



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

**Criminal Case 48 of 2003**

**REPUBLIC ..... PROSECUTOR**

**V E R S U S**

**ANDREW MAYINDU .....ACCUSED**

**R U L I N G**

There is no doubt the deceased, Joseph Indiri Makutwa, was murdered on 20-5-2003 in Ebusungwe Sub-Location in Vihiga District. His body was found in a maize plantation about 50 metres from the homestead of PW1, James Ambovi, by unnamed boy on the night of 20<sup>th</sup> May 2003 who informed PW1, James Ambovi, about it. The latter, in company of his father-in-law, Wilber Asitiega Ongaya, went to the maize plantation and found the body of the deceased. There was moonlight. The deceased had cuts all over the body. He spoke in luhya and said “*people have killed me.*” He did not name anyone. PW1 told the court that he did not know the deceased but PW2 knew him and called him by name. On his part PW2 did not in his evidence acknowledge that he knew the deceased or that he called him by his name. But it was PW1 and PW2 who moved the deceased near the house of PW2 where he remained throughout the night. He succumbed to the injuries at 6.00 a.m.

Both PW1 and PW2 told the court they had heard commotion outside their homestead on the night of 20<sup>th</sup> May 2003 but on checking, neither found anybody. Inspector Onyango of Scenes of Crime and his team and Corp. Daniel Otieno were dispatched to the scene at Ebusalasi village in the homestead of the father of the deceased. They found the body outside the house with cut wounds on the legs and head.

PW2 told the court that in his homestead at Esierambatsi village stood three houses, that is to say, his own, and that of his son-in-law, PW1, and the other for his daughter. It was PW2 who reported the matter to the village elder and the two reported the matter to the Chief of the area, one David Onyino Ngati, PW3, who in turn reported to the police.

In his evidence, PW3 told the court that PW2 had told him that he had a burial meeting in his house following the death of his wife and that the persons playing drums and causing commotion on the night the deceased was killed were responsible for the death of his (PW2's) wife.

The accused is one of the ten persons arrested by the police following the police swoop. He was found in his grand father's house where it was said he had locked himself with others. One Joshua Makomere mentioned the accused as having been involved in the deceased's death. Although the name of the Accused was given to PW3 before the latter recorded his statement with the police, he did not mention this fact in the statement nor did he do so in his evidence-in-chief. Makomere had himself been arrested. He was in the team that was playing “*sikuti*” at the homestead of PW2.

Nothing turned on the evidence of the brother of the accused, Festus Omukhusia (PW5).

The body of the deceased, Joseph Indiri Makutwa, was identified by Fred Ayaboge Tsimboka (PW6) and the deceased's mother Elina Awundo at Vihiga Mbale Hospital to Dr. John Charles Asila Aswani who performed the postmortem on 23.5.2003 and produced as an exhibit the Postmortem report in court in which he stated the age of the deceased to have been 21 yrs at the time of death. He opined that the deceased died due to cardiac arrest caused by loss of blood on account of external bleeding. He observed that the deceased had multiple cut wounds on the left head, back of the head, on the left 4 fingers and right foot and left foot and left leg above the foot.

The case against the accused is based on circumstantial evidence. At this stage, the court is enjoined to decide whether the prosecution has established a prima facie case against the accused for the latter to be put on his defence. Section 306(1) of the Penal Code enjoins the court to acquit an accused person where at the end of the prosecution case, no prima facie case is made out. It was said in **R. v. Taylor Waver and Donovan (1928) 21 Cr. App. R.20** that “*circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.*”

The Prosecution ought to have established by evidence that the accused murdered or participated in the murder of the deceased. There is not a scintilla of evidence to show that the Accused murdered or participated in the murder. The *actus reus* is not there.

There was no evidence from the Investigating Officer to indicate why the accused was arrested save for the fact that an accomplice in the person who was a fellow suspect had mentioned the accused’s name. One is riled by the stark absence of evidence to justify the arrest. Suspicion alone is not sufficient ground for arresting a person. There must be evidence. To put an accused on his defence where a prima facie case has not been established against him is to shift the burden of proof. The Accused is under section 77(2) (a) of the Constitution of Kenya presumed innocent until proved guilty or until he/she has pleaded guilty. Where no prima facie case has been made out at the close of the prosecution case, an order to put the accused on his defence amounts to shifting the burden as it requires the accused to explain his innocence in his defence when no case in law exists against him.

In the instant case, the accused is entitled to an acquittal under section 306(1) of the Penal Code as no prima facie case has been made out against him. I accordingly record a finding of not guilty and order the acquittal of the accused. Unless otherwise lawfully held, the accused shall be released and set free forthwith.

*Delivered, dated and signed at Kakamega this 28<sup>th</sup> day of September, 2006.*

G. B. M. KARIUKI

J U D G E