



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL (MURDER) CASE NO. 38 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**BENSON GICHUKE.....1<sup>ST</sup> ACCUSED**

**NELSON SANGONY.....2<sup>ND</sup> ACCUSED**

**RULING**

**Introduction**

1. The two accused persons are before this court on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars being that on the night of 22<sup>nd</sup> and 23<sup>rd</sup> December, 2012 at Bumanu Sub-Location, Marama West Location Lunza Division Butere District within Kakamega County, jointly murdered APOLLO WANANGWE NASENGO. They each denied committing the offence. The case has been on going since 12<sup>th</sup> December, 2014.

**The Prosecution Case.**

2. The prosecution called 9 witnesses among them Dr. Juma Khayombe who was PW9. He told the court that the cause of death of the deceased was blunt force injury causing severe head injury namely subdural and duodenal haematoma. Among the other witnesses were Prof Philip Wandalwa, PW1 James Shisaka Wandalwa, PW2 and Margaret N. Wanangwe who testified as PW3. PW3 is wife to the deceased.

3. According to the prosecution, the two accused persons who are Administrative Police Officers are the ones who murdered the deceased.

**Submissions**

4. At the close of the prosecution case, Mr. Shifwoka, Counsel for both accused persons, submitted that the evidence on record does not establish a prima facie case to warrant the accused person being placed on their defence. Relying on the persuasive authority in the case of **Republic – vs \_ Hassan Mohammed Osman.- Garissa HCCR Case No. 7 of 2012**, formerly **Nairobi High Court Criminal Case No. 63 of 2011**, counsel submitted that a prima facie case is “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.” He

submitted that on the evidence so far adduced, this case is not one on which this court properly directing its mind could convict if the accused persons remained silent.

5. Counsel also relied on the case of **John Murithi Nyagah – vs – Republic – Nairobi. HCCRA No. 201 of 2007 –[2014] eKLR** the case dealt with identification of suspects during difficult circumstances. Mr. Shifwoka urged the court to make a finding at this stage that the accused persons have no case to answer and to set them free forthwith.

6. In his brief response, Mr. Jumsumba, Counsel for the state submitted that the death of the deceased having been confirmed, even the accused persons themselves, it was not necessary for the court to consider who caused that death.

**Analysis and Determination**

7. Having carefully considered the law and the evidence on record, I am satisfied that the prosecution has established a prima facie case to warrant the accused persons being put on their defence. At this stage, the prosecution used not prove a very weighty case, nor need they show proof beyond any reasonable doubt. Weighing the totality of the prosecution case against the standard of proof for a case to answer, the accused persons are hereby placed on their defence.

8. The accused [persons are reminded of the options open to them when making their defence. They can give sworn or unsworn evidence. If they give sworn evidence, the court and the prosecution have a right to ask them questions. If they choose to give unsworn evidence, nobody is allowed to put any questions to them. In both cases, they can all witnesses, the third alternative is for them to remain silent and let the court decide the case on the evidence that is before it.

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega this 28<sup>th</sup> day of June 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

.....Mr. Juma (present).....for State

.....Mr. Wekesa for Shifwoka (present) ....for both Accused persons

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