



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 97 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ERIC MUYA MWANIKI.....1ST ACCUSED

DALMAS OTIENO JUMA.....2ND ACCUSED

RULIING

1. The accused persons **ERICK MUYA MWANIKI** and **DALMAS OTIENO JUMA** were charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that on 27th August, 2013 at Mlango Kubwa in Starehe District within Nairobi County jointly murdered **THOMAS JAGONGO AMESO**.

2. They both pleaded not guilty and to prove its case against the same the prosecution called a total of nine (9) witnesses and at the close of the prosecution case the parties made submissions on whether the prosecution has proved a prima facie case against the accused persons to enable the court put them on their defence.

SUBMISSIONS

3. On behalf of the 1st accused it was submitted that the burden of proving the case against the accused person lies with the prosecution and that in an attempt to prove its case against the accused, the prosecution presented witnesses who contradicted themselves and told falsehood. It was submitted that the incident happened where people were passing but no civilian was called to testify on behalf of the prosecution and that though the prosecution had proved the death and cause thereof, the same failed to prove beyond reasonable doubt that the deceased met his death as a result of an unlawful act or omission on the part of the 1st accused.

4. On behalf of the 2nd accused it was submitted that the prosecution failed to establish a prima facie case to warrant the 2nd Accused being placed on his defence. It was submitted that none of the prosecution nine witnesses gave any evidence to identify, connect, or indicate that the 2nd accused committed the offence. It was further submitted that the prosecution did not establish any common intention between the accused persons.

5. On behalf of the prosecution it was submitted that the prosecution established a prima facie case

against the accused persons and that common intention under Section 20(1) of the Penal Code was established and that even if the accused persons were to opt to remain silent the court is able to convict them on the basis of evidence tendered.

6. At this stage, the issue is not whether or not the prosecution has established a case against the accused person beyond reasonable doubt but whether a case has been made to justify calling upon the accused person to offer an explanation as was stated in the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR** as follows:-

“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 a defence, it may be a strong case or 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 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.”

7. Without going into a detailed analysis of the evidence tendered having taken into account the evidence of PW1, PW4 and PW5 and looked at it against the evidence of PW7 the Government Analyst and PW9 Dr. Johansen Oduor I am satisfied, find and hold that the prosecution has established prima facie case to enable the court place the accused persons on their defence which I hereby do. The accused persons are advised of their rights under Section 306 of the Criminal Procedure Code.

DATED, DELIVERED and SIGNED at Nairobi this 26th day of July, 2017.

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J. WAKIAGA

JUDGE

In the presence of:-

Mrs. Kinoti for the State

Mr. Shimaka for the 1st accused

No appearance by Wakaba for 2nd accused

Accused present

Tabitha court clerk