



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 99 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

RODGERS ONDIEKI NYANGENYA.....1ST ACCUSED

JAMES MARUBU AKOMBE.....2ND ACCUSED

WESLEY ELIJAH OSORO.....3RD ACCUSED

RULING ON A CASE TO ANSWER

1. The accused persons herein, **RODGERS ONDIEKI NYANGENYA, JAMES MARUBU AKOMBE** and **WESLEY ELIJAH OSORO** 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 charge are that on 14th July 2012 at Market Plaza building in Kisii District within Kisii County jointly murdered **LUCAS OМУYA KEGEGO**.

2. In the celebrated case of **Ramanlal Trambaklal Bhatt vs Republic (1957) 332**, the test on whether the prosecution has established a prima facie case was laid down as follows:

“Remember that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one”

“Which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence” irrespective of its credibility or weight sufficient to put the accused on his defence.” A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence... 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 evidence could convict if no explanation is offered by the defence.”

3. The prosecution presented a total of 7 witnesses in support of its case. PW1 was Dr. Dennis Oeri Ongera who performed the post mortem exam of the deceased’s body and established the cause of death to be cardio-pulmonary arrest secondary to massive haemorrhage.

4. PW2 Gladys Nyaboke Machogu, was the widow of the deceased. Her testimony was that on the night

of 14th July 2012, she received a call from an unnamed lady who informed her that the deceased had fallen and had been rushed to Kisii Level 6 Hospital. She then proceeded to the hospital where she found that the deceased had already died.

5. PW3 Robert Kerosi Moliro testified that he was at Roka's bar on the fateful night when a caller he did not name told him that the deceased had fallen from a storeyed building at Market Plaza and had been taken to hospital.

6. PW4 James Omuya Kegego was the elder brother to the deceased. He stated that on 15th July 2012 he received a message that the deceased was injured whereupon he rushed to the hospital only to discover that the deceased had already died.

7. PW5 Lameck Omuya Marage received a call from PW2 who informed him that the deceased had fallen from a storeyed building and had been rushed to hospital where he died.

8. PW6 Stephen Bagwazi Onzare is a member of the Community Policing group. His testimony was that he assisted the brother of the deceased, one Kennedy, to trace the women who were with the deceased at a bar known as "A-Z" on the night that he died.

9. PW7 P.C. Alfred Nasio was the police officer who investigated the case upon receiving a report from 2 ladies whom he named as Susan Kerubo and Lilian Kemunto. PW7, the said Lilian Kemunto reported to him that the deceased fell down from the roof top at Market Plaza and he died in the hospital shortly thereafter. The investigating officer alluded to the fact that one Lilian Kemunto informed him that deceased had a physical confrontation with the 1st and 2nd accused before he was pushed into a manhole. The said Lilian Kemunto was not called to testify in court and I therefore, at best, I find that this piece of evidence was inadmissible hearsay. PW7 was categorical that his investigation did not reveal any involvement of the 3rd accused in the alleged confrontation with the deceased.

10. From the brief foregoing overview of the evidence tendered by the prosecution witnesses and applying my mind to the test laid down in the **Ramanlal case** (supra), I find that the evidence adduced by the prosecution witnesses did not link any of the accused persons to the charge before the court. No eyewitness testified in court to corroborate the evidence of all the seven prosecution witnesses even though it was alleged that there were eyewitnesses to the crime. All the prosecution witnesses stated that they only learnt of the deceased's fall and subsequent death from other people, who were not called to testify.

11. In the instant case, the burden of proof fell squarely on the prosecution's docket to establish its case against all the accused persons beyond reasonable doubt. As can be seen from the summary of the evidence tendered by the prosecution witnesses, no cogent evidence was adduced to link the accused persons to the murder of the deceased. Accordingly, there is no evidence upon which this court can arrive at the decision that a prima facie case has been made out against the accused persons which can lead to their conviction in the absence of an explanation of from them in the form of a defence.

12. It is therefore my finding that a prima facie case was not established against the accused herein to warrant their being placed on their defence and I consequently acquit all of them at this stage under Section 306 (1) of the Criminal Procedure Code. The accused persons shall be set at liberty forthwith unless they are otherwise lawfully held.

Delivered, dated and signed in at Kisii on 22nd of March, 2017.

W.A. OKWANY

JUDGE

In the presence of:

- Miss Ouko for the State
- Mr. Magara for Okenye for the Accused
- Omwoyo court clerk