

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO.1 OF 2016

REPUBLIC

VERSUS

1. HALKANO GODANA

2. GUYO KIDOLE GUYO

RULING

The accused persons are charged with the offence of murder Contrary to Section 203 as read with Section 204 of the Penal Code Cap. 63 Laws of Kenya.

The particulars of the offence are that the accused on the night of 26.3.2016 at Manyatta Ote Sub-location in Marsabit Central sub county within Marsabit County with others not before the court murdered **ABDIKADIR EJERE EISIMRLE**.

Five witnesses testified for the prosecution. **PW1 JOSEPH LERUK** works with Safaricom. On 20.4.2016 he received a request from the Marsabit central DCIO in respect of a gadget identity history no 353624062824200. The request was to provide the history, subscribers details and both incoming and outgoing calls from 26.3.2016 to 20.4.2016. His investigations revealed that the gadget had two users namely Abdulkadir Mohamed Eisimirie from 15.3. 2016 to 26. 3.2016 at 2.07hrs. The location was Marsabit town. The 2nd user of the phone was Dub Boru on 2.4.2016 at 15.23hrs. The 2nd user was using the gadget in Moyale. They also found that Dub Boru Wako had two other active lines.

PW2 HABIBA BAGAJO ALI lives in Marsabit along Nyayo road. On 26.3.2016 she was sleeping in her house when she heard people quarreling. One was talking in Kiswahili while the other people were speaking in Borana. The one speaking in Kiswahili said “**tafadhalini msiniuwe chukueni kile mnataka**”- **please don't kill me take what you want.**” After a short while the voice of the one who was speaking in Kiswahili changed and she suspected that he had been injured. She woke up her husband and neighbours. They checked on the person who was the deceased and was bleeding from the neck. They reported to the Police who went to the scene and took him. She did not know the deceased. She also did not recognize the voices of those people who were talking.

PW3 TUNU FARHIYA is the deceased's wife. It is her evidence that the deceased had come to Marsabit to do school work. She talked to the deceased on Thursday and Friday. On Friday she talked to him at about 5.00pm. In the morning she called him but he could not be reached. Her mother in law called her asking where the deceased was because someone had been killed in town. Initially her husband had told her that someone by the name Chuligo Jaldesa was threatening him. It turned out that the person who was killed was her husband. She does not know who killed her husband.

PW4 PAUL LOTWIN lives along Nyayo road in Marsabit. His evidence is similar to that of PW2 who is his neighbour. They checked on the deceased and went to report at the Police station. He could not recognize the voices of the people who were talking outside. **PW5 PC ODIRA OCHIENG** was stationed at Marsabit Police station. On 26.3.2016 he was on patrol duties. They were informed that four people had gone to report an incident at the station. They rushed to the station and went with the reportees to the scene. They found the deceased bleeding from the neck. They took the body to the hospital and the doctor told them that he had already passed on.

The prosecution closed its case. The issue is whether the accused should be placed on their defence. The issue for determination is whether the prosecution has established a prima facie case against the accused. The evidence of PW1 relates to the tracking of phone calls. The initial request by the Marsabit central DCIO involved the deceased gadget. It appears that one Dub Boru Wako started using the gadget on 2.4.2016. The said Dub Boru Wako is not one of the accused. The evidence of PW1 does not connect the accused with the offence. The evidence of PW2 and PW4 is to the effect that they heard people quarreling outside their houses. They checked outside and found the deceased who had been injured. They don't know who injured the deceased. The evidence of PW3 is that the deceased was her husband. With regard to the evidence of PW5, the same only relates to how they went to the scene and took the deceased to hospital. The deceased was pronounced death upon arrival at the hospital.

From the evidence on record there is nothing connecting the accused to the offence. None of the witnesses implicated the accused. PW1 to some extent testified that the 2nd accused used one of the phones that was being used by the said Dub Boru Wako. But this was not the deceased's phone. That evidence does not implicate the 2nd accused. A prima facie case is established where the evidence to some extent implicates the accused. In such a case the accused is placed on his defence so that he can testify and controvert the prosecution evidence. Where an accused person is placed on his defence and opt to remain silent in his defence then the trial court is likely to convict the accused. It is not the duty of the court to place accused persons on their defence so that they can give their side of the story or prove their innocence. The burden of proof squarely lies on the prosecution which is supposed to prove its case beyond reasonable doubt. The prosecution should not expect that once the accused is put on his defence then he might give evidence which will implicate himself. Article 50 (L) states that

“an accused person has the right to refuse to give self-incriminating evidence”. Before an accused is called upon to defend himself the court has to be satisfied that in the absence of any controverting evidence from the accused, then the accused is likely to be found guilty of the offence.

From the evidence on record, it is my finding that if the accused are placed on their defence and they decide to remain silent, I cannot convict them of the offence of murder as charged. There is no evidence implicating the accused. I do find that the prosecution has failed to establish a prima facie case against each of the two accused. The two accused shall not be placed on their defence. The accused are not guilty of the offence of murder as charged. They are hereby acquitted under Section 306(1) of the Criminal Procedure Code (Cap. 75 Laws of Kenya). They are hereby set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Marsabit this 30th day of May, 2018

S. CHITEMBWE

JUDGE