



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL (MURDER) CASE NO. 2 OF 2013**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**WINSTONE IMBUKWA**

**CYRUS IMBUSI MUSHIRA**

**NICKSON SHITANDAYI SHIVACHI**

**BENSON MUSHIRA.....ACCUSED PERSONS**

**RULING**

**Introduction**

1. The 4 accused persons are before this Court on an information of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars thereof being that on the 3<sup>rd</sup> day of July, 2012 at Mukulusu Village, Murhanda Location Kakamega East District within Western Province jointly murdered GEOFFREY MOI. They all denied committing the offence. The case has been ongoing since 11.02.2013 when they took plea. The prosecution called 5 witnesses.

2. At the close of the prosecution, Counsel did not submit on whether or not the accused persons have a case to answer, but asked the court to give a ruling the same.

3. The issue of prima facie case in criminal cases was settled by the Court of Appeal for Eastern Africa in the case of **Bhatt –vs – Rex [1957] EA 332**. What is required of the court at this stage is not to make a finding as to whether the prosecution evidence is conclusive as to the guilt of all or some of the accused persons. This court is only required to make a finding that the evidence before it is such that if it properly applies its mind to such evidence and the law, and if the accused persons say nothing in rebuttal, then such evidence could lead to a conviction.

**The evidence**

4. The evidence on record shows that on 03.07.2012, the deceased in this case was attacked and badly cut with pangas by some 6 people among them the accused persons. He suffered deep cuts on the head, hands, the neck and shoulders. Dr. Dickson Mchana who testified as PW4 told the court that the cause of death was cardiopulmonary arrest due to hyponolaemia arising from acute severe haemorrhage resulting from multiple cut wounds. The postmortem report was produced as Pexhibit 1. PW2, Bonface Lubusu testified that he arrived at the scene just as the accused persons who were armed with pangas were cutting the deceased. PW2 testified further that when he went to report the matter to the police, he gave the

names of the 4 accused persons as having been among the 6 persons who cut the deceased.

5. PW3, Mayemula Mutola Malale testified that while he was at his home in Mukulusu Village at about 1.00pm, the 4 accused persons who were armed with pangas and rungas, stormed the home and cut the deceased all over the body. That the 4 accused persons also threatened to cut the witness when he screamed. PW5 received the report of the incident, recorded witness statements and also attended the post mortem examination.

### **Conclusion**

6. From all the above evidence, and applying the principles in the case of **Bhatt** (above) I am satisfied that each of the 4 accused persons has a case to answer and accordingly, I put each one of them on their defence.

7. The law gives the accused persons the option to give sworn evidence after which they may be asked questions both by the court and the prosecution or to give unsworn evidence in which case, they may not be asked any questions. The law also gives the accused persons the option of remaining silent and letting the court decide the case on the evidence before it. If the accused persons elect to testify, whether by giving sworn or unsworn testimony, they each have a right to call a witness or witnesses.

8. Each of the accused persons may now proceed to indicate to the court which of the three options they wish to take in defending themselves.

It is so ordered

Ruling delivered, dated and signed in open court at Kakamega this 28<sup>th</sup> day of September 2016

**RUTH N. SITATI**

**JUDGE**

In the presence of:-

Mr. Ng'etich.....for State

Mr. Osango for Mr. Wekesa.....for Accused

Mr. lagat.....Court Assistant