



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL CASE NO. 47 OF 2009.

REPUBLIC :: PROSECUTOR.

VERSUS

MICHAEL NDEGE SOLOMON :: ACCUSED.

R U L I N G.

1. The accused person was on the 5th November, 2009 arraigned in court for the offence of murder contrary to section 203 as read with 204 of the Penal Code.
2. The particulars were that on 23rd day of October, 2009 at Ivakale village Kambiri location in Kakamega East District within the Western Province, murdered Solomon Njami Ndege.
3. The plea was taken on 24th April, 2010, whereby the accused person pleaded not guilty to the charge.
4. The case was heard by three judges before I heard the evidence of PW6, after compliance with the provisions of section 200 (3) as read with 201 (2) of the Criminal Procedure Code.
5. The duty of the court at this point in time of the trial is to evaluate the evidence adduced by the prosecution witnesses and determine if the accused person has a case to answer under the provisions of section 306 (2) of the Criminal Procedure Code, Cap 75 Laws of Kenya.
6. PW1, Bernard Ndege of Magale, Bulivi sub-location, Kambiri, adduced evidence that on 23rd October, 2009 at 8.00 a.m. he was a home with his father. There were some fundis (builders) who were constructing a house. His father, helped them with materials. They worked until 4.00 p.m., when his wife became sick and collapsed. He took her to Manyatta Clinic where she was admitted. He was advised by his father to prepare the children for bed. He decided to take the small child aged 3 months to its mother in hospital.
7. He passed by the home of his neighbour Simon Lunani who told him that he heard a thud from PW1's father's house. The time was between 8.00 p.m. and 9.00 p.m. Another neighbour John Kutoto also heard the thud. He came out with a torch which he lent PW1 who passed through a sugar plantation to reach his father's house. They found him lying on the ground. PW1 turned him and saw that he had an injury on the head. PW1's sister, Robai Naliaka, PW4 screamed and people went to the scene. They rushed PW1's and PW4's father to Manyatta clinic where the Doctor said the injuries were serious. They then rushed him to Kakamega Provincial General Hospital where he died on arrival. PW1 identified the deceased's body to the Doctor who conducted a post mortem thereon on 28th October, 2009.
8. PW1 informed the court that the accused person, Michael, is his step-brother. His mother left their

father 18 years before the year 2011. The deceased had complained that the accused person and one Nelson were thieves who had stolen his solar (sic). He had also complained that the accused person had converted his property (sic) without permission.

9. On cross-examination, PW1 informed the court that the accused person's relationship with the deceased was not bad. PW1 stated that he that he did not know who assaulted the deceased. He did not find the accused person at the scene.

10. PW2, Samuel Busuru Mwanje testified that on the 23rd October, 2009 at 9.00 p.m., the accused person called him outside his house and told him that he should go and see his father who was dying. At that time, PW2 was working as a Village Elder. On reaching the deceased's home, he found that the deceased had been taken to hospital. He inquired from the accused person what had caused the deceased's death, but he stated that he did not know.

11. PW2 informed the court that the accused person said that he saw someone whom he thought was John Kitoto, his neighbour, running away from the scene. PW2 and the accused person went to Kambiri where the deceased had been taken for treatment. PW2 received information about the deceased's death the following day. He informed the court that the accused person became a suspect because he and the deceased used to live together.

12. PW3 Samuel Jivonde, the deceased's cousin identified the deceased's body at Kakamega Provincial General Hospital on 28th October, 2009, for purposes of a post-mortem.

13. PW4, Robai Naliaka, informed the court that on 23rd October, 2009 at about 9.00 p.m., she was going to hospital with her brother PW1 while carrying PW1's children (sic) on her back. They were going to see the child's mother in hospital where she was admitted. They met one Mzee John by the roadside. He informed them that their father Solomon Ndege, the deceased, was lying down on the road next to Mzee John's house. They proceeded to where the deceased was and found that he had a head injury but he was still breathing. PW4's brother, Mzee John and other people from Mzee John's compound carried the deceased to a private clinic at Kambiri. PW4 informed the court that Mzee John was their neighbour. The deceased was later taken to Kakamega hospital because the private clinic could not handle the matter.

14. PW4 testified that they found a young man by the name of Simon Lunani, a neighbour, standing at their gate. He informed them that he heard the sound of three bangs from the deceased's homestead then it fell silent. Simon Lunani told them that he saw the accused person and his elder brother running out of their homestead. The latter was not wearing a shirt.

