REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 148 OF 2012

REPUBLIC……………………..……………………PROSECUTOR

VERSUS

CHARLES NTABO MONDA alias NYANGARESI……...1ST ACCUSED

EVANS MAKORI ORINA alias NYAMATARI..................2ND ACCUSED

RULING ON A CASE TO ANSWER

1. The accused persons herein **CHARLES NTABO MONDA alias NYANGARESI** and **EVANS MAKORI ORINA alias NYAMATARI** were 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 3rd December 2012 at Iyienga Village, Kiango Sub-Location in Kisii County, jointly with others not before the court, murdered JOSEPH OGANDA MOGAKA.

2. Both the accused persons pleaded not guilty to the charge after which the case was listed for hearing with the prosecution intimating that they intended to present the testimonies of 10 witnesses in support of their case. When the case came up for hearing, however, the prosecution was only able to present the evidence of the investigating officer one Inspector Benson Naibei whose evidence entailed the production of the post mortem report that established the cause of death to be cardio-respiratory arrest secondary to shock after assault. The investigating officer testified that he received a report to the effect that the deceased had been allegedly assaulted by a mob which included the accused persons herein on suspicion that he had stolen a cow. None of the witnesses who reported the incident to the police and who were reported to have recorded their statements with the police testified in court despite having been issued with summons to attend court and therefore the prosecution closed their case with only the testimony of the investigating officer.

4. I am required under Section 306 (1) of the Criminal Procedure Code (Cap. 75) to determine whether the two accused persons have a case to answer. A case to answer is a case where if the accused keeps quiet, the evidence of the prosecution should be such that a conviction will result.

5. The standard of proof as to whether the prosecution has established a prima facie case was laid down in the celebrated case of **RAMANLAL TRAMBAKLAL BHATT -VS- REPUBLIC (1957) E.A. 332** as follows:-

> **"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not 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.**
>
> **(ii) The question whether there is a case to answer cannot depend 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."

5. And in **R -VS- JAGJIVAN M. PATEL AND OTHERS 1, TLR, 85** the learned Judge said;

> **"All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply, its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion."**

6. In the instant case, as I have already stated in this ruling, the only evidence presented by the prosecution was the testimony of the investigation officer who was not a primary witness to the murder in question as he only relied on the information relayed to him by the witnesses who did not themselves testify in court. Under the above circumstances, the testimony of the investigating officer can be said to consist of matters of hearsay which this court cannot rely upon in finding that the accused persons have a case to answer.

7. Even though I appreciate that the life of a citizen was lost, justice demands that I have to consider whether indeed there is evidence that it is the accused persons that killed him. The burden was on the prosecution to establish or tender evidence that connects the accused to the crime. The prosecution did not tender any evidence whatsoever linking the accused persons to the crime of murder. See **Sawe –vs-Republic [2003] KLR 364**. Though it is wrong to kill somebody, it is also wrong for the court to find fault in people against whom there is no evidence, or sufficient evidence.

8. It is therefore my finding that both the accused persons have no case to answer. No prima facie case was established against them. It is my duty to acquit them and I do so under Section 306 (1) of the Criminal Procedure Code. Consequently, I direct that the accused persons be set at liberty forthwith unless they are otherwise lawfully held.

9. It so ordered.

Delivered, dated and signed in at Kisii on 29th of May, 2017.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Mr. Bigogo for the Accused

Omwoyo court clerk