



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL(MURDER) CASE NO.52 OF 2009

MICHAEL OTIENO ODIPO.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. The accused in this case, **Michael Otieno Odipo** is charged with the murder of **Varol Odhiambo Ogilo**. It is alleged that he committed the offence on the night of 7th/8th August, 2009 at Genga Sub-location in Homa Bay District within Nyanza Province. He pleaded not guilty to the information. The prosecution called 7 witnesses in support of its case against the accused.
2. At the close of the prosecution's case, counsel for the accused, **Mr. Nyasimi Kennedy** passionately submitted that the accused has no case to answer and urged this court to acquit him under the provisions of **Section 306(1)** of the **Criminal Procedure Code**. Counsel submitted that the evidence adduced by the prosecution falls short of establishing a prima facie case against the accused. The main ground urged by the defence counsel is that the prosecution case is based on circumstantial evidence which does not pass the test laid down in law. Counsel referred the court to a number of authorities which have been carefully considered by the court.
3. In response to the submissions by counsel for the defence, the learned state counsel, **Mr. Gitonga** submitted that the prosecution has established a prima facie case against the accused who should be put on his defence. He further submitted that contrary to the position taken by counsel for the defence, the prosecution does not at this stage have to prove its case beyond any reasonable doubt. Secondly, the learned state counsel argued that though the prosecution's case is based on circumstantial evidence, the said evidence is so strong that it meets the standard of proof required at this stage. Referring to the case of **Republic –vs- Kipkering arap Koskei** counsel submitted that the exculpatory facts in this case all point to the guilt of the accused. Counsel singled out the evidence of **PW7, Benta Adhiambo**, who is the mother of the deceased, and that of **PW5, Dr. Ayoma Ojwang** the doctor who carried out the postmortem examination on the body of the deceased, and said that the two testimonies neatly tie the prosecution's evidence together and points a finger directly at the accused as the person who killed the deceased.
4. I have carefully considered the submissions by both counsels. I have also carefully considered all the cases cited to the court by both counsel. After considering all the above. I am satisfied that the prosecution has established a prima facie case against the accused requiring the accused to be put on his defence. A close scrutiny at the submissions by defence counsel clearly shows that there was a misapprehension on the part of the defence as to what constitutes a prima facie case. At this stage the

prosecution does not have to prove its case beyond any reasonable doubt.

5. On the basis of the above principles, I find and hold that the accused has a case to answer and I now proceed to put him on his defence.

6. Pursuant to **Section 306(2)** of the **Criminal Procedure Code**, the accused may give sworn evidence from the witness box, in which case he will be liable to cross-examination by the prosecution. He may, if he so chooses, testify from the dock and in that case no questions will be put to him. Thirdly, the accused has a right to remain silent and let the court decide the case on the evidence that is before court. In all cases, the accused can call witnesses.

7. It is now for the accused to indicate to the court which option he will take.

8. It is so ordered.

Dated and delivered at Kisii this **26th** day of **January**, 2012.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:-

Mr. Gitonga for state

Mr. Soire for Nyasimi for accused

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE