



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL (MURDER) CASE NO.41 OF 2009

REPUBLICPROSECUTOR

VERSUS

BENSON OCHIENG OYUNGIACCUSED

RULING

Introduction

1. The accused person herein, Benson Ochieng Oyungi is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 31st day of July 2009, at Nyamboga village Dudi sub location in Kisa West location of Butere/Mumias district in Western province the accused murdered Sospeter Amollo Wanyangu. He accused denied the charge thereby forcing the prosecution to call 7 witnesses in efforts to prove the charge against the accused person.
2. At the close of the case for the Prosecution, the defence Counsel asked for time to make submissions on no case to answer, but after two adjournments the Court decided to write this ruling on whether or not the accused person has a case to answer.

The Prosecution Case

3. The Prosecution called 7 witnesses and from their testimonies the case for the Prosecution is as follows: On 31/07/2009 at about 10.00p.m David Enock Ngwawa, the area Chief of Kisa West location and who testified as PW1 was in his house when a neighbour by the name Ombuya Odando went to PW1's home and informed him that the deceased was lying on the road which was about 50 metres from the home of PW1. Together with the said reportee, PW1 went to the scene where he saw a young man lying down and breathing with difficulty. The scene was at the home of Nathans Majimbo Serwa, a school teacher, who testified as PW5. After making enquiries from the people who were at the scene, PW1, PW5 and son to PW5 went and reported the matter to Dudi Police Patrol Base while another group of people took the injured person to hospital.
4. On 01/10/2009, PW1 received a report that the accused person herein was suspected to have inflicted the injuries to the victim who is the deceased herein. Thereafter PW1 gathered some youths who accompanied him to the accused person's home and arrested him and took him to Dudi Police Patrol Base. On 02/10/2009 PW1 was informed that the deceased had died. He relayed the same report to Dudi Police Patrol Base. PW1 recorded his statement with the Police on 03/10/2009. PW1 told the Court that a piece of wood recovered at the scene was handed over to Dudi Patrol Police Base. PW1 also testified that the deceased is a nephew to PW5.
5. PW3 No.82026 Cpl Christopher Sambai testified and told the Court that on 31/07/2009 while he was at the Butere police Station where he worked, PW1 went to the Station and made a report of a case of serious assault involving the deceased person herein with allegations that the accused

- person herein had inflicted the injuries on the deceased. He booked the report and on 01/08/2009 PW3, in the company of other officers went to the scene from where he recovered a piece of wood which was the suspected assault weapon. PW3 testified that one Albert Majimbo (not called as a witness) is the one who had snatched the piece of wood from the accused person.
6. After the scene visit, PW3 said he went to Yala sub district hospital to check on the deceased but on arrival at the said hospital he was informed by the hospital authorities that the deceased had been transferred to the New Nyanza General Hospital. PW3 also testified that on 01/08/2009 the accused person herein was escorted to Dudi Police Patrol Base by PW1 and it was PW3 who re-arrested the accused from the hands of PW1. PW3 also testified that upon the death of the deceased the accused person herein was charged with the offence of murder after PW3 established that the accused person had hit the deceased on the head with the piece of wood after a quarrel. During cross examination PW3 stated that two of the three persons who had witnessed the incident namely Everlyne and Lucas Otambo had gone into hiding as soon as the deceased died. PW3 also testified that according to his investigations, both accused and deceased were drunk when they quarrelled after coming from the drinking den at the home of Nathans Majimbo Serwa, PW5.
 7. Nelly Atieno, a sister to the deceased and who testified as PW2 and Number 66293 Police Constable Wanyama who testified as PW4 both attended the Post Mortem examination on the body of the deceased though they give the date of the Post Mortem examination as 06/08/2009 and 11/08/2009 respectively.
 8. Nathan Majimbo Serwa PW5 testified that he was a retired teacher and denied any knowledge of what or who may have killed the deceased.
 9. Number 89165 Police Constable Erick Jilani was PW6. He testified that on 31/07/2009 at about 11.00p.m while he was on duty at Dudi Police Patrol Base he received a report from PW1 that the accused person herein had assaulted the deceased. After booking the report in the OB, PW6 went to the scene and recovered a piece of wood – Pexhibit1 and later followed up on the condition of the deceased both at Yala sub district hospital and the New Nyanza Hospital. He stated that the deceased died on 02/08/2009 while undergoing treatment at the New Nyanza General Hospital.
 10. During cross examination, PW6 stated that the piece of wood – Pexhibit 1 was given to him by one Albert Majimbo who is alleged to have wrestled the piece of wood from the deceased. PW6 also stated that the home of Nathans Serwa PW5 was a changaa den.
 11. Dr. Collins Khayeri testified as PW7. He produced the post mortem report on behalf of Dr. Onyango who performed the Post mortem examination on the body of the deceased on 06/08/2009 at 15.40 hours. From the post mortem report which was produced by Dr. Khayeri as Exhibit 2, the cause of the deceased's death was severe head injury. It was stated that there were blood clots in the cranium especially in the parietal and upper temporal areas but there were no head fractures.
 12. The Prosecution closed its case after Dr. Khayeri testified. The issue that now arises for determination is whether the evidence so far on record establishes a prima facie case requiring the accused person to be put on his defence. To determine this question this Court must define what a prima facie is.

