



REPUBLIC OF KENYA

High Court of Kisii

Criminal Case 72 of 2009

REPUBLIC PROSECUTOR

VERSUS

JOASH OKIOMA JOHN 1ST ACCUSED

FRANCIS MOGENI JOHN 2ND ACCUSED

RULING

1. The two accused herein Joash Okioma John and Francis Mogeni John were charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on the 4th of November 2009 at Magenche sub location in Kenyena District within Nyanza Province they jointly murdered John Nyamweya Okoro. They both pleaded not guilty to the charge.
2. The prosecution's case was that on 4th November 2009 at around 8.00 p.m. the deceased had gone to his mother's house (which was 20 m away from his homestead) where he had supper with his mother and discussed about a domestic land dispute which he had with his 2 wives. Shortly after, the deceased left for his homestead and on his way he was confronted by 3 persons 2 of whom were his sons (the accused). The 3rd person was his wife. That the three jointly used crude weapons namely a metal bar, piece of wood and panga to attack the deceased. The deceased bled severely and succumbed to injuries. The struggle attracted the attention of the deceased's mother who went to the scene and found the accused who also attacked her. She managed to raise the alarm and other villagers came to the scene. The accused fled while the body of the deceased was taken to Tabaka Mission Hospital. The prosecution's case was therefore that the accused jointly caused the death of the deceased and at the material time were motivated by the desire to take his land and therefore had malice aforethought.
3. The prosecution called 2 witnesses in support of the charge against the accused. The evidence of the 2 witness was taken by Hon. Justice Makhandia. It became necessary when the prosecution's case came to a close on the 18th December 2012 for me to have time to go over the evidence with a view to determining whether or not the accused have a case to answer pursuant to **section 306** of the **Criminal Procedure**.
4. I have now carefully considered the evidence that is on record and note that PW1 the mother to the deceased only confirmed the prosecution's case that on 4th November 2009 the deceased was in her house, he took some tea then left only to be killed on his way to his house. She however revealed that she did not know who had killed him. This in itself is a clear contradiction to the prosecution's opening remarks which had indicated that PW1 had actually witnessed the deceased being attacked.

5. PW2 the Assistant Chief, Magenche sub location only confirmed that on 4th November 2009 he had received the report concerning the attack upon the deceased and the deceased's subsequent death. That the following morning he went to the scene of the attack and found a piece of metal with blood as well as the handle of a jembe which had blood. That the 2nd accused emerged from behind the house, ran into the tea plantation and on pursuing him, he was caught and taken to police custody. Shortly afterwards the 1st accused was brought from the hills and the 2 accused, together with their mother were arrested.

6. Mr. Nyambati counsel for the accused submitted that the prosecution had not established a prima facie case to warrant the accused being put on their defence. That from the 2 witnesses who have testified none of them gave evidence touching on any of the accused persons, nor was any post mortem report brought before the court to establish the cause of death, and that in the absence of such evidence, the accused persons should be acquitted of the offence of murder.

7. Mr. Mutai, counsel for the state in his submission left it to the court to decide.

8. It is trite law that the standard of proof in all criminal cases is one beyond reasonable doubt. At this state however, I am considering whether the prosecution has established a *prima facie* case. In **Ramanlal Bhatt –vs- Republic [1957] EA 332**, the former Court of Appeal of East Africa held that a *prima facie* case is one which:-

“A reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is given by the defence.

Section 306 (1) of the Criminal Procedure Code also provides that:-

“When the evidence of the witnesses for the prosecution has been concluded, the courts, if it considers that there is no evidence that the accused or anyone or several accused committed the offence shall, after hearing, if necessary, any arguments which the advocates for the prosecution or the defence may desire to submit, record a finding of not guilty.

9. In a report on **Arrest Investigation and Prosecution by the police in Kenya**; prepared by the Oscar Foundation [2007] it has been suggested that a case may be lost in court for many reasons such as:-

- i) *Poor case management by the prosecution;*
- ii) *Insufficient evidence (not orchestrated by the victim);*
- iii) *Shoddy investigations by the police.*
- iv) *Corruption;*
- v) *The unavailability of witnesses.*

10. Putting the above in mind, the prosecution did not adduce evidence confirming that indeed the deceased was murdered by the accused persons. No prosecution witness saw the deceased being attacked, nor were the weapons used in the alleged attack either produced or identified in court. The investigating officer never testified as to how he investigated the alleged offence and neither did I see any postmortem report indicating the cause of death, even though the prosecution was allowed enough time to avail their witnesses.

11. With all the above factors in mind, there is no other conclusion I can draw other than that the prosecution has not established a *prima facie* case to warrant putting the accused persons on their defence.

12. I therefore find the accused not guilty, and acquit them of the charge of murder as provided under section 306 sub section (1) of the Criminal Procedure Code. Unless otherwise lawfully held each of the

accused person to be released from prison custody forthwith.

Dated and delivered at Kisii this 31st day of January, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Shabola (present) for the State

Mr. Kaburi (present) for Accused

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.