



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 34 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

FAUSTINE MAHERA.....ACCUSED

RULING

Faustine Mahera, the accused, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The allegation is that on 16 July, 2007 at Ikuywa Location in Nandi North District within the Rift Valley Province he murdered **Oscar Mudavadi Matiasi** (hereinafter “the deceased”). He denied committing the offence.

After the testimony of three (3) witnesses, the prosecution closed its case. Learned Counsel for the accused **Mr. Okara**, submitted that the prosecution had not demonstrated a prima facie case against the accused and sought his acquittal. On his part **Mr. Kabaka**, Learned Counsel who represented the state, relied upon the evidence on record.

The case for the prosecution in summary was as follows:-

The deceased on the material date at about 2:00am, in the company of **Alfred Ayodi** (PW1) and **Elijah Ayodi** (PW2), were on their way home from a funeral near their home when they were followed by young men who also had attended the same funeral. PW1 and PW2 testified that the young men included the accused. The young men, according to PW1 and PW2 were armed with a panga and clubs. They asked for a girl called **Carol** who was not with them. They told them that they did not know where she was. The accused then attacked the deceased. PW1, PW2 and their companions ran away to their homes and slept until the next morning. In the morning, the mother of the deceased asked PW1 whether he knew where the deceased was because he had not arrived home. PW1 then informed her of the night attack.

Later the body of the deceased was found on the road and PW3 (**Assistant Chief Zaitun Chepkoech Rashid**) was informed. She visited the scene in the morning of 17th July, 2007 and observed that the body of the deceased had a knife injury on the head. She then reported the matter to the OCS Kaimosi Police Station.

I have carefully reviewed the testimony of PW1, PW2 and PW3 to see whether the accused person has a case to answer as defined in the case of **Ramanlal Bhatt -Vs- Republic [1957] E.A.334**. In that case the predecessor of the Court of Appeal stated as follows:-

“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 evidence could convict if no explanation is offered by the defence.”

The accused herein is charged with murder contrary to section 203 as read with section 204. Section 203 reads as follows:-

“203. Any person who of malice a forethought 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 Penal 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 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 flight or escape from custody of any person who has committed or attempted to commit a felony.”

The deceased in this case was found by **Zeitun Chepkoech Rashid** (PW3) with an injury on the head. The injury looked like a knife injury. The accused and his companions are alleged to have had a panga and clubs. So who could have inflicted the knife injury? Was the death caused by a knife injury or some other injury? Only medical evidence would have established the cause of death. That evidence was not adduced. Was the deceased indeed the person who was with PW1 and PW2 on the material night? We shall never know because the prosecution did not call even the usually non-contentious evidence of identification of the deceased.

The attack on the deceased occurred at night in darkness. The only source of light was from torches which were allegedly with the attackers of PW1 and PW2. In the premises, there is the real possibility that PW1 and PW2 could be mistaken as to the identity of their attackers given that they witnessed the alleged attack for a very brief moment.

The investigating officer and the arresting officer were not called to testify. We shall therefore never know on what basis the accused was arrested and charged. In all those premises, I have come to the conclusion that the evidence so far adduced by the prosecution does not demonstrate a prima facie case against the accused person to warrant his being put on defence. Accordingly I dismiss the case against him and do acquit him under section 306 of the Criminal Procedure Code.

DATED AND DELIVERED AT ELDORET THIS 7TH DAY OF DECEMBER, 2011

F. AZANGALALA
JUDGE

Read in the presence of :-
Mr. Kabaka and
The Accused.

F. AZANGALALA
JUDGE

7TH DECEMBER, 2011.