What is a prima facie case?

13. A definition as to what amounts to a prima facie case was given in the case of **Bhatt –vs- R [1957] EA 332**. In that case the Court of Appeal expressed itself on this issue:

“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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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 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.”

14. It is imperative at this stage for this Court to critically look at the evidence on record and determine whether it meets the threshold set out in the Bhatt case (above) as to what constitutes a prima facie case. The strength of the evidence establishing a prima facie case must be the sort of evidence upon whose strength the Court could convict if the defence says nothing to rebut such evidence. It is also worth noting that at this stage the Prosecution does not have to prove its case beyond reasonable doubt; for proof beyond reasonable doubt is required when the defence has also given its evidence, or has closed its case.

Analysis of the Evidence and Findings

15. At the outset of this segment of my ruling, I note that the Prosecution case herein is partly pivoted on circumstantial evidence and partly on suspicion. Why do I say so? I say so because the Prosecution did not avail an eye witness to give an account of what they saw and heard at the scene and before the deceased met his death. With regard to suspicion the law is clear that no amount of evidence based on suspicion, no matter how strong the suspicion may be can be treated as credible evidence. Such evidence is worthless in a criminal trial where the threshold for proof is very high. See generally the case of **Sawe –vs- Republic [2003] KLR 364.**

16. In the instant case, and considering the totality of the evidence on record I have reached the conclusion that the Prosecution has failed to establish a prima facie case requiring the accused person to be put on his defence. PW1 never witnessed the incident. The persons who informed PW1 that it was the accused person who assaulted the deceased were never called to testify. One such person was Albert Majimbo Mulupi who is said to have wrestled the murder weapon from the hand of the accused person. The evidence of Albert Majimbo would have shed more light on the circumstances under which the deceased person died. The evidence of PW3 also fell short in the same way that the evidence of PW1 did. Apart from identifying the body of the deceased for post mortem examination the evidence of both PW2 and PW4 was of no probative value to the Prosecution case.

17. In a nutshell though the Prosecution has proved that the deceased died and that he died as a result of severe head injury, the Prosecution has not shown that the said injury could have been caused by an unlawful act or omission on the part of the accused person nor has it shown that the accused committed the act with malice aforethought. It cannot therefore be said that I could proceed to convict the accused person on the strength of the evidence that is before me if the accused said nothing in his defence. There is of course some evidence on record but the credibility and weight of that evidence is wanting. The bottom line is that with a proper analysis of the evidence on record and considering the law I would be hard put to convict the accused person even if he said nothing in his defence.

Conclusion

18. For all the above reasons, I make a finding that Benson Ochieng Oyungi is not guilty of the murder of Sospeter Amollo Wanyungu and I acquit him accordingly under the provisions of Section 306 (i) of the Criminal Procedure Code. Unless he is otherwise lawfully held the accused person shall be released from prison custody forthwith.

19. It is so ordered.

Ruling delivered, dated and signed in open Court at Kakamega this 18th day of January 2016.

RUTH N. SITATI

J U D G E

In the presence of:

.....for State

.....for Accused

.....Court Assistant