



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO.34 OF 2010

REPUBLICPROSECUTOR

VERSUS

DANIEL ANDAYI ATINOACCUSED

RULING

1. **Daniel Adanyi Atino** (herein referred to as the accused) is charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence are that on the 13th September, 2010 at around 6 pm. at Luanda township, Ebusikhale Sub-location, West Bunyore Location in Emuhaya District within Western Province, he murdered Isaiah Eshikumo Makanga (herein referred to as the deceased).

2. Five witnesses testified for the prosecution. The first witness was the doctor who performed the post mortem on the body of the deceased. He noted that the body had a deep cut wound on the chest and bruises on the right side of the head. He formed the opinion that the cause of death was due to stab wound that injured the heart and upper part of the lungs.

3. The second witness was the father to the deceased. He testified that on the 13th September, 2010 he was at his house when someone called him over his phone and told him that his son Isaiah Makanga had been killed at Luanda market. He went to Luanda market. He found his body lying at a place at the market. Policemen arrived and the body was taken to the mortuary. He was told by somebody from the crowd that his son had been stabbed by a person who had escaped. The body had a stab wound on the chest.

4. The third witness was a brother to the deceased. His evidence was that on the 13th September, 2010 at 7 pm he received a report that his brother had been killed. He went to the scene and found the body of his brother. Policemen arrived at the scene and they took the body to the mortuary.

5. The fourth witness was an assistant chief. He testified that on the material day at 7 pm he was at home when he received a phone call and informed that one person had been stabbed with a knife. He rushed to the scene and found the body of the deceased. He rang the OCS. Policemen arrived and took the body away. They were told that the deceased had been stabbed by a certain person. On the following day the accused was arrested by other people at Luanda market and handed over to the police.

6. The fifth witness was a police officer from Luanda police station. He testified that on the material day at 7 pm they received a call to the effect that a known person had been stabbed at Luanda market. They went to the scene. They found the body of the deceased. It had a stab wound on the chest. They moved the body to the mortuary.

7. This court is now called upon to rule onto whether the prosecution has established a prima facie case against the accused person. In the case of **Ramanlal Trambaklal Bhatt vs Republic** (1957) E.A. 332, the then Court of Appeal stated the following as to what amounts to a prima facie case:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is 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.”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

Nor can we agree that the question whether there is a case to answer depends 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. It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case,” but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

8. The prosecution case is that the deceased was stabbed by someone at Luanda market. However none of the witnesses who testified in this case claimed that he saw the accused stab the deceased or that the accused is the person who stabbed the deceased. No evidence was led as to why the accused was arrested and charged with the offence. There was virtually no evidence to connect him with the offence. The evidence placed before the court cannot in any way lead to the conviction of the accused if no evidence is offered by the defence. In the premises the prosecution has not established a prima facie case against the accused. The accused has no case to answer and is accordingly acquitted of the charge vide section 210 of the Criminal Procedure Code.

Delivered, dated and signed at Kakamega this 21st day of September, 2017.

J. NJAGI

JUDGE

In the presence of:

Juma - for prosecution

George - court assistant

Accused - present

14 days right of appeal