which on full consideration might possibly be thought sufficient to sustain a conviction."*

Analysis and Determination

9. The question that must now be determined "*is whether a case is made out against the accused just sufficiently to require him to make his defence*." In my considered view, there is no such case before me. The evidence on record is from witnesses who only learnt of the death of the deceased after the event, although it is clear that on the eve before his body was discovered in the sugarcane plantation, the deceased was in the company of both Fredrick and John at the home of Martin. Martin was never called as a witness, so there is no evidence whatsoever to indicate at what time the deceased left the drinking den and in whose company he did so.

10. There is also no evidence on record to confirm that the deceased died and under whose hand he died, and what the cause of the death was. Nor is there any evidence to show how the accused herein was arrested. As was held in **Republic – Vs – Pattni [2005] 1KLR**, the only inference this court can draw from the prosecutions failure to adduce the evidence surrounding the arrest of the accused and the death of the deceased is that such evidence would have adversely affected the prosecution case. It is also clear from the evidence on record that there is considerable doubt as to whether the accused herein had the opportunity to commit the alleged offence.

Conclusion

11. In summary, therefore, the benefit of all these doubts goes to the accused. Accordingly, I find that there is no evidence that the accused herein committed the offence with which he is charged. I hereby record a finding of not guilty in accordance with section 306(1) of the Criminal Procedure Code. Unless otherwise lawfully held the accused be and is hereby forthwith discharged.

Orders accordingly

Ruling delivered, dated and signed in open court in Kakamega this 18th day of April, 2018

RUTH N. SITATI

JUDGE

In the presence of

Mr. Ngetich……..for state

Mr. Masakhwe holding brief for Mr. Nandwa……...for accused

Polycap …….Court Assistant