



NO.2073

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
H.C.CRIMINAL CASE NO.39 OF 2009
(Consolidated with
HC.Cr. Case no. 43 and 56 of 2009)

REPUBLIC.....PROSECUTOR

VERSUS

WILLIAM WEKHULO TORONI.....1ST ACCUSED

FLORENCE WEKHULO TORONI.....2ND ACCUSED

GLADYS AMANYA WEKHULO.....3RD ACCUSED

R U L I N G

1. The three accused persons herein **WILLIAM WEKHULO TORONI, FLORENCE WEKHULO TORONI** and **GLADYS AMANYA WEKHULO** have jointly been charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

*Particulars of the offence are that on 1st day of September 2009 at Maola Village Khaunga sub-location East Wanga Division in Mumias District within Western Province jointly murdered **M N T**.*

2. The prosecution closed their case on the 11/11/2014 after calling Seven (7) Witnesses. Pw4 A M 14 years old is the deceased's daughter testified how the three accused persons jointly assaulted her mother with fists, stick and panga, fatally wounding her. PW4 stated that the alleged offence took place at about 6.00 p.m. on 1st September 2009.

3. **PW1** was **Dr. Florence Malowa Wanagwe**. She carried out post mortem examination on the body of the deceased as evidenced by the post mortem report produced in court as PExhibit I. PW1 testified to the injuries seen on the body of the deceased including a deep cut wound on the scapula, six deep cut wounds on the skull and two cuts on the peripheral regions exposing part of the brain. PW1 also testified that the deceased's left hand had no index and middle fingers. Cause of death was given as and severe head injury secondary to assault.

4. PW2 was **Lydia Mukhandia**, Assistant Chief of Khaunga sub-location. She testified of a dispute that had been reported to her by 1st accused on 15th August 2008. Later on 2nd September 2009, she received a report of the murder of the deceased. She also testified concerning the arrest of the 1st accused.

5. P M T testified as PW3. On 1st September 2009 at about 6.30 p.m., he went home only to find his wife the deceased lying in a pool of blood. He testified that it was PW4 who told him that the deceased had been killed by the accused persons herein.

6. PW5 was **Mbest Juma Matera**. He told the court how on hearing screams from the home of the 1st accused on 1st September 2009, he ran to the homestead of the said 1st accused and found him (1st accused) armed with a panga. He also said he noticed the deceased who had cuts on the head, back and two missing fingers on one of her hands. It is PW5 who called the Assistant Chief PW2 and gave her the information of the murder of the deceased.

7. PW6 was **Calistus Wabomba Ochesi Mark**, a retired teacher from Matungu District. He identified the deceased's body during the post mortem.

8. PW7 was **Number 73347, Police Constable Joseph Ngumbi**. He was the investigating officer. He visited the deceased home at about 8.00 p.m. on 1st September 2009. After investigations, he arrested the 1st accused on 3rd September 2009 while 2nd accused was arrested on 28th September 2009 at Makunga AP Camp. The 3rd accused was arrested at Bondo in October 2009. Thereafter the 3 accused persons were charged with the present offence.

9. This court is required under **Section 306 (1)** of the Criminal Procedure Code (Cap. 75) to determine whether the three accused persons have a case to answer. A case to answer is a case where if the accused keeps quiet, the evidence of the prosecution if properly considered could result in a conviction.

10. The standard of proof as to whether the prosecution has established a prima facie case was laid down in the celebrated case of **RAMANLAL TRAMBAKLAL BHATT -VS- R (1957) E.A. 332** as follows:-

"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.

(ii) The question whether there is a case to answer cannot depend 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."

11. And in **R -VS- JAGJIVAN M. PATEL AND OTHERS 1, TLR, 85** the learned Judge said;

"All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. 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. A ruling that there is a case to answer would be justified, in my opinion, 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 conclusion." The standard of proof at this stage is not as high as that required for establishing the case beyond reasonable doubt.

12. It is worth noting that this court did not hear any evidence by the Prosecution witnesses but complied with section 200 of the CPC and parties agreed that the case do proceed from where Chitembwe J left it .Be that as it may, this court has read the proceedings of the witnesses who testified previously. PW4 A

M saw the accused striking the deceased with a panga. She was 13 years when she testified on the 22/06/2011 and the crime occurred on 01/09/2009 when she was 11 years. The court before taking her evidence conducted voir dire proceedings and found that she was intelligent enough to take oath and testify. She was with the deceased (her mother) on the 1st of September 2009 when a quarrel ensued between the deceased and the 3rd accused because of a chicken which had strayed into the 3rd accused's shamba and was eating the beans therein. She saw her mother on top of the 3rd accused when the 2nd accused came out from their house with a stick and started assaulting the deceased. The 1st accused also came out with a panga and cut the deceased who thereafter succumbed to the injuries. The offence occurred at 6 p.m. and there was light and thus PW4 was able to recognize the offenders who happen to be her relatives and next door neighbors. She reported the incident to her father PW3 immediately after at 6.30 p.m. who made a report to the Chief and the Police. PW5 went to the scene after he heard screams coming from the direction of the 1st accused's house he saw the deceased who he explained was wounded and bleeding. He claims that he also saw the 1st accused who had a panga the deceased was identified for postmortem by PW3, PW5, PW6 and PW7. A postmortem report was produced by PW1 being Pexhibit1 which confirmed that the deceased died.

13. From all the above evidence, I am satisfied that the prosecution has established a prima facie case against the accused persons jointly to warrant this court to put them on their defence. I accordingly proceed to do so.

14. As provided under section 306 (2) of the Criminal Procedure Code, the accused persons have a right to give sworn , or unsworn evidence or if they elect they can remain silent and let the court give judgment on the strength of the evidence before it. In each case, the accused persons have a right to call witnesses.

15. I now call upon each of the accused persons to say how they will proceed to defend themselves and whether they have witnesses to call.

16. Orders accordingly.

Ruling delivered, dated and signed in open court at Kakamega this 17th day of December 2014

RUTH N. SITATI

J U D G E

In the presence of

Mr. Ngetich (present) - for State

Mr Nyikuli (present -for 1st Accused

Mr. Osango (present) - for 2nd Accused

Mr. Nyikuli (h/b) for Andia - for 3rd Accused

Mr. Murumia - Court Assistant