

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL CASE 41 OF 2003

REPUBLIC PROSECUTOR

VS

PATRICK ETYANG MAKOKHA ACCUSED

RULING

The accused, Patrick Etyang Makokha is before this Court on information of the Attorney General dated 23rd October 2003, duly charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that on the 5th day of October 2003 at Lutonyi village-Kibingei Location in Bungoma district within western Province jointly with others not before the court murdered Timothy Wanjala Makanda.

When this case came up for hearing the prosecution tendered the evidence of two witnesses in support of the charge against the accused. The prosecution were forced to prematurely close its case when the learned principal State Counsel failed on several occasions to secure the attendance of the remaining witnesses. Both Mr. Ocharo for the accused and Mr Onderi for the prosecution were invited to submit under section 306 (1) of the Criminal Procedure Code. Mr. Ocharo submitted to the effect that the prosecution had not established a prima facie to warrant the accused being placed on his defence in view of the fact that the evidence presented do not establish malice aforethought on the part of the accused. It was also pointed out that there was no medical evidence to show the cause of the death of the deceased.

The Learned Principal State Counsel did not address this Court on the specific submissions raised by the defence save for the fact that it was argued that the evidence tendered by the two witnesses was enough to prove a prima facie case on the part of the prosecution.

Vincent Wanjala Makanga (P.W.1) in his evidence narrated how he received the news of the deceased's death from one Mary Wanyama. The deceased was P.W.1's son. He was not at the scene where the deceased was killed. The person who gave him the information was not called to testify. Hence the evidence of P.W.1 remains hearsay therefore worthless in evidence. Nelson Ambula (P.W2) told this court that on the material day, he attended a memorial ceremony of the deceased's uncle. He told this Court that the deceased and the accused were in the ceremony up-to 1.00 p.m when a dispute over a girl called Baby Metrine erupted. He told this Court that the accused and other five youths accused the deceased for snatching Baby Metrine from them. He said the youths started throwing stones at the house where the deceased and others sought refuge. He said it was dark and he did not know who among the youths was throwing the stones. He said the deceased was fatally injured when he came out of the house in the cover of darkness.

These were the only witnesses who testified in this case. I have considered the submissions made by the learned advocate for the accused and the learned Principal State Counsel. I have also considered the evidence tendered. It is clear that the ingredients constituting the offence of murder have not been established. The evidence tendered did not established the cause of death of the deceased. Malice aforethought was not proved. There was no prove of actus reus.

In the end I agree that the prosecution have not established a prima facie case to warrant the accused being placed on his defence. Consequently I find that there is no evidence that the accused committed the offence of murder. The accused is hereby acquitted. He is set free forthwith from custody unless lawfully held.

Dated and delivered this 28th Day of October 2005.

J. K. SERGON

JUDGE