



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 61 OF 2014

REPUBLIC..... PROSECUTOR

VERSUS

JOSEPHINE MORAA ONDARA.....ACCUSED

RULING ON A CASE TO ANSWER

1. The accused herein JOSEPHINE MORAA ONDARA was 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 14th May 2014 at Mang'ere Sub-Location in Gucha Sub-County within Kisii County, jointly with others not before the court, murdered SAMSON ONDARA.

2. The accused pleaded not guilty to the charge after which the case was listed for hearing with the prosecution presenting the testimonies of 7 witnesses in support of their case. A brief summary of the prosecution's case, as captured in the testimony of PW5 Absalom Ondara was that on the night of 14th May 2014 at about 8pm, he had dinner with the deceased and the accused who were his father and mother respectively before retiring to his house which was about 30 meters from his parent's house. Later that night, his mother knocked at his door with the information that she was worried because the deceased who had left the house to go to the toilet, had taken too long to return and that she heard him crying out for help. It was upon receiving that report that PW5 left his house and accompanied the accused to the toilet which was about 100 meters away. On reaching the toilet, they found that deceased was injured and was lying down and bleeding from the head. They raised an alarm and neighbors who came to the scene assisted them in taking the deceased to hospital but he unfortunately succumbed to his injuries on 22nd May 2014. PW5 was categorical that he was coerced by elders to record a statement implicating the accused in the murder of the deceased as the said elders threatened to curse him if he did not comply with their demands.

3. PW1, PW2 and PW6 were among the people who responded to the distress call by PW5 and the accused and assisted in transporting the deceased to hospital while PW3 was the member of the community policing group who confirmed that he received a call from PW1 over the deceased's injuries. PW4 was the doctor who conducted the post mortem examination on the body of the deceased and established the cause of death to be cardio-pulmonary arrest due to severe head injury inflicted by a sharp object. PW7 was the investigating officer who narrated how the information regarding the death of the deceased was relayed to him, the investigations he undertook and the decision that he made to charge the accused with the offence of murder. According to PW7, he did not find any direct evidence linking the accused to the death of the deceased but that he charged her with the offence because she was the person who was last with the deceased before he was found injured in the toilet.

4. I am required under Section 306 (1) of the Criminal Procedure Code (Cap. 75) to determine whether

accused person has 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."

6. 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."

7. From the brief summary of the prosecution's case, it is clear to me that none of the witnesses tendered any evidence linking the accused to the murder and according to the investigating officer, he decided to charge the accused with the offence of murder based on the suspicion that she was involved in the crime in view of the fact that she was the one with the deceased last before he was attacked. My finding is that mere suspicion cannot form the basis for a finding that a prima facie case has been established against an accused person to warrant her being placed on her defence as such suspicion must be backed by some tangible evidence pointing to the guilt of the accused.

8. While I appreciate that the life of a citizen was lost in a very gruesome attack, justice demands that I have to consider whether indeed there is evidence that it is the accused person who killed him. The burden was on the prosecution to establish or tender evidence that connects the accused to the crime. As I have already observed in this ruling, 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.

9. Under the above circumstances, it would be futile to make a finding that the accused has a case to answer and to place her on her defence. It is therefore my finding that the accused person has no case to answer. No prima facie case was established against her. It is my duty to acquit her and I do so under **Section 306 (1) of the Criminal Procedure Code**. Consequently, I direct that the accused be set at liberty forthwith unless she is otherwise lawfully held.

10. It so ordered.

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

W.A. OKWANY

JUDGE

In the presence of:

- Miss. Mbelete for the State
- N/A Nyagwencha for the Accused
- Omwoyo court clerk