



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL (MURDER) CASE NO. 31 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ANDREW OSIAKO IMONJE ANABWANI.....ACCUSED**

**RULING**

**Introduction**

1. On 15.07.2013, the accused herein denied a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that on 20<sup>th</sup> day of June, 2013, at Munungo Village Ebukhunza Sub-Location, Emusutswi Locatin in Emuhaya District within the County of Vihiga, he murdered Daniel Imonje Anabwani.
2. The first and only witness in this case, Hellen Awinja testified on 3<sup>rd</sup> November, 2015. Before then and since then, the prosecution failed to call other witnesses inspite of numerous adjournments granted at the prosecutions behest.
3. When the case came up on 25<sup>th</sup> October, 2016, the prosecution was granted a last adjournment to enable them avail the remaining witnesses. The case was then fixed for further hearing on 28<sup>th</sup> November, 2016. No witnesses were availed on the said date but for the reason that the ODPP had recently moved offices, the prosecution was indulged one more time to avail witnesses on the next hearing date which was 27<sup>th</sup> February, 2017. The prosecution had pleaded for a final adjournment as they sought to trace their file in their new offices; but on 27<sup>th</sup> February, 2017, the prosecution did not avail any witnesses and asked for yet another adjournment. The application by the prosecution for another adjournment was opposed. The court did not grant the application for further adjournment as it found no justification for the same. The prosecution closed its case, upon which Mr. Kundu asked for a date for ruling as to whether or not the accused person had a case to answer.

**The Law**

4. Section 306(2) of the Criminal Procedure Code provides that upon closure of the prosecution case, the trial court shall proceed to put an accused person on his defence if it finds that the prosecution has established a prima facie case against the accused. What amounts to a prima facie was defined by the Court of Appeal for Eastern African in the renowned case of **Bhatt – vs – R[1957] EA 332.** A prima facie case is thus proved where the evidence is such that a reasonable court properly addressing its mind to such evidence would be prepared to convict if the accused person says nothing in his defence. The

question that arises for determination now is whether the evidence so far adduced by the prosecution is such that without an explanation by the accused herein, this court would be ready to convict.

### **The Prosecution Case**

5. As pointed out earlier, the only witness in this case was Hellen Awinja, PW1. From her testimony, the prosecution case is that on 20<sup>th</sup> June, 2013 at about 9.30pm, she was in her house resting when her husband, Daniel Anabwani came home. After serving him with supper, she retired to the bedroom. Within no time she heard her nephews and nieces screaming. PW1's husband opened the door and went outside. PW1 then heard the words, "you have killed" The words were allegedly said by one of the children who were screaming. PW1 did not go outside, but continued resting; but also heard a lot of noise coming from her mother in law's home.

6. It was then that PW1 decided to go outside and when she did so, she found her husband lying on the ground outside his mother's house. She carried her husband to their house. She was assisted by one of her sons to carry her husband. At around midnight, PW1 discovered that her husband was dead.

7. She had earlier noticed an injury on his head. She made a report to her mother –in-law and also to their neighbour, both of whom confirmed that her husband Daniel Imonje Anabwani was dead. They took him to Mbale Health Centre where he was put on a drip. He was confirmed dead at 3.00am.

8. The following morning, PW1 reported the matter to the village elder, the Assistant Chief and later to Luanda police station. PW1 also testified that the noise she had heard from her mother in law's house was about food which her mother in law and the children were telling the accused he had no share in it. PW1 also testified that after the accused person's wife died, he went back to eating in his mother's house. She also testified that one of the children S a had told her the accused had hit the deceased on the head when the latter sought to know why there was so much noise at his mother's home.

### **The Law**

9. Sections 203 and 206 of the Penal Code require the prosecution to prove the following if a charge of murder is to succeed;-

- 1.) That the deceased died and to prove the cause of death
- 2.) That the death resulted from an unlawful act or omission on the part of the accused.
- 3.) That in causing the death, the accused had malice aforethought.

### **Analysis and Determination**

10. From Hellen Awinja's testimony in which she said that the doctor told her the deceased had died, there is no medical evidence to support that allegation. No doctor testified to confirm that indeed, Daniel Imonje Anabwani died. Nor is there any evidence to prove or show the cause of death. Of course at this stage, the evidence needed not for proving the fact and cause of death beyond any reasonable doubt, nonetheless, as the evidence on record goes, it is not confirmed that the deceased truly died and what the cause of his death was.

11. Regarding the second point as to whether the death of the deceased was or is attributable to the accused person herein, I can only say that there is no evidence to that effect. PW1 conceded that she did not witness the incident. She also testified that S, who was aged 17 years at the material time, told her it was the accused who hit the deceased on the head with a stone. S was not availed to testify, so PW1's evidence on how the deceased may have died remained hearsay evidence. Such evidence is inadmissible.

12. Having come to the above conclusion the issue of whether or not the accused had malice aforethought remains only an academic question. First, there is no evidence that it was the accused who

inflicted the injuries from which the deceased died. Secondly there is no evidence confirming what injuries the deceased suffered and whether the deceased died as a result of those injuries.

**Conclusion**

13. In view of all the above findings, it is my considered view that the prosecution has not established a prima facie case to warrant the accused person being put on his defence. Consequently I make a finding that the accused person is not guilty of the murder of Daniel Imonje Anabwani. I therefore acquit him under the provisions of Section 306(1) of the Criminal Procedure Code.

14. Unless he is otherwise lawfully held he shall be released from prison custody forthwith.

It is so ordered.

Ruling delivered, dated and signed in open court this 23<sup>rd</sup> day of March 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

.....Mr. Juma.....for the state

.....Mr. Kundu(present).....for Accused

.....Polycap.....Court Assistant