



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Case 27 of 2007

REPUBLIC STATE

VERSUS

SAMWEL CHACHA KABAKA ACCUSED

RULING

The accused was charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on the 8th day of December 2005 at Igena sub location in Kuria District within Nyanza Province, the accused murdered **Stephen Mogesi Nyamohanga**, hereinafter referred to as “**the deceased**.” The prosecution managed to call only three witnesses. Their evidence can be summarized as hereunder.

Nyamohanga Mwita, PW2, is the father of the deceased. He testified that on 8th December 2005, the deceased went missing. He used to operate a bicycle taxi known as “boda boda” at Kehancha market. He further testified that on 14th April 2007, the deceased’s wife told him that she had been informed by some women that they knew his son’s killers. She was allegedly so informed by two women known as **Nchagua Kabaka** and **Ngati Nyagusi**. They said that it was the accused, son of **Nchagua Kabaka**, who had killed him. PW2 went to Kehancha police station and made a report. Together with police officers they went to the home of Nchagua Kabaka and when the accused saw them he ran away. The police arrested his mother. On the following day the accused’s mother led the police to a deserted homestead and pointed at a pit latrine. The police removed a big stone that was placed at the entrance to the pit latrine and when they peeped therein they saw a skeleton. The skeleton was removed by the police in the presence of a doctor. There were also some clothes in the pit latrine, a shirt and a trouser. The said clothes were identified as belonging to the deceased. The accused’s mother also led the police to the place where the deceased’s bicycle had been buried. It was about 200 metres from the pit latrine. They dug out a particular spot and removed a bicycle. The bicycle was identified as the one the deceased used to ride.

The accused was arrested in Tanzania and escorted to Kehancha police station. Upon his arrest he told the police that he used an axe to kill the deceased, PW2 added.

Nchagua Mwita Burure, PW3, is the grandmother of the deceased. She testified that on 14th April 2007, the accused’s mother and another woman went to her home. She was asked by the accused’s mother to inform PW2 that it was her son who had killed the deceased. PW3 relayed the information to PW2 who in turn reported to the police. Thereafter PW3 saw a human skeleton that was said to have been removed from a pit latrine.

Dr. Samuel Omondi Owino, PW1, testified that on 15th April 2007 he did an autopsy in respect of a human skeleton that

was said to be that of the deceased. The autopsy was done next to the pit latrine from where the skeleton had been retrieved. There was a fracture on the left part of the head but the other bones were intact. In his view, the cause of death was a head injury that resulted to a fracture of the skull bone. He was not able to tell whose skeleton it was. No DNA tests were done on the bones and the clothes to ascertain whose body it was.

Mr. Kemo, Senior Principal State Counsel, told this court that all the other witnesses disappeared to Tanzania and the police were unable to trace them.

Although it was suspected that the skeleton that was found in the pit latrine was that of the deceased, there was no conclusive evidence to that effect. PW1 explained that no DNA tests were done to determine whose skeleton it was. There is therefore a possibility that it could have been of any other person.

The accused's mother who was said to have been the one who led the police to the pit latrine where the skeleton was retrieved from was not called as a prosecution witness. It was not clear how she came by the information that it was the accused who had murdered the deceased and threw his body in the pit latrine. She was one of the people who were arrested but it appears that the police released her. In a case of this nature as in all criminal cases before a court can conclude that a *prima facie* case has been established by the prosecution, the evidence on record must be so strong that even if the accused opted not to tender any evidence in his defence the court would be able to convict him. See **REPUBLIC –VS- WACHIRA** [1975] E.A. 262. In **BHATT –VS- R** [1957] E.A. 332, the Court of Appeal for East Africa held that a *prima facie* case is established in a case where:

“A reasonable tribunal properly directing

its mind to

the law and the evidence could convict if no

explanation is offered by the defence.”

Given the paucity of the prosecution evidence, I find that a *prima facie* case has not been made out against the accused and hereby acquit him of the charge of murder pursuant to the provisions of **section 210** of the **Criminal Procedure Code**. The accused is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF MAY, 2010.

D. MUSINGA
JUDGE.

20/5/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Mutuku for the state

Mr. Omwega for the accused

Court: Ruling delivered in open court.

D. MUSINGA

JUDGE.