

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Case 53 of 2003

REPUBLIC PROSECUTOR

V E R S U S

JUSTUS ONYINO MAKANGA ACCUSED

R U L I N G

The accused, JUSTUS ONYINO MAKANGA, was charged with murder contrary to *section 203* as read with *section 204* of the Penal Code. The particulars of the charge were that:-

“On the 29th day of November, 2001, at Emusaba village, Shiraha Sub-location, Marama North Location, in Butere/Mumias District, within the Western Province, murdered SOSPETER MUSALA OKANGA.”

The accused pleaded not guilty. The hearing commenced before me on 12.10.2004 and went on up to 23.11.2006 when the State closed the prosecution case.

A total of six prosecution witnesses gave evidence. **Dickson Makanga Kuto**, the uncle of Sospeter Musela Okanga, the deceased, testified as **PW1**. In his evidence in cross-examination, PW1 told the court that he did not see who hit the deceased. In his evidence, **Joseph Mwai Opati**, **PW2**, told the court that what he told the court was what he had been told and was therefore not an eye witness this “evidence” was hearsay. **Florence Achieng Otanga**, the mother of the deceased was **PW3**. She did not witness the incident in which her son, the deceased, was killed. She suspected the accused because the latter was the person who had been with the deceased prior to his death.

In his evidence, PW4, Priscilla Dickson Makanga, told the court that she saw the accused screaming saying that he had killed the deceased but she had not seen the accused hit the deceased. The brother of the accused, one Philip Akhonya Makanga, gave evidence as PW5. He testified that on 29.11.2001 at 8.30 P.M., he was with the deceased. When they got home (from work) they found the accused and his wife one Damaris Ambase sitting in the house. Sospeter, he said, hit the accused. He also knocked off the lump which went off. The accused rose and got hold of an object which PW5 did not know what it was, and hit the deceased with it. It was already dark and PW5 could not see the object as the lump had gone off. The deceased fell near the door of the room without screaming.

PW5 went and called the deceased’s parents. In cross-examination, PW5 told the court that when he and the deceased got home, they were both very drunk having taken changaa. He said he saw the deceased slap the accused in front of the latter’s wife and that he saw the deceased put off the lump. The fight that ensued between the accused and deceased was in darkness.

In his evidence, Daniel Amukowa (PW6), a Pastor, told the court that the accused was his brother. He did not witness the incident in which the deceased was injured. The prosecution closed its case after this witness.

Should the accused be put on his defence? If there is a prima facie case made out against him, he should be put on his defence. If there is not, then he is entitled to an acquittal. To put an accused person on his defence when there is no prima facie made out against him is to shift the burden of proof. The law requires that the burden rests on the prosecution throughout. If after the prosecution closes its case no prima facie case has been made out, the accused person cannot be called upon to fill in the gaps or to

explain his innocence. He is presumed innocent and if the prosecution has failed to adduce sufficient evidence to establish a prima facie case, the accused cannot be called upon to explain his innocence.

The evidence of PW3, PW4, PW5 and that PW1 clearly show that there was a fight between the deceased and the accused in which the deceased may have been injured. The prosecution did not adduce medical evidence to whether the deceased's cause of death. In absence of such medical evidence, the cause of the death remains unknown. This was fatal on the prosecution's case. The investigating officer in this case was not called to testify either. In the circumstances of this case, the court cannot put the accused on his defence without shifting the burden not least because no prima facie case has been made out. In the result, I have no alternative but to acquit the accused on this ground. Unless otherwise lawfully held, the accused shall be released and set free forthwith.

This is a case in which the police have shown remarkable tardiness. They were reluctant to offer evidence with the result that the deceased's death cannot be attributed to the accused's actions. This laxity must be stemmed otherwise the public will lose confidence in the law enforcement machinery. All too often the so called mob justice which is the law of the jungle results due to loss of public confidence in the enforcement of the law. We must not allow the law of the jungle to set in. And the only way to do this is build public confidence in the criminal justice system. This case is yet another indictment on the part of the police who failed to pull up their socks to collect and furnish evidence to enable the court determine who the murderer of the deceased was or were.

Dated at Kakamega this 17th day of May, 2007

G. B. M. KARIUKI

J U D G E