



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL CASE NO. 14 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

1. FRED OMONDI OUMA

2. JOHN ASANGO AYANO.....ACCUSED

RULING

1. **Fred Omondi Ouma** and **John Asango Ayano**, the accused persons herein, were charged with the murder of **Patrick Ogwela Malago** (hereinafter referred to as '**the deceased**') before this Court on 09/05/2016. It was alleged that on 8th day of August 2015 at Sota Ogunde village at Magungu Sub-Location in Nyatike Sub-County in Migori County within the Republic of Kenya the accused persons murdered the deceased. The accused persons denied the information and a trial was ordered.

2. Only one prosecution witness testified in a bid to prove a *prima facie* case against the accused persons. He was **James Onyango**, a brother to the deceased. The witness testified on how he was attacked by three people while in the company of the deceased. That, it was around 10:00am when three people namely **Justus Auma Agando**, **Charles Ooko Ouma** and **John Asango Ayano** (the second accused person herein) attacked them. That, the attackers while armed with pangas told the witness and the deceased that they were going to kill them that day. Without giving them any reason, the attackers pounced on the two and cut them severely. The attackers were also joined by a fourth one as they all assaulted them. According to the witness all the attackers were their cousins and the father to the witness had bought land from the father of the attackers and established a home thereat.

3. The witness and the deceased screamed, and the villagers responded as the attackers fled. They were both taken to hospital as they were badly injured. They were both admitted and after one month the witness was discharged. The deceased however died three days after the witness was discharged from the hospital.

4. The witness then reported the matter to the police and attended a post mortem examination of the deceased. He also recorded his statement with the police.

5. The prosecution closed its case after the testimony of the witness since the investigating officer could not secure the attendance of any other witnesses despite several adjournments.

6. It is now on the foregone evidence that this Court is called to ascertain whether the prosecution established a *prima-facie* case (See the case of **Ramanlal Trambaklal Bhatt v. R (1957) E.A. 332**). In doing so this Court must have an eye on the ingredients of the offence of murder. There are three ingredients of the offence of murder which are: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the '**actus reus**' of the offence; and

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the '**mens rea**' of the offence.

7. In arriving at a finding as to whether the prosecution has established a *prima facie* case for the accused person to be placed on his defense, this Court is not only called upon to look at whether some evidence was adduced but the Court must go further to look at the credibility, the weight and the sufficiency of that evidence vis-à-vis the ingredients of the charge and whether such evidence can hold a conviction even in

the absence of any explanation from the accused person before deciding to call upon the accused person to render a defense. As said in the case of **Ramanlal Trambaklal Bhatt** (supra) '*a mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence...*'

8. By applying the legal principles to the evidence in this case, the prosecution evidence was uncorroborated and even if this Court takes that the death of the deceased occurred, it will be highly prejudicial to the accused persons to rely on such uncorroborated evidence and in the unique circumstances of this particular case and presume the cause of death as well as finding that the accused persons are the ones who killed the deceased. There were no explanations given why all the other witnesses did not testify especially the eye-witnesses and the expert witnesses. In any event even the witness only identified the second accused person as among the alleged attackers.

9. Looking at the law and the evidence, the upshot is that there is no cogent and reliable evidence connecting the accused persons with the death of the deceased and as such the prosecution has failed to establish any *prima-facie* case against the accused persons. Consequently, the accused persons have no case to answer. Pursuant to **Section 306(1)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya, I find that the accused persons herein **Fred Omondi Ouma** and **John Asango Ayano** are **NOT GUILTY** of the murder of **Patrick Ogwela Malago** and each of them is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 27th day of June 2018.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Ouma Counsel for the accused persons.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistan