



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 07 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

PHILLIP ONSARE OUNDU.....1ST ACCUSED

ASA OUNDU AGAI.....2ND ACCUSED

MILKA KWAMBOKA OUNDU.....3RD ACCUSED

RULING ON A CASE TO ANSWER

1. The accused persons herein, **PHILIP ONSARE OUNDU**, **ASSA OUNDU HAGGAI** and **MILKA OUNDU** are jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence were that on 14th January 2012 at Sosera Sub-Location in Masaba South District within Kisii County in the Republic of Kenya jointly with others not before the court murdered PETERSON MURUMBA KERUMA.

2. It was the duty of the prosecution to establish a prima facie case against the accused persons to warrant them being placed on their defence. A case to answer is established where, if an accused person opts to keep quiet and tender no evidence in his defence, the evidence of the prosecution would be sufficient to secure a conviction.

3. Counsel for the state Miss Mbelele submitted that the prosecution had established all the requisite ingredients of the offence of murder being, proof of malice aforethought and cause of death by an unlawful act or omission.

4. Mr. Oundu, learned counsel for the accused, on his part maintained that the prosecution had not discharged the burden placed on them to establish a prima facie case so as to justify the accused person being called upon to make their defence. He urged the court to acquit the accused persons under Section 306 (1) of the Criminal Procedure Code. Mr. Oundu poked holes in the testimony of the prosecution witnesses and attributed the death of the deceased to the actions of an unruly mob that responded to an alarm that was raised to the effect that thieves had invaded the accuseds' home.

5. It was not in dispute that an elderly man of approximately 70 years died as a result of serious injuries following an assault. Indeed, the post mortem report that was produced by PW7, DR. WILLIS OMWOYO showed that the deceased died of cardio-respiratory arrest due to severe chest and head injuries following an assault.

6. The issue at hand is whether the 3 accused persons killed the deceased.

The prosecution summoned a total of 8 witnesses in support of their case.

7. PW1 ZACHARY MORUMBA testified that he accompanied the deceased to the home of the 2nd accused to enquire about the whereabouts of the deceased's daughter one Juliet Morumba (PW3) who had reportedly eloped with the 2nd accused's son one KELVIN but no sooner had they made the enquiry at the accused's home than the 1st accused arrived armed with a rungu and a panga which he used to attack the deceased before calling for a rope to tie him up.

8. He stated that other villagers joined in and the fracas beat him with a rungu whereupon he lost consciousness.

9. He recalled that the 1st Accused, one Marita Ongori and Charles Obongo also attacked them. He also identified the 2nd and 3rd accused as having been present during the attack even though they did not do anything but that the 3rd accused screamed when the 1st accused attacked them. PW1 and the deceased were then taken to Kisii Level 6 Hospital where the deceased succumbed to his injuries.

10. PW2 NORAH MORUMBA heard screams and commotion emanating from the 2nd accused's home and on going to the scene, she found PW1 and the deceased being assaulted by the 1st accused.

11. PW3 JULIET MORUMBA, was the daughter of the deceased. Her testimony was that she was at the home of the 2nd accused, in the house of one Kevin on the fateful day when the deceased and PW1 came to look for her and that when they knocked at the 2nd accused's gate, the 3rd accused raised a false alarm while claiming that thieves had invaded her home and which caused many people to turn up at the scene and that the crowd started beating the deceased and PW1. She identified the 1st accused as one of the people who beat the deceased and stated that he was armed with a rungu that had bolts and nuts.

12. PW4 Murumbwa Samwel testified that one Monda informed him that the deceased had been assaulted by the 1st accused. He went to the scene and found the 1st accused who started beating him while the 2nd accused said that they were thieves who should be burnt. He also stated that the 3rd accused asked for paraffin to burn them.

13. PW5 JACOB KERUMA MURAMBWA also heard the commotion and went to the 2nd accused's home where he found the 1st accused armed with a rungu which he used to beat him when he enquired why his father, the deceased, and PW1 had been bound with ropes. He added that as they were being beaten, other people namely, Nyamweya, Peter Otero, Otero Agai and Jas Obongo also joined in the assault while the 2nd accused called his family members to join in as the 3rd accused asked for petrol to burn them.

14. PW6, PAUL ZACHARY NYANTUKA identified the deceased's body before the post mortem examination was carried out while PW8 P.C. EDWARD Nzau was the investigating officer.

15. From the brief summary of the evidence tendered by the prosecution witnesses, I am satisfied that a prima facie case has been established against the accused person to warrant them being put on their defence. The incident in question took place at 7 p.m at the home of the 2nd accused and all the accused persons were identified by several witnesses as having been at the scene of the crime.

16. Having considered the rival submissions made by both the prosecution and the defence, coupled with the evidence of the 8 prosecution witnesses, it is still important to note that the standard of proof applicable, at his stage, on whether a prima facie case has been established is a standard lower than the standard on beyond reasonable doubt which will only apply at the conclusion of the full trial after the accused persons have been heard.

17. A prima facie case under section 211 of the Criminal Procedure Code is made out when at the

conclusion of the prosecution case, the evidence adduced is sufficient, in so far as the charge is concerned, to require the accused to make an answer to it failure of which a court, properly directing its mind to the law and the evidence adduced, is sufficient to find a conviction.

18. With the evidence on record, I find that the 3 accused persons have a case to answer and consequently, I hereby place them on their defence.

Delivered, dated and signed in at Kisii on **19th** of **September** 2017.

W.A. OKWANY

JUDGE

In the presence of:

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