



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 20 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL ONYANGO AGEMBO.....ACCUSED

RULING

1. Daniel Onyango Agembo is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the 6th day of May, 2018, at Kabola sub location in Rachuonyo North Sub County within Homa Bay County, murdered Mary Danga Ousa.
3. The prosecution witnesses adduced evidence to the effect that the accused attacked the deceased when she raised an alarm while he was stealing their generator. This would appear to be mere speculation for no witness testified to have heard the deceased raise an alarm.
4. PW1, PW2, PW3 & PW4 in their evidence linked the accused to the offence due to the theft of a generator. None of them witnessed what befell the deceased.
5. We have evidence on record that the deceased could not walk unaided. There are therefore two possible scenarios. One, is that the accused attacked her so as to perpetrate the theft and the second is the possibly she fell on her own and the accused took advantage of stealing the generator. However, without evidence we may not know what transpired.
6. It would appear that the accused was suspected for he was found with a generator that he had stolen from the home where he had earlier been left with the deceased. There was good reason to suspect him therefore. However, suspicion alone however strong is worthless. The Court of Appeal in the case of **Sawe vs. Republic[2003] KLR 354**, the Court of Appeal held as follows:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

7. When can the prosecution be said to have established a *prima facie* case? In the **Black's Law Dictionary, 10th Edition** *prima facie case* is defined as follows:

***Prima facie case.* (1805) I. The establishment of a legally required rebuttable presumption. 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.**

8. The Court of appeal in the case of **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335**, defined *prima facie* case as follows:

It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

9. Article 50 (2) (i) of the Constitution of Kenya provides:

(2) Every accused person has the right to a fair trial, which includes the right—

(i) to remain silent, and not to testify during the proceedings;

In the instant case, if the accused person opts to exercise his constitutional right hereinabove stated, I cannot convict him based on the evidence on record. This therefore means that the prosecution has not established a prima facie case against him. I accordingly acquit him of the offence of murder under section 306 (1) of the Criminal Procedure Code. He is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE