



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 86 OF 2009

REPUBLIC PROSECUTOR

VERSUS

AMOS NKUNO NGARUAACCUSED

RULING

The accused **AMOS NKUNO NGARUA** face a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge are that

“On the 4th day of October 2009 at Olasit Trading Centre in Narok North District of the Rift Valley Province murdered ‘SALAASH TINKOI’”

The accused entered a plea of ‘Not Guilty’ to charge and his trial commenced on 9/2/2011 before my learned senior brother **Justice Anyara Emukule**. The prosecution called a total of eleven (11) witnesses. **Hon Justice Emukule** heard he first six (6) prosecution witnesses. Following his transfer to Mombasa high Court **Hon. Lady Justice Helen Omondi** took over the trial and heard the remaining five (5) prosecution witnesses. Upon the transfer of **Justice Helen Omondi** to Bungoma High Court I did take over the case. However no witness testified before me and on 24th November, 2015 the prosecution closed its case a full 3½ years after the trial began.

Briefly the facts of the prosecution case were that on 4/10/2009 the accused and the deceased were amongst other friends playing a game of cards at Oasit Trading Centre. In the course of the game a quarrel erupted between the two over Ksh 10/= which the accused claimed that the deceased owed him. Witnesses state that the accused suddenly pulled out a knife and stabbed the deceased in the chest. The deceased also managed to lift his *rungu* and hit the accused on the head before he fell bleeding profusely. Those present rushed the deceased to hospital where he unfortunately died. The accused was then arrested and arraigned in court.

At the close of the prosecution case the court must be satisfied that a *prima facie* case has been established sufficient to calling upon the accused person to defend himself. In the case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] E. A 332** it was held that:

“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””

I have considered the totality of evidence of the prosecution witnesses. I find that the witnesses gave clear concise and cogent evidence regarding the events of that evening. They all state that it was the accused who stabbed the deceased. However despite this weight of evidence the prosecution made a fatal omission in failing to call in a medical practitioner to adduce evidence on the **cause** of death of the deceased. This is a crucial issue in any murder trial. To prove that the deceased was assaulted and died is not sufficient. Evidence must be called to prove what led to the death of the deceased. The court cannot merely **assume** that it was the stab-wound which caused the death of the deceased. The cause of death is a critical fact in issue one which requires proof beyond reasonable doubt.

In the case of **NDUNGU Vs REPUBLIC [1985]KLR** the Court of Appeal held that

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries. Medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution”

Similarly in the case of **CHENGO NICKSON KALAMA Vs REPUBLIC [2013]eKLR** the Court of Appeal sitting in Malindi

“..... save in very exceptional cases it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased to the extent that the same was not donedeath and its cause was therefore not proved beyond reasonable doubt”

This is precisely the position that pertains in this case. The witnesses state that an autopsy was conducted on the body of the deceased. It is due to sheer negligence that the prosecution failed to procure a medical practitioner to testify and give evidence on the cause of death. A crucial aspect of the charge therefore remains unproven. If called upon to defend himself if accused opted to keep silent no conviction could be rendered without the post-mortem report. It would in the circumstances be an exercise in futility to put accused to his defence. I find that the charge of murder has not been proved beyond reasonable doubt. I enter a verdict of **‘Not Guilty’** and I acquit the accused of this charge. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 27th day of July 2016.

Maureen Odera

Judge

Mr. Malero holding brief for Mr. Kengo

Ms Rugut for State