



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Case 14 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

SANINGO KINAYO.....1ST ACCUSED

KUNINI KINAYO.....2ND ACCUSED

RULING

The accused persons are charged with **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**.

According to the information laid before the court by the Attorney General, the accused persons jointly with others not before court are alleged to have murder Kiankut Ole Leposo on the night of 27th and 28th January, 2007 at Narok Township. The prosecution has called seven (7) witnesses.

At the close of the prosecution case, the question to be determined is whether the evidence presented constitutes a *prima facie* case as defined in the celebrated case of **Ramanlal Trambaklal Bhatt Vs. Republic** (1957) EA 332

The deceased was employed as a watchman to guard the property of **P.W.1, Josephat Ndungu Wambugu** (Wambugu) which was under construction. On 28th January, 2007 Wambugu went to the construction site at about 2p.m. and found the body of the deceased. He noted that the deceased was dead and had his

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throat cut. The deceased person's personal items such as a bicycle, torch, *rungu* and belt were missing from the scene. The matter was reported to the police who came and collected the body. A day before the body of the deceased was found by Wambugu, the deceased had confided in **P.W.2 David Dabash (Dabash)** that the father of the 2nd accused person, one Kinayo had threatened him with death for the reason that he (the deceased) had implicated the 2nd accused person in a case of theft of a bicycle for which the 2nd accused person's father had to sell a cow in order to retribute. It was also the evidence of **P.W.4 Lemeria Ole Yenke (Yenke)** that mzee Kinayo Randa, the father of the accused persons had confided in him that three people would be killed in a revenge mission for implicating his son with theft of a bicycle. Yenke was joined by other villagers, including **P.W.5 Nenek Tarakwei** and **Saigili Ole Ikayo** to investigate the allegations attributed to the accused persons' father. They went to his home where they found him and the 1st accused slaughtering a sheep.

It is alleged that the 1st accused person's clothes had blood stains; that on seeing the villagers he placed down a *rungu* which he was carrying; that the *rungu* was identified to belong to the deceased; that when he was arrested by the

villagers, the 1st accused told them that the deceased was murdered by the 2nd accused person and another man by the name Wanyonyi. On the 1st February, 2007,

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P.W.7 Parken Ole Tobon arrested the 2nd accused.

Since there was no eye witness, the evidence summarized in the foregoing paragraphs constitute circumstantial evidence against the accused persons. It is now settled that an accused person will be convicted on circumstantial evidence if that evidence irresistibly points to the guilt of the accused person to the exclusion of any other person and only if there are no co-existing circumstances or factors that may weaken or destroy the inference of accused persons' guilt. See **Republic Vs. Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Musoke Vs. Republic** (1958) EA 715. Does the evidence point exclusively and irresistibly to the guilt of the accused persons?

The allegation that the father of the accused persons issued a threat to harm the deceased does not amount to a dying declaration as it was not made by the deceased when he was in immediate expectation of death in terms of **Section 33(a)** of the **Evidence Act**. see also **Kimeu Vs. Republic** (2002) 1KLR 756. On the issue of the *rungu* there was no conclusive evidence that the *rungu* in question indeed belonged to the deceased as it did not have any unique marks. The blood stains on the *rungu* and on the 1st accused person's clothes were not subjected to any forensic analysis to link the blood to the deceased. After all the 1st accused and his father were slaughtering a sheep and the blood may have emanated from the sheep.

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The evidence of Yenke that the accused father had confided in him that three people would be killed does not at all relate to this matter as only one person was found murdered. After all the father of the accused persons was not charged or called as a witness, even though unlike Wanyonyi he was available.

The 2nd accused was arrested merely because he had been mentioned by the 1st accused. That is not sufficient evidence. I come to the conclusion that the circumstantial evidence presented by the prosecution is below the threshold of *prima facie* case. It does not point to the accused persons to the exclusion of others as the person who committed the murder of the deceased person. The deceased was a night watchman in town and any other person may have inflicted the fatal injuries.

Secondly, medical evidence was not called to establish the actual cause of death. It is a cardinal requirement in a case of murder that the immediate cause of death be established by medical evidence.

The Court of Appeal in **Ndungu Vs. Republic** (1985) KLR 487 at page 492 explained that:

“Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post mortem report would not necessarily be fatal. But even in such cases

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medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the cause of the death in the circumstances relied on by the prosecution.”

For these reasons, I find that the case against the accused persons is not such that a conviction can be found if the accused persons were to elect to say nothing in rebuttal.

The accused persons are acquitted of the charge of murder and shall be set at liberty forthwith unless they are held for any lawful cause.

Dated, Signed and Delivered at Nakuru this 7th day May, 2010.

W. OUKO

JUDGE