

REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 17 OF 2004

REPUBLIC PROSECUTOR

V E R S U S

JOHNSON WATITI MUNYENDO ACCUSED

R U L I N G

The accused, *JOHNSON WATITI MUNYENDO*, was charged with the *felony of murder contrary to section 203 as read with section 204 of the Penal Code*. The particulars of the charge were that, on 17th January, 2004, at Malanga village, Kholera Sub-location, Matungu Location in Butere/Mumias District within Western Province the accused murdered *JOSHUA KALAMWANGA*. The accused pleaded not guilty to the charge on 21st June, 2004 and the case was set down for hearing on 13th and 14th June, 2005 but the hearing did not commence because the defence counsel did not turn up in court. Subsequently it was adjourned severally and was fixed for hearing on 4th and 5th December, 2006. When it came up for hearing on 4th December, 2006, the hearing was stood over to 5th December, 2006 when the State closed its case without adducing evidence.

Under section 306 (1) of the Criminal Procedure Code, a prosecution case is closed when the evidence of its witnesses has been concluded. If the court considers that no prima facie case has been made out to warrant the accused being put on his defence, the court acquits the accused on the ground that there is no case to answer. Where, however, the evidence establishes a prima facie case against the accused, the latter is put on his defence.

In the instant case, the prosecution did not call any witnesses or adduce any evidence against the accused who has been in remand from the year 2004 awaiting trial. There is simply no evidence of any kind against the accused. Should the court make a finding of no case to answer and acquit the accused? In the lower Bench, the subordinate courts are statutorily enjoined to acquit an accused person in criminal cases where a complainant with due notice fails to appear in court during the hearing of the case. In effect, the accused is acquitted due to lack of evidence. On this analogy it seems that the words “*when the evidence of the witnesses for the prosecution has been concluded*” in **section 306 (1) of the Criminal Procedure Code Cap 75 of the Laws of Kenya** must include the situation where the prosecution has closed its case without adducing evidence because the prosecution is then deemed to have adduced no evidence in support of the charge and the court is consequently enjoined to make and record a finding of not guilty. It was open to the prosecution to resort to **section 82 (1) of the Criminal Procedure Code** by entering *nolle prosequi* but it chose not to go that route. Granted, the accused has been in remand for about two years and it may not have reflected well on the Attorney General if **s. 82 (1) [supra]** was invoked.

Mr. Karuri, the learned State Counsel, stated to the court on 5.12.06 that the witnesses in the case herein have not been traced and that they appear to have been unwilling to testify. In the circumstances, the course taken by the prosecution seems to be the proper one.

In the result, it is my finding that there is no evidence whatsoever against the accused and I accordingly acquit him. Unless otherwise lawfully held, the accused shall be released and set free forthwith.

Dated at Kakamega this 7th day of December, 2006.

G. B. M. KARIUKI

J U D G E