15. PW4 testified that their deceased father had spent the whole day at PW1's house where he had been assisting him to construct a house. She further informed the court that PW1's house was in a separate compound in the deceased's farm. The deceased had left PW1's house between 6.00 p.m. and 7.00 p.m. PW4 informed the court that she did not know who assaulted the deceased.

16. PW5, Dr. Dickson Muchane, a pathologist at Kakamega produced a post mortem report on behalf of Dr. Nyukuri who conducted the post mortem on the body of the deceased, Solomon Ndege. The post mortem report indicated the cause of death as severe head injury secondary to blunt force trauma to the head. The post mortem report was produced as exhibit 1.

17. PW6, No. 45571, P.C. Daniel Owino Asin was the Investigating Officer. He visited the scene of crime with two other Police Officers on 24th October, 2009. That was on the day after the attack. PW6 observed signs of struggle behind the house where some sugar canes had been destroyed.

18. They re-arrested the accused person who was being detained and took him to custody at Kakamega Police Station. A post mortem was conducted on 28th October, 2009 by Dr. Dickson Muchane who handed the post mortem report to PW6. Investigations revealed that both the accused person and the deceased were at a function where the accused person's brother was building a new house and after the

function there were some celebrations in the course of which the accused person and his father, the deceased quarreled. The cause of the quarrel was not known.

19. On cross-examination, PW6 indicated that the post mortem on the deceased's body was conducted by both Doctor Nyukuri and Dr. Muchane. The post mortem report shows that the accused person was attacked by known people. This information was given by the Chief.

20. PW6 informed the court that a witness by the name of John Kitoto Musa who was an eyewitness, declined to testify. Although he was issued with witness summons, he did not attend court. He is the one who told PW6 that the accused and the deceased quarreled.

21. On re-examination, PW6 revealed that John Kitoto Musa declined to testify because he was the deceased's cousin. He was informed that the said person moved to Nairobi. He was a suspect initially but PW6 cleared him of the offence.

22. PW6 informed the court that the quarrel between the accused person and the deceased made the accused person hit the deceased on the head and the right shoulder.

23. The foregoing is the evidence that was put forth by the prosecution in support of its case.

Determination of whether there is a case to answer.

This trial court has to be satisfied that a prima facie case has been established in order to put the accused person on his defence as provided under the provisions of section 306 (2) of the Criminal Procedure Code.

24. The case of **Ramanlal Trambaklal Bhatt vs. Republic [1957] EA 322 at 334 and 335** outlined what constitutes a prima facie case in the following words:-

“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 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.” See also Wibiro alias Musa Vs. R. [1960] EA 184.”

25. Guided by the cases cited above, I find that there is neither direct nor indirect evidence on record implicating the accused person to the commission of the offence.

26. The investigating officer, PW6 informed the court that one John Kitoto Musa is the one who reported to him that he had seen the accused person running away from the scene of crime. PW6 also informed the court that the said John Kitoto Musa declined to attend court when witness summons were issued to him. The prosecution did not seek further assistance from this court, such as a warrant of arrest, to secure John Kitoto's attendance in court to adduce evidence. The prosecution readily surrendered its rights to call the said witness who could have shed light on what he knew about the deceased's death. In the absence of the said John Kitoto's evidence, the contention by PW6 that the accused person was seen running away

from the scene of crime is hearsay which is inadmissible in evidence.

27. PW4, Robai Naliaka informed the court that a young man by the name of Simon Lunani had seen the accused person and their elder brother running away from their homestead. This was after Simon Lunani heard three bangs from PW1's and PW4's homestead. The said Simon Lunani did not adduce evidence.

28. Failure to call material witnesses left glaring gaps in the prosecution's case. It is my finding that the evidence adduced by the prosecution does not meet the threshold set out in the case of **Ramanlal** (supra).

29. It is therefore my considered view that a prima facie case has not been established by the prosecution. I find the accused person not guilty of the charge of murder contrary to section 203 as read with 204 of the Penal Code.

30. I hereby acquit the accused person of the said charge under the provisions of section 306 (1) of the Criminal Procedure Code. He shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED in open court at KAKAMEGA on this 26TH day of APRIL,2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the accused person.**

..... **for the office of the DPP.**

..... **Court Assistant.**