

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 54 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

BAINITO ONYANCHI ALIAS ODIPO.....ACCUSED

RULING

The accused, Bainito Onyanchi alias Odipo was charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on the 10th of December 1999 at Mutirithia village in Nakuru District, the accused murdered Nyambura Kamau (*hereinafter referred to as the deceased*). When the accused was arraigned before court, he pleaded not guilty to the charge. At the hearing of the case, the prosecution called one witness in its bid to establish the murder charge against the accused. The prosecution were however not able to avail other witnesses in spite of being given several adjournments by this court.

On the 21st of February 2006, Mr. Gumo the Assistant Deputy Public Prosecutor pleaded with the court to grant the prosecution one last time to avail witnesses. This court granted the prosecution a last adjournment and fixed the hearing of the case on the 25th of May 2006. On the said date, the prosecution again failed to avail witnesses and their application for adjournment was rejected by this court. Mr. Koech, learned state counsel who was then appearing for the prosecution told this court that he did not have any evidence to offer and closed the prosecution's case. This is therefore a ruling of this court based on the evidence that had been adduced by the single witness availed by the prosecution.

PW1 Muthee Wa Njoroge testified that on the 11th of December 1999, he was at his house at Molo at 8.30 p.m. He had just arrived home after tracing his cow and its calf that had escaped from the cow shed. While in the house, two people entered his house. One was a woman and the other was a man. He testified that he knew the man by name. He is the accused person in this case. He however did not know the name of the lady although he knew her by appearance. He testified that the two of them started fighting inside the house and after a while the two of them fell to the ground. PW1 recalled that he was able to see what was happening because he had put on a lamp. He testified that when he saw the two fighting, he picked a stick and hit the accused twice on the head after which the accused pulled the woman from the house of PW1 and went outside with her.

At the time the incident was taking place, PW1 was with his wife in the house. After the incident he ate supper and then slept. On the following day, at about 7.00 a.m. he found the woman who was fighting with the deceased lying naked near his well which was behind his house. He saw that the throat of the woman had been cut. Her abdomen had also been cut from the navel to the chest. He realised that the woman was already dead. The woman is the deceased in this case. PW1 informed his employer one Wanjiru who made a report to the police. The police arrived at the scene, collected the body of the deceased and commenced investigations. PW1 testified that he was arrested by the police and detained for nine months after which he was released. He recalled that when he saw the deceased with the accused on the material night, the deceased was fully clothed but when he saw her in the morning, she was naked. He reiterated that when the accused and the deceased entered his house, they were wrestling each other on the floor.

He further testified that he did not follow the accused and the deceased when they went out of his house. He recalled that when the accused and the deceased were struggling on the floor of his house, they were not making any noise. He testified that when he hit the accused on the head with the stick, the accused took the woman with him when he went out of the house. He recalled that when he woke up the following day, he found that the deceased had been killed near a well which was at the rear of his house. He admitted that some of the clothes of the deceased including her petticoat and underpants were found inside his house. He also admitted that there was a trail of blood from his house to where the body of the deceased was found. He conceded that the clothes of the deceased were found on top of the cupboard in his house. He however reiterated that when he woke up in the morning he was not aware that there was blood in his house. He testified that when the accused and the deceased burst into his house, his wife was already asleep and therefore did not witness the fight between the accused and the deceased. He testified that after being detained by the police, he was released without being charged because it was established that he had not been involved in the death of the deceased.

As stated earlier in this ruling, the testimony of PW1, is the only evidence that the prosecution adduced in this case. The said evidence apart from pointing to the fact that the deceased was seen with the accused on the night before the day she was found to have been killed outside the house of PW1, does not establish that it was the accused who killed the deceased. Further, there is no evidence that the deceased in this case actually died. No post-mortem report was produced. There is no evidence that the case was investigated to establish that it was the accused who killed the deceased. The prosecution were given several adjournments by this court to enable them produce the witnesses in order to establish the guilt or innocence of the accused. Unfortunately, the more adjournments this court granted, the more the prosecution failed to produce witnesses in court. In the circumstances of this case, it is clear that the prosecution could not avail witnesses to establish its case on the charge of murder against the accused.

In the circumstances therefore, this court has not alternative but to find that on the evidence adduced by the prosecution, the guilt of the accused has not been established. The said evidence adduced is scanty and does not connect the accused with the death of the deceased. The prosecution therefore failed to establish a prima facie case that would enable this court put the accused on his defence. The prosecution adduced no evidence sufficient to establish the guilt of the accused.

The accused is therefore acquitted on the charge of murder. He is ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 23rd day of June 2006.

L. KIMARU

JUDGE