



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL (MURDER) CASE NO. 41 OF 2010

REPUBLICPROSECUTOR

VERSUS

AGGREY RABANDO ONAMI.....ACCUSED

RULING

Introduction

1. The information before court is dated 12.10.2010, wherein the accused person is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that Aggrey Rabando Onami on the 8th day of November, 2009 at Malaha Market Lusumu Sub-location Bunyala West Location in Kakamega District within Western Province murdered Charles Orada Wafula. The accused person pleaded not guilty to the charge when he appeared before Lenaola Judge (as he then was) on 01.11.2010. The accused had earlier appeared before the Deputy registrar on 13.10.2010.

The Prosecution Case

2. For a long time the hearing of this case did not take off with the first prosecution witness taking the stand on 02.12.2013. PW1 John Wasike told the court that on 08.11.2010 between 9-10.00am, he heard noises from the accused person's house and when he went there and entered the house, he found the deceased lying down on the floor. He also saw the accused person carrying a blood stained knife in his hand and also a jug which had blood in it. According to PW1 (Wasike) the accused person was a well-known medicine man and the information received earlier that morning was that the accused was treating one of this patients. Wasike also stated that when he looked at the deceased, he noticed that the neck of his penis as well as the tongue were cut. Thereafter, the accused ran out of the house and disappeared into a sugar cane plantation. The accused remained at large for about one month before he was apprehended by police.

3. Wasike testified further that he made a report of the incident to Kakamega Police Station and recorded his statement with the police that same day. During cross examination, Wasike stated that when the accused person ran away, he took with him the blood stained knife, the jug and its bloody contents, the deceased's tongue and the genitals, though he admitted that according to the post mortem report which was shown to him by the defence counsel, the deceased's genitals were described as normal and that even the tongue was not said to be missing.

4. The next witness for the prosecution was Dr. Dickson Mchana who testified as PW1 (should be PW2) on 25.11.2014. Dr. Mchana produced the post mortem report of the examination conducted by Dr. Nyikuri.

5. According to the report, the deceased was about 22 years old. He had fractured skull on the forehead measuring 16 cm long, with another 10cm long fracture of the skull above the right ear and a third fracture at the back of the head measuring 6cm long. There was also a fracture of the second neck bone and a further fracture of the right hand between the fingers.

6. Internally, the wind pipe had been cut into two and the blood vessels on either side had been severed. The food pipe had also been cut into two and the spinal cord had been injured at the tail end of the second neck bone. In the opinion of Dr. Nyikuri, the cause of death was severe blood loss due to cut wounds on the head and neck. The post mortem report dated 09.11.2010 was produced as PExhibit 1.

7. Number 51256 Inspector Augustine Mwakio testified as PW3 (though he was recorded as PW2). He was the then OCPD at Navakholo. He testified that on 08.11.2010 at around midday, he received a report of the material incident from Inspect Caleb Kunyomba of the D.O's office Navakholo. He proceeded to the scene in the company of PC Isaac Momanyi. On entering the house he saw the body of the deceased whose neck had been slit and some fingers were also cut. He found a panga inside the house which he suspected was the murder weapon. He took the body of the deceased to Kakamega PGH.

8. Inspector Mwakio's enquiry into the whereabouts of the accused person revealed that he had disappeared into the sugarcane plantation until 09.10.2010 when he was arrested by officers from Makhanga Police Patrol Base. Inspector Mwakio produced the alleged murder weapon as Pexhibit 2. He also recorded statements from Wasike, Anthony Lipesa Inyanza, Edwin Ekungu and CI Caleb Kinyobo.

9. During cross examination, Inspector Mwakio testified that he was unable to take any finger prints at the scene because the huge crowd was quite hostile even to the police. Nor did he take any blood samples.

10. The prosecution was unable to avail other witnesses despite a number of adjournments granted to the prosecution to avail witnesses. On 26.10.2016, the state was forced to close its case after failing to adduce further evidence following the court order giving them a last adjournment.

Submissions on no case to Answer

11. At the close of the prosecution case, Mr. Aburili, Advocate for the defence submitted that the prosecution had not established a prima facie case to warrant putting the accused person on his defence. The prosecution relied on the evidence on record.

Analysis and Determination

12. The issue for determination at this stage, is whether on the evidence on record, this court, properly directing its mind to such evidence, would be prepared to convict if the accused person said nothing. The law on this matter is that at this stage, the court is not concerned with whether the evidence is weighty enough or not nor is it the court's concern whether such evidence has proved the case against the accused person beyond any reasonable doubt. The issue of proof of the case beyond any reasonable doubt is for the final stage after the court has heard the case for the defence. Generally see Bhatt – vs – Republic [1957]EA 336.

13. Applying the above principles to the evidence on record, I am satisfied that the prosecution has established a prima facie case against the accused person to warrant the accused being put on his defence. There is evidence showing that the body of the deceased which had multiple cut wounds on the head, neck and fingers was found in the same house from which the accused person emerged before he disappeared into the sugarcane plantation. The evidence by Wasike also shows that he (Wasike) saw the accused person cutting the deceased. There is also medical evidence showing the cause of death of the deceased. There is also evidence by C.I Mwakio confirming that a blood stained panga was found in the house where the deceased's body was found.

14. The above evidence is of such a nature that the accused person is under a duty to give his side of the story though this is not to say that he must prove his innocence. In the final analysis the burden is on the

prosecution to prove its case against the accused person beyond any reasonable doubt. For the moment, the accused person has a case to answer and he may do so by way of giving sworn or unsworn evidence. If he elects to give sworn evidence, both the court and the prosecution may ask him questions. If he elects to give unsworn evidence, he will not be asked any question. In both instances, the accused person has a right to call witnesses. The accused person may also elect to remain silent and let the court decide the case on the strength of the evidence that is already on record.

15. The accused person may now, either by himself or through his advocate, indicate to the court which of the three options he will choose in defending himself.

Orders accordingly,

Ruling delivered, dated and signed in open court at Kakamega this 29th day of November 2016

RUTH N. SITATI

JUDGE

In the presence of;

.....Mr. Aburili.....for Accused

.....Mr. Oronifor the state

.....PolycarpCourt Assistant