



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Case 9 of 2001

REPUBLIC PROSECUTOR

- V E R S U S -

CHONDA MWERO 1ST ACCUSED

NDILO MWERO 2ND ACCUSED

RULING

CHONDA MWERO and NDILO MWERO the Accused persons in this case are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 2nd day of November 1999 at about 1.30 p.m. at Peturani Village, Mwereni Location in Kwale District within Coast Province the two jointly murdered **JUMA NGOKA**.

After calling 6 witnesses the prosecution closed its case. The defence then submitted that the prosecution has not made out a prima facie case to require the Accused persons to be put on their defence. The defence counsel argued that apart from the fact that the cause of the deceased's death has not been established, the pathologist who performed the autopsy having not been called there is no evidence linking the Accused persons with the death of the deceased. Counsel added that PW1, PW2 and PW3 contradicted themselves.

Regarding the autopsy Mr. Kamoti for the second Accused, whose submissions Mr. Gekonde for the first Accused associated himself with, cited the Court of Appeal decision in **Kinshanto Ole Siololo -Vs- Republic, Criminal Appeal No. 7 of 1995** and submitted that failure to produce medical evidence to establish the cause of death is fatal to the prosecution case.

On his part Mr. Monda for the prosecution submitted that the prosecution had made out a prima facie case against both the Accused persons to require them being put on their defence. He said that the Accused persons were with the deceased shortly before he was found lying down with cut wounds on the head and that the Accused persons were seen running away. He contended that medical evidence should be regarded like any other evidence. In this case there is evidence that the Accused persons killed the deceased.

It is trite law that at the close of the prosecution case if there is no evidence upon which the court can base a conviction if the Accused opts to say nothing as he is entitled to do then he should be acquitted. That was made abundantly clear in the old case of **Ramanlal Bhatt -Vs- R [1957] E.A 332** in which it was stated:

“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.”

This authority has been followed in several subsequent cases including **Criminal Appeal No. 77 of 2006 Anthony Njue Njeru -Vs- Republic (CA)**.

In this case is there evidence upon which the Accused persons can be convicted if they opted to say nothing?

To start with there is no medical evidence as to the cause of the deceased’s death. In such a situation except in obvious cases like where the accused has decapitated the deceased’s head medical evidence as to the cause of his death is crucial. The Court of Appeal had this to say on the point in **Kinshanto Ole Silolo –Vs- Republic Criminal Appeal No.70 of 1995**.

“No doubt as the learned trial judge observed in his judgments, expert evidence is not necessarily binding on the court. However, in cases of culpable homicide where a dead person’s cause of death is crucial to the conviction of an accused person... medical evidence in that regard is necessary. It is only when such cause of death is so patently obvious, as where such a deceased person’s head had been decapitated, that medical evidence as to his cause of death in a criminal proceeding may not be necessary, although in all criminal proceedings relating to culpable homicide, it is always prudent to tender medical evidence as to the deceased’s cause of death unless such evidence is unavailable.”

In that case there was evidence that the accused and the deceased had quarrelled and were seen fighting and the deceased’s body was found the following day at the scene of fighting.

In this case apart from there being no obvious evidence as to the cause of the deceased’s death, the deceased’s head having not been decapitated, the Accused’s involvement in the deceased’s death is in doubt. The evidence of PW1 and PW2 who claim they saw the Accused persons cutting the deceased with pangas is not only contradictory but is itself accomplice evidence. The two were suspected of having murdered their father (the deceased) and were kept in police cells for three days. According to PW2 while they were in their mother’s house they heard their mother scream outside. On going out he saw the two accused persons cutting their father. But when cross examined by Mr. Kamoti for the second Accused who referred the witness to the statement he had given to the police he changed the story and said he did not see the cutting. He only saw the two Accused’s backs as they ran away. PW6, the deceased’s daughter-in-law said in examination in chief that she was outside her mother-in-laws’ house and saw Accused 1 cut the deceased. In cross-examination she also changed her story and said she was in the house and that when she came out she found the deceased lying down with cut wounds. The

deceased's wife Mbeyu who was said to have witnessed the murder and had screamed was not called.

The evidence on record cannot convict any of the Accused persons and I therefore find that the prosecution has not made out a prima facie case to require the Accused persons to defend themselves. I accordingly acquit them of the charge against them and order that they be set free forthwith unless otherwise lawfully held.

DATED and delivered this 25th day of July 2007.

D.K. MARAGA

JUDGE