



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 53 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

EVANS MONDA NYATUKA.....ACCUSED

RULING ON A CASE TO ANSWER

1. The accused herein EVANS MONDA NYATUKA was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code, The particulars were that on 11th June 2011 at Sosera Sub-location within Kisii County in the Republic of Kenya murdered **ZAKARI NYATUKA KERUMA**. The accused pleaded not guilty to the charge and a trial ensued in which the prosecution tendered the evidence of only one witness, Francis Gekonge Omindu (PW1), the area chief of Ikorongo Location.
2. The testimony of PW1 was that on 11th June 2011 he received a call from an assistant chief one Julius Mose Moturi who informed him that the deceased had been killed. He went to the home of the deceased the following day and found that the accused and his mother had been arrested.
3. He added that a blood-stained Jembe, broom and gum boots were carried away by the police as exhibits.
4. The prosecution did not avail any other witnesses in court after tendering the testimony of PW1 despite being granted numerous adjournments and on 27th July 2017, over six (6) years after the accused's first court appearance, the prosecution closed its case.
5. Under **Section 306 (1) of the Criminal Procedure Code (Cap 75 Laws of Kenya)**, the court is required to determine whether an accused person has a case to answer. A case to answer is a scenario whereby if an accused person decides to keep quiet and does not tender any evidence in his defence, the evidence of the prosecution would be sufficient to sustain a conviction.
6. The test on whether or not the prosecution has laid down a prima facie case to warrant the accused being placed on his defence was established in the 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."

7. In the present case, the prosecution presented only the evidence of PW1 an area chief who was not a primary witness to the murder in question as he only received a report concerning the killing from a third party who was not called as a witness in the case.

8. Furthermore, whether or not the alleged deceased died and the cause of his death was not established in any manner whatsoever. Under the above circumstances, one can say that the testimony of PW1 consisted of matters of hearsay which this court cannot rely upon in reaching a finding that the accused has a case to answer.

9. While this court appreciates that a citizen's life must have been lost thereby prompting the filing of the murder charge against the accused, the burden was on the prosecution to establish that the accused was involved in the crime.

10. The prosecution did not tender any evidence linking the accused to the crime of murder and therefore my finding is that the accused has no case to answer and I acquit him under **Section 306 (1) of the Criminal Procedure Code**. The accused shall be set at liberty forthwith unless he is otherwise lawfully held.

Delivered, dated and signed in at Kisii on 31st July, 2017.

W.A. OKWANY

JUDGE

In the presence of:

- Otieno for the State
- Mr. Ondari for the Accused
- Omwoyo court clerk