



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 8 of 2006

REPUBLIC APPELLANT

VERSUS

PRISCILLA KANARIO & 4 OTHERS RESPONDENT

RULING

The accused persons, Priscilla Kanario, (1st accused) Peter Kiruku Mate(the 2nd accused), Samwel Kithure Ndegwa the(3rd accused), Henry Matumbi Mworira alias Mwanaume (the 4th accused) and Jackson Kailikia (the 5th accused) are jointly charged that on the 11th February, 2006 at Kangeta Location they jointly murdered Zakayo Michubu Kaumbuthu(the deceased).

The evidence adduced by the prosecution witnesses before the State closed its case was to the effect that on the fateful morning at about 7am PW2, Julius Bariu met with three people walking uphill, two of whom were carrying a person lying on a sack.

Of the three he recognized only the 2nd accused. When he sought from them what the problem he was asked to mind his own business. He did so and concluded that they were drunk.

PW3 – David N’toithia Mworeria was on his way to his shamba at about 7am on the day in question when he saw 5 people, one lady and 4 men. They were carrying a person. Of the five PW2 was able to recognize 3, namely 1st accused, 2nd accused and 4th accused.

He followed the five. When he got to where the body was he identified the body as that of the deceased. Then there was the evidence of PW4, Julius Muto who also saw the five people at about 7am as he bought milk and sugar at a kiosk. He was able to identify four of the 5, namely, 1st, 2nd, 4th and 5th accused persons.

Dr. Mutha Titus Kiriinya performed post mortem examination and noted blood oozing from the deceased person’s nose and ears. There were frictional burns on the right forearm. He observed a fracture of the rib, scalp, haematoma fracture of the skull. He formed the opinion that the death of the deceased was probably caused by haemorrhagic shock due to head injuries.

It is a cardinal rule of criminal law that the onus of proving a case against a suspect is on the prosecution. The burden is discharged if the prosecution is able to prove the guilt of the suspect beyond any reasonable doubt.

However, where only the prosecution has tendered evidence, Section 306 of the Criminal Procedure Code, enjoins the High Court to consider at this stage whether or not there is evidence that the accused persons or any one of them committed the offence. If the court is convinced that the evidence adduced does not implicate the accused persons or any of them they or he will be set free after the court has recorded a finding of not guilty. That is the stage this trial has reached.

At this stage the court is mainly concerned with whether or not the evidence discloses a *prima facie* case. What constitutes a *prima facie* case was extensively explored in the celebrated case of Ramanlal Trabaklal Bhatt V R (1975) EA 332 at 334-335 where the law was stated as follows;

“Remembering that the legal *onus* is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out, if at the close of the prosecution, the case is merely one:-

“Which on full consideration might possibly be thought sufficient to sustain a conviction”

This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is;-

“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”

A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson J, said, that the court is not required at that 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 has been heard. 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 the evidence could convict if no explanation is offered by the defence”

In other words a *prima facie* case is made against an accused person if the evidence adduced by the prosecution witnesses is sufficient to found a conviction if the accused offers no evidence in rebuttal.

In the trial before me all the eye witnesses confirmed having seen the 1st, 2nd, 4th, and 5th accused persons carrying the deceased. There was no evidence as what role the 3rd accused person played with regard to the deceased person. Asking him to defend himself will be tantamount to asking him to fill the gaps left in the prosecution case. The evidence on record cannot be a basis for a conviction should the 3rd accused person elect not to defend himself.

For this reason, I make a finding that the 3rd accused, Samwel Kathure Ndegwa, is not guilty and order that he shall be set free forthwith unless he is otherwise lawfully held. I find however, that a *prima facie* case has been established against the 1st, 2nd, 4th and 5th accused persons to warrant the court to require them to make their defence.

Orders accordingly.

DATED AND DELIVERED AT MERU THIS 22ND DAY OF JUNE, 2007

W. OUKO

JUDGE