



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MURDER CASE NO. 41 OF 2011

STATE PROSECUTOR

VERSUS

VITALIS OTIENO MUTOKAACCUSED

RULING

Having considered the evidence in support of the prosecution's case as well as the submissions by Counsel I am not satisfied that a prima facie case has been established against the accused person sufficiently to warrant him to be put on his defence. This is bearing in mind that a prima facie case would be one where a reasonable tribunal properly directing its mind could convict even should the accused elect to remain silent when put on his defence.

The facts of this case are that at about 7.30p.m of 22nd June 2011 Mary Anyango Aluoch (PW1) stumbled upon the body of the deceased sprawled on the floor of the house where she lived alone. The deceased had a wound on the neck and was bleeding profusely. The cause of death was established as traumatic head injury from sharp object.

Evidence against the accused person was that he and his wife did not come out when PW1 raised the alarm upon finding the body, that he fled to Mombasa where he was arrested, that he had threatened the deceased following a land dispute, that he was seen fleeing the scene with an axe in hand and that he led police officers to a grave yard where the axe was recovered. All this would appear to be watertight evidence against him but a closer scrutiny of it reveals that most of it is worthless. In the first place failure to answer to a distress call is not of itself evidence of commission of an offence. It may give rise to suspicion and perhaps very strong suspicion but that's just it. It would have been good or strong circumstantial evidence if it was indeed supported by other evidence. For instance that the accused was seen fleeing the scene with an axe. However we do not have such evidence on record. The person who is alleged to have seen the accused fleeing with an axe is PW1. She did not however in her testimony allude to such a fact at all. Her husband (PW2) who she is alleged to have told she saw the accused leave the deceased's house with an axe denied it. He was in fact declared a hostile witness. His evidence is as such not credible. If PW1 did not tell this Court that she saw the accused attack or leave the deceased's house with an axe then whoever said she did was giving hearsay. Indeed the evidence of Corporal Nickson Lukwa was nothing but hearsay – inadmissible hearsay. All he told this Court was admittedly what he was told by one PC Limo. No explanation was given for not calling PC Limo as a witness. If indeed the accused led him to the grave yard where the murder weapon was recovered that would have been strong evidence. The evidence here is of the weakest kind. There was completely no evidence even to prove that the axe produced in Court was the one recovered at the grave yard if at all. There was also no evidence at all that it was the murder weapon and there was no evidence at all to link it to the accused

person and the offence charged.

The fact that the accused had threatened the deceased and that he was arrested in Mombasa do not in themselves give rise to circumstantial evidence of his involvement in this crime. As I stated they may give rise to very strong suspicion and even when one thinks of it whereas there is evidence there was a land dispute there is no cogent evidence of a death threat to the deceased by the accused person. The fact that Mary Atieno (PW3) was at the home of the deceased and heard the accused threaten her at about 12.30pm is not supported by other evidence. Surely the prosecution would not have missed to find a witness who saw her there. The Prosecution Counsel seems to base his submissions on the statements given by the witnesses to the police. Such statements were however not exhibited in Court and were in any event recanted by their own alleged makers. Conviction of the accused person can only be based on the testimonies of the witnesses in Court but not on their statements to the police and where a witness perjures him/herself the prosecution must insist on action being taken against such a witness. That is the only way that witness can take their duty to the administration of justice seriously.

On the whole I find that the evidence adduced in this case does not prove the charge against the accused person beyond reasonable doubt. Accordingly I enter a finding of not guilty as provided under Section 306 of the Criminal Procedure Code and acquit him.

Signed, dated and delivered at Kisumu this 27th day of October 2016

E. N. MAINA

JUDGE

In the presence of:-

Mr. Muia for ODPP

Accused person

N/A for Mr. Anyumba Advocate

C/A Serah Sidera

Interpretation: English/Dholuo