

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 27 OF 2017

REPUBLIC..... PROSECUTOR

VERSUS

PIUS ONANG'Ó OCHIENG..... ACCUSED

RULING

1. Pius Onang'o Ochieng 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 night of 13th & 14th day of August, 2017 at Nyandiwa village in Suba sub County within Homa Bay County, jointly with others not before court murdered Odhiambo Daniel Achoko.
3. The evidence by the prosecution witnesses 1, 2, 3, 4, 5 & 6 did not link the accused to the offence. The only evidence that tended to implicate the accused to the offence is that of Chief Inspector Christopher Wesonga (PW7). He testified that he linked the accused to the offence due to Safaricom data that showed that the deceased and the wife of the accused were in communication. He also testified of information that there was a fight in the house of the accused on allegation that his wife had an affair with the deceased. This implicating evidence did not rise beyond hearsay. This will therefore mean that the accused was charged on mere suspicion. 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.

4. After considering the evidence on record, the question is whether the prosecution has established a *prima facie case* against the accused person. 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.**

5. 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.

6. 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 opts to exercise his constitutional right hereinabove stated, I cannot enter a conviction based on the evidence on record. This therefore means that the prosecution has failed to establish 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 6TH DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE