

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 51 OF 2006

REPUBLIC **PROSECUTOR**

V E R S U S

BONIFACE MAKALE **1ST ACCUSED**

WILSON ALUMASA **2ND ACCUSED**

R U L I N G

The two accused persons are 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 the accused *on the 8.10.2006 at Lutonyi village, in Kakamega district of the Western Province jointly with others murdered FRED MALUMASA.*

The prosecution called 9 witnesses. **PW1, UNIDA ANDIS REUBEN** informed the court that the 1st accused is her step-son and they used to live together. On the 8.10.2006 the accused went home at about 7.00 p.m. and went to his room. He did not take supper and slept. She does not know whether the accused went out after that. **PW2, KEFA INGAYA** is the father of the 1st accused while the 2nd accused is his neighbor. His evidence is that on the 9.10.2006 the 2nd accused and another young man informed him that they had assaulted someone whom they thought was a thief. It is his evidence he did not see the accused kill the deceased. He was also arrested and later released.

PW3, CI PATRICK NGEYWA was stationed at Kakamega police station as the Deputy Officer in-charge of the station. On the 8.10.2006 it about 9.00 p.m. they got information that the deceased was being chased by many boda boda operators along the Kakamega-Mumias road. Together with other officers he went to that place but did not see any one. They went back to the station. On the night 8.10.2006 he went to the deceased's house and they were told that the deceased was not at home. The following day at about 5.00 a.m. they got information that someone had been found dead along the road. They went to the scene and saw the deceased dead dressed in civilian shirt and police uniform trouser. They took the body to the mortuary. The matter was investigated by the criminal investigation department. PW3's further evidence is that somebody had reported at the police station that evening that he was with the deceased and they were being carried on a bicycle. It is his further evidence that on that material night there were many criminal incidents in the area and two other people were killed and their bodies burnt.

EVANS LUBANGA MASINYA was **PW4** and he is a staff at the Butali Law Courts. On the 8.10.2006 he was with the deceased and he went with him to his Kakamega police quarters house. The deceased went to check on the duty roster at the office and then left with PW4 while leaving the deceased's relative **LOYCE (PW5)**. The two went upto to Joyland area and decided to take boda boda bicycles. Each of them was on a separate bicycle and while riding they saw about 6 to 7 boda boda operators who started shouting "*ni huyu, ni huyu*" ... it is this one. The deceased alighted from the bicycle and ran away. PW4 also managed to escape and it was dark. There were no lights at the area and PW4 did not manage to identify anyone. He went to the Kakamega police together with Loyce and reported the incident. The police did not take their report seriously and they kept reminding them about it. They went to sleep at the deceased's house and in the morning he went home. Later that morning he heard that the deceased had

been killed.

PW5, LOYCE KARAKACHA is a nurse and the deceased was her cousin. On the material night she was at the deceased's house when the deceased went there with PW4. She prepared food and the two left. Later at about 8.00 p.m. PW4 went to inform her that they had been attacked by boda boda people. Together with PW4 they went to report the matter at the Kakamega police station. They stayed there up to 11.00 p.m. Nothing was done until morning when she heard that the deceased had been killed. **PW6, MALUMASA MUKWANA** is the deceased's father. On the 10.10.2006 he identified the deceased's body to the doctor at Kakamega Provincial General Hospital for postmortem purposes. **PW7, ALEX MUTANDA OREMO** is the Assistant Chief Shirakalu sub-location in Kakamega Central district. On the 11.10.2006 they got information that there was a person who was involved in the murder who was hiding in Shiyunza sub-location. He went there and arrested the 2nd accused.

PW8, CPL REUBEN KIPKORIR KIRUI investigated the matter and was based at the Kakamega police station CID office. He got information about the murder on the 9.10.2006 at about 8.00 a.m. The deceased was also a police officer based at the Kakamega police station. He went to the scene but the body had already been removed to the Kakamega hospital mortuary. He went to the mortuary and saw the body had a deep cut on the face. His investigations found that the deceased was killed by boda boda operators. They arrested 5 suspects. The two accused confessed before a magistrate. According to PW8, the deceased had visited his girlfriend at Lutonyi area while on his way he arrested a boda boda operator who is not amongst the accused persons. Along the way he released the boda boda operator he had arrested. Later that day the deceased went to the same area with PW4 and when they reached the same place he had arrested the boda boda initially one of them shouted that they were robbers. The boda boda operators chased the deceased and assaulted him resulting to his death.

PW9, DR. DICKSON MCHANA MWALUDINDI produced the post mortem report on behalf of Dr. Jason Amukonye. The body had multiple bruises on the entire body and fracture of the lower jaw. It had skull fracture on the left forehead and left side above the left ear. The cause of death was severe head injury due to the fractures and bleeding.

The main issue is whether the prosecution has established a prima facie case to warrant placing the accused on their defence. A prima facie case is one whereby the court can convict the accused on the evidence on record should the accused opt not to offer any testimony. In other words the evidence by the prosecution should be sufficient enough to warrant an explanation by way of defence evidence by the accused. The evidence on record shows that the deceased suffered his death in the hands of boda boda operators at Lutonyi area in Kakamega town. PW4 was with the deceased and did not identify the attackers as it was dark. The evidence of PW2 is that he heard that the 2nd accused had assaulted somebody whom he thought to be a thief. During cross-examination PW2 testified that he was not so sure that that information was correct. The investigating officer informed the court that the two accused persons confessed before the Resident Magistrate. The confession statements were marked for identification and were not produced. Section 25 of the Evidence Act allows for the taking of a confession from an accused person and section 25A provides for the circumstances under which a confession can be taken. The statements were not produced and are not part of the court record. The circumstances under which the statements were taken are not clear. The date when the confessions were made is not given. Other than the contention that the accused confessed, there is no evidence connecting the accused with the offence.

Given the evidence on record, I am satisfied that the prosecution has not established a prima facie case to warrant placing the accused on their defence. There is no evidence that the accused participated in the assault of the accused. The police could have investigated the boda boda operators who used operate at the area. According to the investigating officer the deceased had arrested a boda boda operator who is not one of the accused. There is no evidence that the accused are also boda boda operators. In the end, I do find that the prosecution has not established a prima facie case against the accused. The accused are hereby set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 14th day of November 2013

SAID J. CHITEMBWE

J U D G E