



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 49 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

CHRISANTUS ONDATI MASEGA.....ACCUSED

RULING ON A CASE TO ANSWER

1. The accused herein, CHRISANTUS ONDATI MASEGA was charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence were that on the night of 4th and 5th March 2013, at Bobaracho village, Kegati Location within Kisii County, murdered Douglas Masese.

2. The accused pleaded not guilty to the said charge and a trial ensued in which the prosecution called a total of 4 witnesses. I however heard only the last witness PW4, while the first three witnesses testified before my predecessor in the case, Nagillah J. I have however perused the record in respect to the testimonies of all the witnesses in determining whether the prosecution established a prima facie case against the accused that would warrant me to place him on his defence.

3. The standard of proof on whether or not a prima facie case has been established was laid down in the case of **Ramanlal Trambaklal Bhatt vs Republic (1957) EA 332** as follows:

“Remember that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one”

“Which on full consideration might possible be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence” irrespective of its credibility or weight sufficient to put the accused on his defence.” A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence... 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 evidence could convict if no explanation is offered by the defence.”

4. In the instant case, **DR PW1 BEN LIPESA** testified that he performed the post mortem examination on the body of the deceased and established that the cause of death was severe head injury due to blunt trauma.

5. **PW2 ALEXANDER NYAKINYWA** the assistant chief of Kegati Sub-location testified that the

received a telephone call on 5th March 2012 from one Regina Magati informing him of the death of the deceased whose body had already been taken to the mortuary. PW2 also attended the post mortem examination on the body of the deceased.

6. PW3 CHRISTINE NYABOKE OSIRE was the owner of the hotel where the deceased and the accused went to ask for food on the night that the deceased was later on found dead along the Kisii-Keroka Highway. Her evidence was that both the accused and the deceased appeared drunk on the night they came to her hotel.

7. PW4 was **No. 81607 P.C. JOAN KIMETTO** who received a phone call that the deceased lay dead at Bobaracho area along Kisii-Keroka road. Her testimony was that she visited the scene of crime and formed the opinion that the deceased could have been a victim of a hit and run motor vehicle accident. She stated that the case was later suspected to be that of murder.

8. The written statement of one No. 67867 P.C. Alfred Nasio dated 14th March 2012 was by consent adopted and produced as PExhibit 2. P.C. Nasio also visited the scene, removed the body to the mortuary and attended the post mortem examination.

9. A brief over view and analysis of the evidence tendered by the prosecution witnesses reveals that there was no direct evidence linking the accused to the charge of murder except the evidence of PW3 which merely stated that the accused and the deceased were last seen together at her hotel and that the two appeared drunk.

10. To my mind, the prosecution did not furnish the court with any direct evidence whatsoever to link the accused to the death of the deceased. According to PW2, the investigating officer, the death of the deceased was initially suspected to have been caused by a hit and run motor vehicle before suspicion shifted to that of murder. It is however my finding that mere suspicion, however strong, cannot be a basis for filing of criminal charges unless such suspicion is backed by some real or cogent evidence. I find that this evidential backing was wanting in the instant case. It is therefore my finding that the prosecution has failed to establish a prima facie case against the accused to the standards envisaged in the celebrated case of **Ramanlal Trambaklal Bhatt (supra)**.

11. Consequently, I therefore acquit the accused off the charge of murder at this stage under Section 306 of the Criminal Procedure Code. The accused shall henceforth be set at liberty unless he is otherwise lawfully held.

Delivered, dated and signed in at Kisii on **29th of November, 2016**.

W.A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Mr. Bigogo for the Accused
- Omwoyo court clerk