



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL CASE (MURDER) NO. 41 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

RICHARD ONDUSO MASINYA.....1ST ACCUSED

ERICK ONCHOKE.....2ND ACCUSED

RULING

1. Richard Onduso Masinya hereinafter referred to as the 1st accused person and Erick Onchoke hereinafter referred to as the 2nd accused person are jointly charged with the offence 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 28th and 29th March 2015 at Iyabe location within Kisii South Sub County in Kisii County in the Republic of Kenya jointly with others not before the court murdered Joachim Masinya Mogere.

2. The accused persons denied the offence and the prosecution called 5 witnesses. The prosecution at the close of their case need to have established a prima facie case that warrants the accused persons to be put on their defence. If no such case has been made out at this stage, then the trial court must acquit the accused as provided for under section 306 (1) of the Criminal Procedure Code.

3. What constitutes a prima facie case was clearly stated in the case of **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332** the court stated as follows:

“It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence” (emphasis mine). See also Wibiro alias Musa v. R [1960] EA 184.

4. My task is to determine if the evidence by the prosecution adduce fits the threshold set out in the above case.

5. Pw1 Nyangewso Masinya testified that on the night of 28/3/2015 she was in her house with the deceased who is her husband asleep. At about 1.00am the window in their bedroom was hit and people entered their house. She tried to escape but one of the persons stepped on her chest and told her to keep quiet. They killed her husband by cutting him on his neck. She went out to get help after the persons left. She was no able to identify any of the persons who killed her husband.

6. Pw2 Diana Ntabo Munda testified that on the night of 28th March 2015 she was with her grandparents in their house. She heard the window being hit. People entered the house at 1.00am. They were ordered to keep quiet. She heard her grandmother scream. After the persons left they found their grandfather dead. She was not able to identify any one of the persons.

7. Pw3 No 66824 Sgt. Emmanuel Rono he testified that on the 29/3/2015 whilst at the police station they received a report of murder at Iyabe location from the chief. They went to the homestead of the deceased. They found the body on the bed, his head had been cut off. They took the body to Kisii Referral hospital. On the 28th June 2015 the 2nd accused was arrested after he reported that money had been stolen from his safaricom line. That whilst in the cells the 2nd accused confessed to having been involved in the murder. The 1st and 2nd accused persons are the sons of the deceased.

8. Pw4 doctor Murebu Momanyi produced a post mortem report on the body of Joachim Masinya Mogere on behalf of Doctor Omari. The deceased’s body had multiple deep cutting on the head and neck. One of the deep cuts was on the scalp and the 2nd was on the lobe, there was a fracture of the scalp and the brain tissue was oozing out. The deep cut measured around 10 cms long. The deep cut was on the posterior side of the neck and measured 12 cms. There were 3 deep cut wounds at the back which measured 10 cms, 9 cms and 12 cms. The cause of death was the severe injuries secondary to the deep cuts on the head.

9. Pw5 Benson testified that he is a chief of Iyabe location. The accused persons are known to him the 1st accused is the deceased's son and the 2nd accused his grandson. He recalled how he received a report that the deceased had been murdered. On going to the deceased's home he found him slaughtered at the neck. He called the OCS and the body was taken to the mortuary. In the process of waiting for information on the murder a clan elder was called by the wife of the 2nd accused and informed that she had ran away because she had been forced to wash a jacket which her husband had worn when he butchered the mzee. She also informed the mzee that the panga which was used had been thrown in the pit latrine. She handed a mask to the clan elder. She informed the clan elder that she feared for her life and refused to testify. He got a message on his phone which he read in court. After he got the message he called for a baraza and they asked people to come out with useful information. He also recalled that in 2010 the 2 accused persons had gone to his office and reported to him that they wanted extra piece of land from the deceased and he advised them to use persuasive language to persuade the mzee. He recalled that at every baraza the sons of mzee attended and raised the same issue and that their relationship was poor.

10. The prosecution have established that the deceased died as a result of severe cuts on the head and neck the post mortem reports confirms the cause of death. The next issue is whether the prosecution have adduced evidence against the accused persons to warrant them being put on their defence. The 2 persons who were with the deceased in the house on the fateful night Pw1 and Pw2 testified that they were not able to identify the persons who murdered the deceased. There was evidence from Pw5 that the 2nd accused's wife informed the clan elder that her husband had made her wash a bloody jacket and that the murder weapon was thrown in a pit latrine. The 2nd accused's wife was not called to testify this evidence remain hearsay evidence. Pw4 testified that the 2nd accused confessed but the confession was not produced in evidence. The evidence on the involvement of the accused persons in the murder of the deceased was hearsay evidence. There was no direct evidence adduced to show that they were involved. They remain suspects and in the absence of evidence that links them to the murder I cannot put them on their defence. The prosecution evidence is weak and cannot sustain a conviction even if I put the accused persons on their defence. I find on the evidence adduced that the prosecution have failed to establish their case beyond reasonable doubt. Each accused person is acquitted and is free to go unless lawfully held.

Dated signed and delivered at **Kisii** this **18th** day of **December 2018**.

R.E.OUGO

JUDGE

In the presence of;

1st accused person Present

2nd accused person Present

Mr. Nyagwencha h/b for Mr. Kaburi For the Accused persons

Mr. Otieno Senior Prosecution State

Rael Court clerk