



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA ATKAKAMEGA

CRIMINAL DIVISION

CRIMINAL CASE NO. 16 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

FREDRICK OYARO APLHAS.....ACCUSED

RULING

Introduction

1. The accused person herein appeared before this honourable court on 14th May, 2012 to answer a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars in the information dated 17th April, 2011 (correct date should be 17th April, 2012) as per the charge sheet of that date) are that on the 14th day of April, 2012 at Navichekhe Village, Emukola Sub-location, in West Bunyore Location in Emuhaya District within the county of Vihiga, jointly with others not before court, murdered NEHEMIAH ACHOKA OMULEMA.

2. The accused person denied committing the offence when he took the plea before Hon. Mr. Justice S. J Chitembwe on 14th May, 2012. Before then the accused had appeared before the Deputy Registrar on 18th April, 2012.

The Prosecution Case

3. The prosecution called 7 witnesses in its attempt to prove the case against the accused person. PW1, Patrick Kabale Musumba, whose age was not given testified as PW1 and told the Court that he saw with his own eyes the accused person cutting the deceased on both sides of the head with an axe. The witness could not identify the accused while in court.

4. PW2 Samuel Nambwenya Peter, told the court that he saw the deceased after he had been cut. He also saw the deceased being taken to hospital by his (Deceased's) brother. PW2(Samuel) also identified the deceased's body on 15th April, 2012 for purposes of post mortem examination.

5. The post mortem examination was done by Dr. Philip Kawaron Athero, PW7 of Dolphin Maternity and Nursing Home. According to Dr. Athero, the deceased had deep cut wound with fractures on the left and right parietal region. He also exhibited. Oedema of the penile and scrotal tissue. According to Dr. Athero, the cause of death was fatal head injuries secondary to assault. The post mortem report form was produced as PExhibit.

6. PW4, Julius Achola Omulema is father to deceased. His testimony was to the effect that the deceased and the accused had a dispute over a woman who was wife to accused but lived with deceased after the accused had been arrested in connection with some other offence. PW4 (Julius) did not witness the incident but saw deceased bleeding from some cuts.

7. Number 53069 Police Constable Maurice Kituyi PW6 was the investigating Officer. He took statements from witnesses and stated that during investigations, he established that there was a dispute between the accused and the deceased over a woman who was wife to accused but allegedly taken away by deceased.

8. PW5, did not give her evidence because she was not called again after she was stepped down to await an interpreter of the proceedings into Kinyore language.

Submissions

9. At the close of the prosecution case, Mr. Shifwoka, counsel for the accused person submitted that the prosecution has not proved a prima facie case against the accused person to warrant him being put on his defence. In doing so, he urged the court to find and hold that there was no proper identification of the accused person by the key witness PW1. He also submitted that no recoveries were made and further that the real culprit by the name Chapchap is still at large. He urged the court to set the accused person free at this stage. Counsel relied on the case of Republic – vs – Hassan Mohammed Osman- Garissa High Court Criminal Case No. 7 of 2012.

10. In the said case, Mutuku J, cited the well-known case of R- Vs – Jagjivan M. Patel & 4 others (1) T.L.R.(R) 85 where the court stated;-

“.....all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his 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 as 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 the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”(Underlining is mine for emphasis)

11. The principle to be gleaned from the above is that at this stage, the prosecution need not prove the case against the accused person.

Analysis and determination

12. After a careful analysis of the evidence on record, I am satisfied that the prosecution has established a prima facie case against the accused person to warrant his being put on his defence. This case may not be very strong. PW1 may have failed to identify the accused person in court but there is other available evidence on record which points to the accused, though perhaps not very conclusively, as having had a hand in the death of the deceased. Such evidence, in my considered view just sufficiently requires the accused person to say something in his defence.

13. Accordingly, the accused person is put on his defence pursuant to Section 306(2) of the Criminal Procedure Code. The accused may give sworn or unsworn evidence. If he chooses the former both the court and the prosecution may ask him questions. In either case, he has a right to call witnesses. Thirdly the accused may choose to remain silent and let the court decide the case on the evidence on record.

14. I now call upon the accused person to indicate to the court what option he wants to take in answering the charge. He may do so either by himself or through his advocate.

It is so ordered

Ruling delivered, dated and signed in open court at Kakamega this 27th day of June 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Juma (present) for Republic

Mr. Nyikuli for Shifwoka for Accused

Polycap - Court Assistant