REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 18/2003

REPUBLIC ……..... PROSECUTOR

=VERSUS=

EDWARD ASANGA …….....……..... 1ST ACCUSED
JOSHUA ASANGO …….....…… 2ND ACCUSED
OSBORNE KENNEDY …….....….....……..... 3RD ACCUSED

RULING

After the testimony of eleven witnesses, the prosecution closed its case. Learned counsel M/s **Misoi, Okara** and **Kipnyekwei** for the accused persons then submitted that the prosecution had laid no case requiring that the accused persons be put on their defence. Learned Senior State Counsel, **Mr. Chirchir**, on his part contended that there was indeed a *prima facie* case made out by the evidence adduced by the prosecution.
This is a case in which Benson Amakanga Shivere, (hereinafter, **"the deceased"**) was said to have been killed during the morning of 12th May, 2002, near his home and the accused persons were charged with causing his death. Each of the accused persons denied committing the offence.

Briefly the case for the prosecution was as follows:-

J.A., (P.W.1), the widow of the deceased, witnessed the 2nd and 3rd accused persons assault her daughter **S.M.**, (P.W.4) on 1st May, 2002. The deceased took P.W.4 to the police to file a complaint which culminated in the arrest of the 2nd and 3rd accused persons. The duo was however released and no further evidence was led in that regard. However, on 12th May, 2002, early in the morning, P.W.1 saw and heard the 1st accused threatening to kill the deceased. According to her, the deceased also heard the threats. Notwithstanding the threats, the deceased set off, on his bicycle, for church service but before he went far, the 1st accused pounced on the bicycle and the deceased fell down. The 1st accused then cut him on his hands and hit him on the neck. P.W.1 screamed, which screams attracted the 2nd and 3rd accused persons who joined in the attack on the deceased. She allegedly saw the 1st accused armed with a sword and the 2nd accused had stones. She then left to report the attack. In cross-examination, she changed her story and testified that it was the 2nd accused who was armed with a Somali sword while one of the others had stones.

S.M. (P.W.4), testified when she was eleven years of age. After a *voire dire* examination, she was found intelligent enough to testify and she was affirmed before her testimony. She stated that on the material date, as her father, the deceased, left for church, he was attacked by all the accused persons. Her

testimony was however weakened when she admitted in cross-examination that her mother, (P.W.1) had told her what had happened. It is significant that at the time of the attack, she was only five years old.

M.A, (P.W.9), gave similar testimony as her mother (P.W.1). Although she testified that she witnessed the accused persons attack the deceased with pangas, she admitted, in cross-examination, that she had in her statement to the police, stated that the 3rd accused carried nothing and did not attack the deceased. It is also significant that she was a minor aged about 11 years at the time of the attack and she was testifying a whole nine year later.

Festo Adiaga, (P.W.2), testified that on the material date, as he went to church at about 10.00 a.m., he heard shouts from the road and when he went to investigate, he found the accused persons having knocked down the deceased and were beating him. He observed that the 3rd accused had a long sword, the 2nd accused had stones and another had a maasai sword. He was not consistent in his testimony at all. While being led in his evidence in chief, he altered his earlier testimony and stated that the 2nd accused was the one armed with a sword and the 3rd accused was the one armed with stones. While still being led in his evidence, he made a further alteration that the 3rd accused had a sword and 2nd accused had stones. Worse still, he confused the names of the accused persons giving the 2nd accused the name of the 3rd accused.

Zipporah Mukweno, (P.W.3), also allegedly witnessed the attack upon the deceased. She however did not describe the roles each of the accused persons played in the attack.

Zipporah Imali Mzoli, (P.W.11), allegedly met the 3rd accused person on the material day who informed him that he had accomplished his mission to kill the deceased. She however, confused his nick name with that of the 1st accused. She also testified that the other accused persons were not armed. It is also significant that she did not observe any injuries on the deceased.

The rest of the witnesses were formal and received reports of the attack. They are **Musa Mwaniki**, (P.W.5), **Diana Owaro**, Assistant Chief,(P.W.6), P.C. **Kenneth Auma,** (P.W.7) and AP CPL **Sammy Makona,** (P.W.10).

I have carefully reviewed the above evidence to see whether any of the accused persons has a case to answer as defined in **Ramanalal Bhati –vrs- Republic [1957] (EA 334)**. In that case, the predecessor of our Court of Appeal stated as follows:-

“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 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 be 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”.

The accused person is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The former stipulates as follows:-

“203 Any person who of malice aforethought causes the death of another person by an unlawful

act or omission is guilty of murder."

AND malice aforethought is defined in section 206 of the same code as follows:-

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not or by a wish that it may not be caused;
(c) An intent to commit a felony;
(d) An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony."

The cause of death in this case can only be the subject of speculation. I say so, because the prosecution did not adduce any medical evidence to establish the same. That testimony was crucial given the testimonies of the purported eye witnesses who were not in agreement as to the role each of the accused persons played and the instruments each of them carried.

P.W. 1, the widow of the deceased was not certain who was armed with what; and was inconsistent in her testimony; P.W.3 did not describe the roles each of the accused persons played; P.W.4 was told what happened by P.W.1 whose testimony itself is discredited; P.W.9's testimony in court was not consistent with the statement she gave to the police and P.W.11 besides, assigning incorrect names to the accused persons did not observe any injuries on the deceased.

Given the above testimonies, medical evidence as to that cause of death was crucial but was not adduced. The want of medical evidence was compounded by the failure of the prosecution to call the investigating officer. In **Baraneka –vrs- Uganda [1967] (EA768)**, it was held, inter alia, that, **"it is the duty of the prosecutors to call as witnesses the police officers who investigated the case and charged the accused."** The court further observed that it is necessary for the said officers to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person.

The failure to call the investigating officer meant that the various exhibits identified by the witnesses could not be produced. The weapons allegedly used in killing the deceased were therefore not produced.

In all those premises, I have come to the conclusion that the evidence adduced by the prosecution does not establish a prima facie case against any of the accused persons. I therefore dismiss the case against each of the three accused persons and do hereby acquit each one of them under section 306 (1) of the Criminal Procedure Code.

The assessors are discharged.

DATED SIGNED AND DELIVRED AT ELDORET THIS 6TH DAY OF JUNE, 2011.

F. AZANGALALA
JUDGE

Read in the presence of:-

(1) **Mr. Misoi** for the 1st accused,
(2) **Mr. Okara** for the 2nd accused,
(3) **Mr. Kipnyekwei** for the 3rd accused and
(4) **Mr. Kabaka**, State Counsel for the State.

Also present are the following assessors:

(5) **Paul Lukon** and

(6) **Abitha Agasira**

F. AZANGALALA

JUDGE