



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

1. YOUNG KOMBO MARKO *alias* KEVIN OKEMWA MASES

2. BEATRICE ATIENO GONY

3. NICHOLAS OGARE TOM.....ACCUSED

RULING

1. **Young Kombo Marko *alias* Kevin Okemwa Masese, Beatrice Atieno Gony and Nicholas Ogare Tom**, the accused persons herein, were charged with the murder of **Charles Gony Omuono** (hereinafter referred to as '**the deceased**') before this Court on 12/04/2016. It was alleged that on 2nd day of March 2016 at Obondo village within Rongo Township in Migori County within the Republic of Kenya the accused persons jointly murdered the deceased. The accused persons denied the information and a trial was ordered.

2. The trial was delayed as the third accused jumped bail and was at large for a long period. When the trial took off seven witnesses testified in a bid to prove the information. **Pamela Atieno Odingo**, the wife of the deceased and a co-wife to the second accused testified as **PW1**. Two uncles to the deceased testified. One was **Michael Ochieng Opiyo** who testified as **PW2** and the other was one **Daniel Onyango Opiyo** who testified as **PW6**. **PW3** was **Esther Nyaboni Onynyi**, a neighbour to the first accused. **PW4** was a daughter to the deceased. She was **Prisca Akoth Charles** who witnessed the post mortem examination on the body of the deceased with her brother one **David Odiwuor Gony** who testified as **PW5**. Another son to the deceased testified as **PW7**. He was **Joshua Otieno**. I will refer to the witnesses in the sequence they testified.

3. **PW1** who was a co-wife to the second accused testified on how the second accused woke her up in the night of 01/03/2016 and informed her that the house in which she had spent with the deceased had been invaded by thugs and that the deceased had been injured. **PW1** raised alarm and a neighbour one **Opapo** (not a witness) rushed to their home. That, they accompanied **Opapo** to the house of the second accused and when they opened the door they saw a lot of blood on the floor and the wall and the lifeless body of the deceased lay thereon. They informed the other family members.

4. According to **PW2**, **PW6** and **PW7** the first accused, who had been shortly employed by the deceased as a farm hand, developed a sexual relationship with the second accused and when the deceased suspected as such he dismissed the first accused. That, the first accused had threatened the deceased with death through a phone message which **PW7** saw and verbally through **PW7**. The issue was however not pursued by the deceased.

5. **PW4** and **PW5** witnessed the post mortem examination on the body of their father, the deceased, and noted a deep stab wound on the neck. **PW3** testified that she had lost her national identity card and reported to the local authorities and as she was awaiting for the replacement thereof she was summoned by the police and told that her identity card had been used by the first accused to commit offences.

6. With the foregone evidence the prosecution closed its case. Based on that evidence 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 always have an eye on the 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 to be placed on their defenses, this Court is not only called upon to look at whether some evidence was adduced but 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. 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 case was unproved. The cause of the death was not proved and the assailants were not established. Even though the deceased died, it will still be highly prejudicial to the accused persons to assume that the accused persons are the ones who killed the deceased. There were no explanations given why all the other witnesses including the investigating officer did not testify.

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 **Young Kombo Marko alias Kevin Okemwa Masese, Beatrice Atieno Gony and Nicholas Ogare Tom NOT GUILTY** of the murder of **Charles Gony Omuono** and each of them is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of October 2018.

A. C. MRIMA

JUDGE

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

Mr. Gembe Counsel for the first accused person.

Mr. Agure Odera Counsel for the second accused person.

Mr. Jura Counsel for the third accused person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant