

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO 30 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

EDWIN ISMAEL MASIGA.....ACCUSED

RULING

1. **EDWIN ISMAEL MASIGA (the accused)** faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that on 8th November 2015 at NYAERE village within **MFANGANO SOUTH in MBITA** sub-county within **HOMA BAY** County he murdered **RUTH AKINYI OMIGO**. The accused denied the charge and was represented by **MR. R. OCHIEN’G**, while **MISS ONGETI** appeared for the State.

2. **NICHOLAS ODERO MISUNGU (PW5)** was at his home in **MFANGANO** on 8TH November 2015 at about 1.00pm when the accused who was passing by stopped outside the homestead and asked for drinking water. PW5 sent his 11 year old son named **D** to take some water to him before going to join him for a brief chat. Just then **RUTH AKINYI OMIGO (the deceased)** passed by accompanied by a young child and greeted PW5 saying “Hallo father”. However she did not greet the accused. She walked on and the accused remained standing at PW5’s gate for a while. Shortly thereafter, PW5’s step-mother passed by, and the accused immediately began to follow her without excusing himself to PW5.

3. After about an hour PW5 heard screams and someone was wailing out the deceased’s name. He rushed to the place where the screams were coming from and realized that the girl who had just passed by and greeted him was now lying down on the ground in a pool of blood still dressed in the same clothes he had seen her wearing but her blouse had been removed and she was left with a brassiere. He later learnt that the accused had been arrested in connection with the girl’s death. Both PW5 and his son **D (PW6)** confirmed that when they encountered the accused he was not armed with anything

4. Meanwhile, the area chief **RICHARD OKORO AWIRO (PW2)** received information that that a dead body had been found on the way between **ULWE** and **WAKULA**. He rushed to the scene after informing police, and found a crowd gathered. He observed the area a little away from the body, which members of the public suggested was the scene of a struggle and noted some blood stains. The body had a stab chest injury just near the breast.

5. The deceased’s father **RICHARD OMOGI ODHIAMBO (PW3)** said he did not know the accused nor would he even think of a reason why he would want to kill his daughter.

6. The investigating officer **JAMES MWENDA (PW7)** did not state what led him to believe that the accused was the author of **RUTH’s** death but he nonetheless seemed to rely on the theory given by **PW5** and **PW6** that because he was seen going towards the same direction that the deceased had gone, and because he had left in such haste, he was the culprit. I do not know how this connection was made but apparently on 10th November 2015, the accused appeared at his uncle’s **MAURICE OCHIENG MASIGA (PW1)** home in a blood soaked state and with serious injuries on his throat. He said he had been attacked by persons not known to him and the uncle got him to change into fresh clothes to take him to hospital. However on the way they were confronted by a hostile mob which thwarted the move and snatched away while baying for his while baying for his blood then took him to the chief’s office.

7. What evidence is there that the accused killed the deceased? What happened to the child who had accompanied the deceased? At least she could have shed some light on the deceased's movements after they had gone past PW5's gate. Why did PW5 and the police officer think the accused was the culprit and not the woman who had passed and gone immediately after the deceased? She was well known to PW5 yet her evidence is loudly missing. What became of the puritanical blood thirsty mob that was ready to sentence the accused when it came to setting out the truth.....none of them could come to court to throw the first stone!! Indeed as **MR OCHIEN'G** correctly submitted there was no eye witness to the murder, and the theory advanced that because an unarmed man walked towards the same direction as the deceased then he must be the offender holds very little water and is sheer suspicion and not worth being camouflaged as circumstantial evidence. The scenario offered has so many gaps that can be filled with other extraneous evidence that it does not inculpably point to the guilt of the accused to the reasonable exclusion of everyone else.

8. In the celebrated case of **BHATT vs. REPUBLIC [1957] EA 332-334** cited by the defence counsel, the onus of establishing a prima facie case rests with the prosecution at all times as was stated that -

“...that the question whether there is a case to answer does not depend on whether there is some evidence irrespective of its credibility or weight...A mere scintilla of evidence can never be enough...”,[Paraphrased]

9. It would be a contradiction to the principles set out in the Bhatt case to require the accused to be put to his defence because that would mean asking him to fill the gaps left by the prosecution.

10. There is no direct or real evidence and the circumstances relied on by the prosecution are so inconclusive and I hold that the evidence is so lacking in probity that it does not warrant the accused being placed on his defence. He has no case to answer and I return a finding of **NOT GUILTY** under section 306 (1) of the Criminal Procedure Code. The accused shall be set at liberty forthwith unless otherwise lawfully held

Delivered and dated this 20th day of June 2017 at Homa Bay

H.A. OMONDI

JUDGE