

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA
Criminal Case 10 of 2002

REPUBLIC.....PROSECUTOR

VS

DERRICK WASWA KULOBAACCUSED

RULING

Derrick Waswa Kuloba, the accused herein, is before this Court on information of the Attorney General dated 23rd May 2002, duly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 21st day of January 2002 at Musaka Village in Bungoma District of the Western Province murdered Elizabeth Nafula Waswa.

At the close of the prosecution's case, a total of six prosecution witnesses had testified. Both the learned principal State Counsel and the Learned advocate for the accused tendered submissions under section 306 (1) of the Criminal Procedure code. In brief, the defence is of the view that the prosecution had not made out a prima facie case to warrant this court placing the accused on his defence on the ground that the cause of death was not proved. On his part, the learned principal State counsel argued to the effect that, though the prosecution did not establish the cause of death, it had established a prima facie case because there is no dispute that the deceased died. He was of the view that there was ample evidence which showed that the accused was involved in the deceased's murder. I have considered the evidence of all the six prosecution witnesses. It is clear that the prosecution's case heavily relied on circumstantial evidence. The only evidence which attempted to connect the deceased with the offence was that of Godfrey Simiyu Okumu (P.W.5). He said that he interrogated the accused and the accused confessed that he had picked a quarrel with his wife (deceased) on 21.1.2002 which resulted to a fight which led to the deceased's death. It is trite law that such confessions are inadmissible. Even if such evidence were admitted still the prosecution must discharge the burden of proving the cause of death. The prosecution must show that the accused had by acts or omission caused the death of the deceased. In this case it is conceded that the post mortem report was not produced as an exhibit in evidence. In the absence of the post mortem report then it is not proper to implicate the accused with the offence he is charged with. There is no nexus between the accused and the deceased's death save for the fact that there is a very strong suspicion that he played a role in causing the deceased's death. Even if the accused is placed on his defence, I do not think it will change the position because the burden of proof never shifts. The onus of the prosecution is to establish its case beyond reasonable doubt. The prosecution has miserably failed to discharge that burden. The evidence tendered is not enough to sustain a conviction.

In the end, I find that there is no evidence that the accused person committed the offence. He is acquitted. He should be set free forthwith from custody unless lawfully held. The assessors serving in this case are hereby ordered discharged. They may however be re-summoned to be selected to serve in other cases. They should also be paid today's allowances.

Dated and delivered this 25th day of November 2005.

J. K. SERGON

JUDGE