

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 116 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KIMIYA MWANIKI.....ACCUSED

RULING

I have now had the benefit of reviewing the prosecution evidence in this matter. I have also considered carefully the submissions by Mr. Karanja learned counsel for the accused herein along with those of Mr. Nyakundi, learned State Counsel.

Indeed as Sir Newham Worley P said in the old case of **RAMANLAL T. BHAT vs. R [1957] E.A. 332,**

"the court is not required at this 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 had been heard."

The expression, "*prima facie*" evidence, in its literal sense is used to mean on the threshold, proof of an issue, the burden of proving which is upon the party giving that evidence, and which in the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving such evidence discharges his onus.

In this case, the prosecution's primary case is that the accused herein was known to PW2 or PW2 knew him before, and recognized him armed with a rifle, and even shot at PW2 twice and missed him. Ordinarily civilians do not walk around with guns unless they are licensed to carry them. I agree with the submission by Mr. Nyakundi, learned State Counsel the fact that the accused was armed with a gun is sufficient testimony that the attack on the deceased, and the survivors, was planned. There is evidence that the accused was among the persons who designed the attack and executed it.

There is evidence that the accused and the other raiders had a common intention to carry out the attack although nobody saw him kill the three deceased an adult and two children.

For those reasons, I find that the accused has a case to answer, and is reminded of his statutory rights under Section 306(2) of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*) to address the court (*through his Advocate as he is represented by counsel*), to give evidence on his own behalf, or to make an unsworn statement and to call witnesses in his defence, and of his intention to call such witnesses.

Dated, delivered and signed at Nakuru this 29th day of October 2010

M. J. ANYARA EMUKULE
JUDGE