



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 32 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JARED ASEMBO AMAYI.....ACCUSED**

**RULING**

**Introduction**

1. The accused herein, Jared Asembo Amayi first appeared in court on 2<sup>nd</sup> July, 2013 and on 23<sup>rd</sup> July 2013, he pleaded not guilty to the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the night of 28<sup>th</sup>/29<sup>th</sup> June, 2013, at Ematundu Village, Kisa North Location, Khwisero District within Kakamega County, murdered WYCLIFFE ASEMBO AMAYI. The accused and the deceased are brothers. The prosecution called six witnesses though it is clear from the record that the doctor who concluded the postmortem examination and the Investigating Officer were not availed to testify.

**The Prosecution Case**

2. The prosecution case was anchored in the evidence of PW1 Livingstone Etemesi Amwayi, PW2, Julius Mumia Anyera, PW3 Jackson Amwayi Etemesi who are all brothers of the accused as well as the deceased. The evidence of these three witnesses was taken by Hon. Mr. Justice Said J. Chitembwe on 12<sup>th</sup> March, 2014.

3. The next batch of witnesses comprised PW4 Samson Etuko Ebuhenya, the Assistant Chief of Wambuliche Sub-location of Khwisero Sub-County, PW5 Joseph Madara Andenga of Ebuchiro village and chairman of the Community Policing of Ebuchiro village and PW6 who was number 92589 PC Joseph Njogo of Khwisero Police Station. He is the one who received the report at the police station and also received the accused who was taken to Khwisero police station by PW5. PW6 rearrested the accused from PW5 and placed him in cells. The evidence of PW4 – PW6 was taken by Mr. Justice Anthony C. Mrima on 15<sup>th</sup> July, 2015.

**Submissions**

4. At the close of the prosecution case, Mr. S.M. Shifwoka advocate for the defence submitted that the prosecution had not established a prima facie case requiring the accused to be placed on his defence. The main argument by the defence was that none of the six prosecution witnesses saw accused assault the deceased. Secondly counsel submitted that the state had failed to establish any nexus between the death of the deceased and any acts/omissions on the part of the accused, and accordingly urged the court to acquit the accused at this stage.

5. On his part, Mr. Ngetich for the state relied on the evidence on record and asked for a ruling date.

**Analysis and Determination**

6. I have now carefully considered and analysed the evidence on record. I have also considered the applicable principles when a court is determining whether or not there is a case to answer. In particular, I have considered the principles as set out in the case of **Bhatt – vs – R[1957]EA 332**. In the said case the Court of Appeal for Eastern Africa held, among other things that no amount of worthless evidence can establish a prima facie case, and that a court should place an accused on his defence only when the evidence on record is such that in the absence of any defence, the court would be prepared to convict.

7. Applying the above principles to the instant case, I find that the prosecution has not established a prima facie case to warrant the accused being placed on his defence. As rightly submitted by defence counsel, placing the accused on his defence would be an exercise in futility, for if he were to elect to remain silent when put on his defence there would be no evidence on which this court would be prepared to convict the

accused.

8. In the first place, the prosecution has not proved the cause of death, although there is evidence that the deceased died. It is not in doubt that the cause of death is a critical ingredient of the offence of murder both at this stage of case to answer and also at the close of the hearing. No medical evidence was called to inform the court what killed the deceased.

9. Secondly, and apart from the fact that none of the prosecution witnesses saw the accused assault the deceased, the prosecution failed to call what the court considered as critical witnesses such as the mother of both accused and deceased whom PW5 said he found assaulting the accused after the incident. There was also another witness by the name LIBOI whom PW5 said informed him that it was accused who had killed the deceased. In the absence of such witnesses, the testimonies of PW5 as well as PW4 is mere hearsay which this court cannot accept.

10. The two above stated reasons leave this court with no option but to find that the prosecution has failed to establish a prima facie case requiring the accused to be put on his defence. It is not that the accused did not kill the deceased. He may have done so, but it was the duty of the prosecution to place sufficient evidence on record to substantially show at this stage that the accused had a hand in the death of the deceased. The prosecution also needed to prove the cause of death, but did not do so.

**Conclusion**

11. For all the above reasons, and there being no proof of a prima facie case against the accused person, find him not guilty of the murder of Wycliffe Asembo Amayi and acquit him under the provisions of Section 306(1) of the Criminal Procedure Code. Unless there is any other reason for keeping the accused in prison custody, he is to be released therefrom forthwith.

Orders accordingly,

**Ruling delivered, dated and signed in open court at Kakamega this 29<sup>th</sup> day of May 2018**

**RUTH N. SITATI**

**JUDGE**

**In the presence of**

.....**Mr. Ngetich - present.....for State**

.....**Mr. Munyendo for Matete.....for accused**

.....**Polycap Mukabwa.....Court Assistant**