



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 18 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**REUBEN SHANGI AKELLO.....1<sup>ST</sup> ACCUSED**

**SIMON NDUNGU WAINAINA.....2<sup>ND</sup> ACCUSED**

**RULING**

Reuben Shanghi Akello (hereinafter the “1<sup>st</sup> accused”) and Simon Ndungu Wainaina (hereinafter “the 2<sup>nd</sup> accused”) are facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. This court was informed that on the 27<sup>th</sup> day of April 2011 at GK Prison, in Naivasha Municipality of the Nakuru County they jointly murdered Peter Mungai Macharia (hereinafter “the deceased”).

Briefly, the case for the prosecution is that the two accused persons, who were convicts at Naivasha Maximum Prison, were placed in Cell No. 2 located at the Reception Block. Evidence shows that the two had been moved to Naivasha from Nakuru. In Cell No. 2 was another prisoner, namely, Peter Mungai Macharia who is the deceased in this case. One PC Benson Mbula Juma, PW2, in company of Patrick Mutai, was assigned to guard Cell No. 2 on the material night, 27<sup>th</sup> April 2011. As security rules dictated, Cell No. 2 was locked and the key kept in a secure place where it was not accessible without following stringent procedures.

PW2 told the court that they were in Cell No. 1 which was adjacent to Cell No. 2. They were also locked in and could not access Cell No. 2 or go outside. At around 7.30pm, PW2 heard a loud bang from Cell No. 2. He and his colleague peeped through security holes in the wall of Cell No. 2 and saw the 1<sup>st</sup> accused holding the deceased by the neck while the 2<sup>nd</sup> accused was hitting the deceased on the stomach using blows. PW2 raised alarm. It took some time before help came. IP Benson Kiprotich Amani, PW5, and SGT Samson Monda, PW1, heard the alarm raised by PW2 and his colleague. They picked the key to Cell No. 2 and proceeded to the place. They found the two accused persons standing while the deceased lay on the ground in a pool of blood. The deceased was confirmed dead by a Clinical Officer. The two accused persons were charged with murder of the deceased and were arraigned in court to answer to those charges.

The prosecution closed its case after unsuccessful application to have the proceedings adjourned to afford them time to summon the Investigating Officer and the Pathologist. Parties opted not to submit after the case for the prosecution was closed.

It is the duty of this court to analyze and consider the evidence tendered to determine whether the prosecution has tendered sufficient evidence to establish a *prima facie* case against the accused persons in order to place them on their defence. I have considered the evidence on record. I am persuaded that the evidence presented so far establishes that both the accused persons are culpable. To my mind the case against the accused persons is one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence (see **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335** and **Wibiro alias Musa v. R [1960] E.A at 186**).

I am alive to the fact that the court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. In line with decided cases, a ruling that there is a case to answer would be justified in a border line case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction (see **R. v. Jagjivan M. Patel & Others 1, TLR, 85**).

I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons before me in this case have a case to answer and I so find and hold. Consequently, I will and do hereby, place them on their defence. In compliance to section 306 (2) of the Criminal Procedure Code, the accused persons are hereby notified of their right to inform this court the manner they wish to tender their defence and whether they will be calling witnesses. It is so ordered.

**Dated, signed and delivered in open court, in the presence of all parties, this 19<sup>th</sup> day of December 2016.**

**S. N. Mutuku**

**Judge**