

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 43 of 2004

REPUBLICPROSECUTOR

VERSUS

BERNARD OKELLO JUMAACCUSED

R U L I N G

Bernard Okello Juma is before this court duly charged with the offence of murder contrary to Section 203 as read together with Section 204 of the penal code. The particulars contained in the information are that on the 21st day of August 1999 at about 4.00 p.m. at Mrima Village, Likoni Location in Mombasa District within Coast Province jointly with another not before court murdered Kamene Milu, the deceased.

The prosecution tendered the evidence of three witnesses before being forced to close its case prematurely when this court refused an application for an adjournment. The learned Senior State Counsel and Mr. Abubakar, learned advocate for the accused did not submit under section 306 of the Criminal Procedure Court.

This court proceeded to consider the testimonies of the three witnesses to determine whether or not the prosecution had established a prima facie case. It is the evidence of David Maina Karanja (P.W.1) that on 21st August 1999 at about 4.00 p.m. he found two men standing next to their disused kitchen. He peeped through and saw one of them lying on top of a girl as though they were having sexual intercourse. He said he knew those who stood outside the house by face. P.W.1 claimed he knew one of them by the name Bernard. P.W.1 rushed to inform his brother what he had witnessed. When they came back they found the girl alone lying naked and unconscious. A report was booked at Likoni Police Station. Oscar Nyamai Masua (P.W.2) learned of the deceased's ordeal from his neighbour called Kamende. The deceased was his niece and thereafter he informed his sister, Josephine Mwinzi (P.W.3). P.w.2 and P.W.3 visited the scene where they saw the deceased's body. The police took the body for preservation. The duo (P.W.1 and P.W.2) identified the body before the autopsy was performed. Under Section 306 of the Criminal Procedure Code, this court is enjoined to rule whether or not the prosecution have established a prima facie case. In the case of **Ramadhan Bhatt vs= R [1957] E.A. 334** the court of Appeal for **Eastern Africa** defined the meaning of a prima facie case as follows:-

“It may not be easy to define what is meant by a prima facie case, but at least it must mean 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.”

In order for the offence of murder to be established, two elements must be established namely *actus reus* (prohibited) and *mensreas* (malice aforethought). Can the evidence tendered by the prosecution sustain a conviction if the accused chose to keep quiet? My answer to this question is in the negative. There is no proof as to who killed the deceased. It is possible that the deceased was killed by the accused because he was found at the scene of crime by P.W.1. Unfortunately there is no evidence in form of a post mortem report to establish when the deceased died and as to what caused the deceased's death.

Having come to the above conclusion. I am of the firm view that the accused should not be placed on his defence. I find the accused not guilty of the offence of murder. I acquit him. He should forthwith be

released from custody unless lawfully held.

Dated and delivered at Mombasa this 31st day of July 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Monda for the State and

N/A for Mr. Abubakar for the accused.