



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL CASE NO. 45 OF 2003

REPUBLIC PROSECUTOR

V E R S U S

MARK SHIUNDU.....ACCUSED

R U L I N G

1. The accused herein, Mark Shiundu was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. It was alleged that on 4.6.2003 at Shirakalu village, Shikoti Location in Kakamega District, he, jointly with others not before the court, murdered Michael Ingutia Ishiungi.

2. I have read the record and i note that the hearing begun before G.B.M. Kariuki, J. on 7.12.2004 who had the assistance of assessors. On that day, two witnesses testified and on 14.7.2005, two others testified and thereafter, the hearing was set for 30.1.2006, 31.1.2006, 27.2.2006, 5.6.2006, 6.6.2006, 6.7.2006, 20.11.2006, 4.12.2006, 19.3.2007, 20.3.2007, 26.6.2007, 6.2.2008, 18.2.2008, 17.6.2008, 17.10.2008, 21.10.2008, 6.5.2009, 7.5.2009, 13.7.2009, 2.11.2009, 30.11.2009, 26.1.2010, 23.3.2010, 21.4.2010, 19.5.2010, 16.6.2010, 12.7.2010, 13.7.2010 and on the latter date, i granted a last adjournment as on all the previous occasions, the case could not proceed to trial primarily because on most of the set dates, no witness was availed.

3. In spite of the fact that on 15.12.2010, i granted the Republic another opportunity to produce witnesses, on 1.2.2011 when i called out the matter, Mr. Orinda learned Senior Principal State Counsel stated that he had no witness present and that the OCS, Kakamega Police Station had failed to revert to him even after receiving a letter dated 3.1.2011 asking him to avail all the witnesses on the hearing date. I declined to grant another adjournment and the Republic closed its case.

4. I should note that all the evidence recorded by G.B.M. Kariuki J. is sadly of no relevance because on 30.11.2007, Chitembwe J. ordered the matter to begin de novo and so from where I sit, there is no evidence whatsoever to which the charge of murder can attach.

5. I am alive to the difficulties the Republic often has in producing witnesses (in some cases) and I am aware of the profound yet understandable, difficulty created when assessors were dispensed with in criminal trials, vide Gazette Notice no. 7/2007. But that hurdle, while surmountable, should not unnecessarily be the basis for breach of the Constitutional right to a speedy trial. Article 50 (2) (e) of the Constitution provides as follows;

“Article 50 (2) – Every accused person has the right to a fair trial, which includes the right –

(a)

(b)

(c)

(d)

(e) to have the trial begin and conclude without unreasonable delay”

6. It cannot be true that having been arrested in June 2003, the accused person has been accorded a fair trial when by January 2011, hearing has not proceeded beyond the aborted trial of 2004. Eight years of waiting to face his accusers is a long time and this court will not condone the laxity exhibited by the Republic.

7. In any event, the Republic has closed its case, without any evidence on record, and so I find that no prima facie case has been established against the accused person. That being the case, he has no case to answer and he is acquitted of the charge of murder.

8. He may be released unless he is otherwise lawfully held.

9. Orders accordingly.

Delivered, dated and signed at Kakamega this 13th day of April, 2011

ISAAC LENAOLA

J U D G E