



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL CASE NO. 35 OF 2020

REPUBLIC..... PROSECUTOR

VERSUS

SIRIL COLLINS OTIENO.....1ST ACCUSED

GEORGE ODHIAMBO OBUYA2ND ACCUSED

RULING

1. Siril Collins Otiemo and George Odhiambo Obuya are 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 22nd day of August, 2020, at Misita village in Ndhwa Sub County within Homa Bay County, jointly with others murdered Irene Atieno.

3. Mariko Ogao (PW1), the husband of the deceased testified that after he had found his wife dead, he suspected the two accused persons. He said he had suspected the duo for they had had differences prior to this incident. While looking for his wife before he had discovered her body, he had met some five people but did not recognize any for it was dark.

4. Mariko Odiwuor Opiyo (PW2) testified that when he answered an alarm at about 8 p.m. he went with the two accused persons who were coming from the direction of the alarm. The two were just walking and he recognized them with the help of the moonlight. He however did not talk to them for Elisha Nyamasi had told him that he had taken Mariko Ogao (PW1) to the police.

5. The evidence of PW2 contradicted that of Mariko Ogao (PW1). Whereas PW1 said that it was a dark night and even with the help of the D-light lamp he had was unable to recognize any of the five people he met, PW2 testified that he was able to identify the two accused persons with the help of moonlight. It is curious why what Elisha Nyamasi allegedly told him affected his relationship with the accused persons just because he came from the same family with the accused persons. His evidence is suspect. The court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates makes it unsafe to accept his evidence.

Mariko Odiwuor Opiyo (PW2) is of the ilk described by the Court Appeal. He is unworthy of belief.

6. The suspicion that led the accused persons to be connected to the offence was not buttressed with any material evidence. 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 persons opt to exercise their constitutional right hereinabove stated, I cannot convict any one of them based on the evidence on record. This therefore means that the prosecution has not established a prima facie case against them. I accordingly acquit each one of them of the offence of murder under section 306 (1) of the Criminal Procedure Code. Each is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 16TH DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE