

-REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 29 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

SAMSON ALUBE NGOTA.....1ST ACCUSED

ROBINSON NGINYA KAMAU.....2ND ACCUSED

RULING

Samson Alube Ngota, 1st accused person, and Robinson Nginya Kamau, 2nd accused person, are jointly charged with murder contrary to **section 203** as read with **section 204 of the Penal Code**. Particulars of this offence are that on the 24th day of March 2011 at Dandora Phase Two Estate, Njiru District within Nairobi County, they jointly murdered Sammy James Oyongo, deceased.

The two denied committing this offence. The prosecution called nine witnesses to support the case. At the close of the prosecution case the prosecution counsel Ms Nduati submitted that the prosecution has, through the evidence of the nine witnesses, proved that the two accused persons caused the death of the deceased and asked the court to place them on their defence. On the opposing side, the defence counsel Ms Celine Odembo submitted that the prosecution has failed to adduce sufficient evidence to warrant the calling upon the two accused persons to their defence. She submitted that only two witnesses gave direct evidence and they told the court that the offence was committed at midnight and therefore the case for the prosecution relies on the evidence on the identification of the accused persons and direct evidence. Ms Odembo took issue with the evidence of the two identifying witnesses submitting that only one of those two witnesses testified and she did not describe the source of light and how strong it was and therefore the evidence on identification is not free from error. She submitted that the identification parade process did not follow procedure and the accused persons were not allowed a lawyer or a relative and that the evidence of PW5 that he recovered the murder weapon, the knife, from 1st accused person's waist cannot be true because if the knife had blood stains the 1st accused person's clothes would have been stained. Counsel submitted that the prosecution case leaves some gaps and does not establish a prima facie case against the accused persons to warrant their being placed on their defence. She urged the court to acquit the accused persons under section 306 (1) Criminal Procedure Code.

The prosecution presented a case that on 24th March 2011 around midnight, Jane Akinyi Otieno (PW4) assisted by her daughter Winnie Achieng and son James Oyongo (deceased) were busy fetching water from the water point outside their home in Dandora Phase 2 and ferrying it upstairs to their house. They were accosted by the two accused persons who demanded money from them and when they failed to get any money they stabbed James on the chest. James died as a result of the injuries he sustained as a result of the stab wound.

On the same night one hour after the stabbing at around 1.00am, the family of David Adali Abednego (PW5) also residents of Dandora Phase 2 was mourning the death of their son. They were hosting a funeral meeting. PW5 saw two people enter into the house in which the funeral meeting was taking place. One of them, identified as the 1st accused, sat on a table while the 2nd accused sat on a chair. The two were not known to PW5. Shortly thereafter, the 2nd accused told the 1st accused that he was going out to buy some cigarettes and he left. About 5-10 minutes after the 1st accused started dozing. PW5 who had spotted a knife tucked at the 1st accused person's waist picked it without alerting the 1st accused person

and called the police who arrived shortly thereafter and arrested the 1st accused. PW5 handed the knife to the police. PW5 described the knife as having blood stains. The 2nd accused returned to PW5's house unaware that the 1st accused had been arrested. He was also arrested. The two accused persons were identified by PW4 and her daughter at an identification parade mounted by CIP Richard Kioko (PW2) at Dandora Police Station. After investigations, the accused were charged with this offence. The knife was examined at the Government Laboratories and DNA profiles generated. It was found to have been stained with deceased's blood.

I have considered this evidence carefully. I agree with the defence counsel that the case for the prosecution relies heavily on the identification of the two accused persons. In my determination as to whether the prosecution has established a prima facie case, I am guided by the legal principle that for an accused person to be called upon to give his evidence in his defence under **section 306 (2) Criminal Procedure Code**, the evidence by the prosecution at the close of its case must be of such a nature that a reasonable tribunal properly directing its mind to the evidence and the law can convict on such evidence even if the accused offers no explanation. My analysis of the evidence on record and the brief rival submissions show that the prosecution has established a prima facie case against the two accused persons. I find the evidence sufficient to warrant the calling upon of each of the accused persons to tender evidence in his defence. This court will be able to give its detailed reasons in the final judgement. Consequently each accused person has a case to answer and in compliance with section **306 (2) Criminal Procedure Code** the accused persons are informed of their rights under that provision. It is so ordered.

Dated, signed and delivered this 18th day of August 2016.

S. N. Mutuku

Judge

In the presence of:

Ms Nduati counsel for the prosecution

Ms Celine Odembo counsel for the accused persons

Mr. Samson Alube Ngota, 1st accused person

Mr. Robinson Nginya Kamau, 2nd accused person

Mr. Daniel Ngumbi, court clerk