



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRC NO. 42 OF 2014

PROSECUTOR.....REPUBLIC

VERSUS

KEVIN ODHIAMBO OTIENO.....ACCUSED

RULING

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The information states that on 9th May 2014 at Kajulu Koker Sub-location, in Kisumu West District, within Kisumu County, he murdered **Cornel Auma Ouma**, deceased.

The prosecution called three witnesses the key witness being Jane Akinyi Ouma (PW1) who testified that the deceased in this case was her step son while the accused was her husband having married her (inherited) upon the death of her husband, the father of the deceased. She testified that on the material day she witnessed a quarrel between the accused and the deceased allegedly because the deceased did not want the accused who he had always chided as an “inheritor”, to burn charcoal in that place. The quarrel lasted until the deceased went out to graze the cattle but the animosity resumed when the deceased came back in the evening; this despite the pair shaking hands and saying they had forgiven each other. Jane Akinyi Ouma (PW1) testified that she tried to calm the pair but the deceased did not stop hurling insults at the accused and when she later retired to bed she left the accused outside. The deceased continued hurling insults at the accused even when the deceased went to bed and when he could not take it any more PW1 heard him go to the accused's house. Thereafter she heard him go to a neighbour's house for help but soon came back. Thereafter PW1 heard a thud like sound in the deceased's house and when she demanded to know what the accused had done to the deceased he said he had just beaten him. Later the next morning PW1 discovered the deceased had died. She forced the accused to accompany her to Kombewa Police Station where they reported the matter. They were later apprehended but she was soon released and treated as a witness. The accused was however charged with this offence.

The other two witnesses were an Assistant Chief (PW2) and a Police Officer (PW3) both of who did not witness the occurrence. They were both called to the scene after the deceased's body was discovered in his house. They did not take any part in the investigations.

At this stage this Court is required to determine whether the prosecution has made out a prima facie case against the accused person sufficiently to warrant him to be put on his defence.

Mr. Singahachi, Advocate, for the accused person, has, relying on the cases of **Bhatt V. Republic [1957]EA 332** and **Republic V. Benard Obunga Obunga [2015]eKLR**, urged this Court to find that no such prima facie case has been established and urged this Court to acquit the accused under Section 306(1) of the Criminal Procedure Code. He submitted that the accused cannot be expected to fill in the gaps in the prosecution's case and contended that there was no evidence that the accused killed the

deceased; that the prosecution's evidence is weak and cannot amount to a conviction.

On his part Mr. Muia, Prosecution Counsel submitted that the evidence on record was so clear that even had the case stopped at PW1's evidence the Court would have put the accused on his defence. He submitted that PW1, the wife of the accused, was present when the accused confronted the deceased and that she confirmed it was he who inflicted the injuries that resulted in the death of the deceased. Mr. Muia contended that this is not a mere scintilla of evidence; that the evidence is weighty and there are no gaps to be filled. He submitted that the cause of death is set out in the post mortem form and that is the accused who caused the death of the deceased.

As stated in **Bhatt V. Republic [1957]EA 332** “A *prima facie* case, at least, means one which a reasonable tribunal, properly directing its mind to the law and evidence could convict if no explanation is offered by the defence”. I do also agree with my sister Mutuku J – in **Republic V. Benard Obunga Obunga [2015]eKLR** that the Court can only work with the tools provided – meaning the evidence adduced. I also agree with her observation that the accused is protected and also Mr. Singahachi's submission that the accused is not expected to fill in the gaps in the prosecution's case. The onus is always upon the prosecution to prove its case and it is not for the accused to disprove it. In the present case the evidence against the accused person is circumstantial. Jane Ouma (PW1) did not see the accused person hit the deceased. The accused was in his own house and she was in bed in her house. It was her evidence that she heard a thud like sound and just like that the deceased went quiet. She did however state that the accused person went to their neighbours house twice. That being her evidence it cannot be said that her evidence was direct; she did not actually see the accused enter the deceased's house and strike him. Whatever she said the accused told her after that cannot be a confession as she is not qualified to take a confession. If the prosecution intended it to be then they should have taken the accused to an Inspector of Police to record it.

Circumstantial evidence, such as is in this case, could only result in a conviction if the exculpatory facts are incapable of an explanation other than that of the accused's guilt. In **Kariuki Karanja Versus Republic [1986] KLR 190** the Court of Appeal held -

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”

The question then becomes whether the circumstantial evidence in this case is sound enough to prove the guilt of the accused person. Although Mr. Muia, Prosecution Counsel, referred to a post mortem report which was not produced in evidence and we do not therefore know what killed the deceased; whether it was the injury which, PW1, suspected the accused inflicted upon the deceased when she heard the thud. In the absence of evidence proving the cause of death the exculpatory facts do not meet the test. It is my finding that indeed what the prosecution has is a strong suspicion that the accused inflicted upon the deceased an injury which led to his death. It is then asking this Court to put the accused on his defence so that he can tell whether this is so. Clearly the evidence here is only based on suspicion that the thud the witness (PW1) heard was the accused striking the deceased. However the nature and extent of that injury and whether the same could have resulted in the death of the deceased were not proved. To put the accused on his defence would be tantamount to asking him not only to confirm this suspicion but to fill in the gaps in the prosecution's case. That is not permissible. In the premises I find there is no evidence to satisfy this Court that the accused committed the offence and acquit him under Section 306(1) of the Criminal Procedure Code. He shall be released forthwith unless otherwise lawfully held.

E. N. MAINA

JUDGE

Signed, dated and delivered in open court this 30th day of May 2017

In the presence of:-

Mr. Singahachi for the Accused

Mr. Muia for State

Accused person

Serah Sidera – Interpreter

INTERPRETATION: English/Dholuo