



REPUBLIC OF KENYA

High Court of Kisii

Criminal Case 62 of 2009

REPUBLIC PROSECUTOR

VERSUS

SAMEL OTENYO NYAKWARA ACCUSED

RULING

1. The accused herein, Samwel Otenyo Nyakwara was arraigned before court on 7th October 2009 on 2 counts of murder, 1 count of attempted murder and 1 count of attempted suicide. In count I, he was charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**, it being alleged that on 27th August 2009 at Miruka sub location in Nyamira District within Nyanza Province, he murdered Maureen Nyaboke Nyakwara.
2. In the second count of murder, it was alleged that on the 27th August 2009, in the same place he murdered Ebisibah Bochaberi. In count III, he was charged with attempted murder contrary to **section 220 (a)** of the **Penal Code**, it being alleged that on the 27th August 2009 in the same place, he attempted unlawfully to cause the death of Erick Nyakwara Otenyo.
3. In count IV, the accused was charged with attempted suicide contrary to **section 226** of the **Penal Code**. It was alleged that on the 27th August 2009, in the same place, he attempted to kill himself.
4. The accused pleaded not guilty to all the 4 counts. The facts of the case were that on the 27th July 2007, the accused's wife deserted the matrimonial home, leaving the children behind. On the night of 27th and 28th August 2009, the accused was at home with the children who were asleep in a different room. The accused climbed over the wall separating the two rooms and went to where the children slept. The children were Erick Nyakwara Otenyo, Ebisibah Bochaberi and Maureen Nyaboke Nyakwara. The accused woke up all the 3 children and administered some poison to them on the pretext that he was deworming them.
5. On the morning of 28th August 2009, one Birita Bonareri, who testified as PW1, went to the accused's house to pick up a jembe but she found the house locked from inside. She called out the names of the accused's children who were her grandchildren but she received no response. When Bonareri later entered the children's room, she found 3 bodies in lying still in the room. The 3 bodies were rushed to hospital for treatment. Only Erick Nyakwara Otenyo survived.
6. Thereafter investigations commenced leading to the arrest and subsequent arraignment of the accused before court.

7. The postmortem examination conducted by Dr. Okiri on the bodies of the deceased revealed that the cause of the deaths was toxic or poisonous substances which were indigested by the deceased. The prosecution contended that by administering poison to the children, on the pretext of deworming them the accused intended to cause the deaths of the deceased and that he had malice aforethought.

8. Bonareri, testified that when she went to the accused's house to pick up a jembe, she saw the accused trying to signal her from an open window. The door of the house was bolted from inside. On seeing the accused signaling her, Bonareri went and called her other son, Charles Nyakwara Obwoye, also known as Bernard Nyakwara (Charles, who testified as PW2). Charles came, entered the accused's house through the window and opened the door. On entering the house, Bonareri and Charles noticed that the accused was sick. They carried him to the sitting room. The two also saw the bodies of the accused's children two of whom were dead while Erick Nyakwara Otenyo was still alive. The accused and Erick Nyakwara Otenyo were both taken to hospital for treatment while the bodies of the deceased were taken to Nyamira District Hospital mortuary for preservation and subsequent post mortem.

9. During cross examination, Bonareri told the court that she did not know how the deceased died.

10. Charles also testified and stated how Bonareri called him to go to the accused's house on the morning of 28th August 2009. He confirmed what Bonareri stated regarding the condition of the accused and of his children when he and Bonareri entered the accused's house. He further stated that he did not know what caused the death of the deceased.

11. The prosecution was unable to call any other witnesses in this case. When the case came up on the 25th October 2012, the prosecuting counsel, Mr. Jacob Mutai told the court that the remaining witnesses had left their homes and could not be traced despite concerted efforts by the prosecution to trace them. Counsel asked for a mention date to enable him take instructions on the way forward. The application for a mention date was opposed and the same was subsequently refused by the court. The prosecution therefore had to close its case with only the evidence of Bonareri and Charles being on record.

12. At the close of the prosecution case, counsel for the defence, Mr. S.M. Sagwe submitted that the prosecution had not established a *prima facie* case to warrant the accused person being put on his defence. Counsel submitted that there was no evidence placed before the court as to the cause of death of the 2 deceased persons and that in the circumstances, the accused is entitled to an acquittal under **section 306 of the Criminal Procedure Code**. Counsel for the State stated in response that he was leaving the matter to the court.

13. After carefully analyzing all the evidence that has been placed before me, and upon considering the submissions made by counsel, the issue for determination is whether the evidence so far adduced before court is sufficient to establish a *prima facie* case. What amounts to a *prima facie* case was defined by the Court of Appeal for Eastern Africa in the case of **Wibiro alias Musa –vs- R [1960] EA 184**. The court expressed itself on the issue in the following words appearing at page 186:

“The question of what constitutes a *prima facie* case was dealt with by this court in 1957 in the case of *Ramanlal Trambaklal Bhatt –vs- R. (1), [1957] E.A. 332 (C.A.)* and the following passage was taken from the judgment of the court at p.334 and p.335 –

“Remembering that the legal onus is always on the prosecution

to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is 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.”

“This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.

“Nor can we agree that the question whether there is a case to answer depends 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. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a ‘prima facie case’, but at least it must mean 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.”

14. In essence therefore, a *prima facie* case can be said to have been established only if, a reasonable tribunal, properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence.

15. In the instant case, the prosecution case is based on allegations that the accused herein administered some poison to all his three children before two of them succumbed to the poison. Neither Bonareri nor Charles adduced any evidence to show that either both or one of them saw the accused administer any poison to the deceased. In any event, neither Bonareri nor Charles, being simple folk from Miruka sub location of Nyamira District could say what substance was or was not poison. Expert evidence needed to be placed before me to confirm that upon post mortem, the insides of the deceased were examined and found to contain substances that were confirmed to be poison. In the instant case, there is no evidence of any post mortem examination having been done, nor is there evidence of any chemical analysis having been done of the specimens removed from the bodies of the deceased person or from the surviving child Erick Nyakwara Otenyo to confirm that there were toxic substances found in their systems.

16. It may be true that the accused administered poison to his children and also to himself, but there is no evidence to that effect. In my considered view therefore, I find and hold that the prosecution in this case has not established a *prima facie* case as defined in the **Wibiro case** (above) to warrant the accused being put on his defence. If I were to put the accused on his defence at this point, it would be tantamount to asking him to prove his innocence in the matter. That is not the law. The burden of proof is always on the prosecution and never ever shifts to the defence. The prosecution was under a duty to prove the circumstances under which the deceased died, especially in view of the fact that the prosecution case was hinged mainly on circumstantial evidence. Having failed to discharge its duty, the benefit of the doubt goes to the accused herein.

17. In the result, and for the reasons above stated, I find that the prosecution has not established a *prima facie* case against the accused person to warrant his being put on his defence. I therefore find the accused not guilty on each of the 4 counts and accordingly acquit him of all the counts under **section 306 (1)** of the **Criminal procedure Code**.

18. Unless otherwise lawfully held, the accused shall be released from prison custody forthwith.

19. It is so ordered.

Dated and delivered at Kisii this 31st day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Mutai (present) for State

Mr. Ondieki h/b for S.M. Sagwe (present) for Accused

Mr. Bibu (present) Court Clerk

RUTH NEKOYE SITATI

JUDGE.