



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CRIMINAL CASE NO 18 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**1. JACOB ODHIAMBO AROKO.....1<sup>ST</sup> ACCUSED**

**2. KELVIN OCHIENG ODIKRE.....2<sup>ND</sup> ACCUSED**

**3. WYCLIFF ODHIAMBO OWUOR.....3<sup>RD</sup> ACCUSED**

**4. GEORGE OPIYO ODIKRE.....4<sup>th</sup> ACCUSED**

**RULING**

1. The accused persons were charged with the offense of murder contrary to section 203 as read with Section 204 of the Penal Code, the particulars of which were that, on the 23<sup>rd</sup> of January 2014 at **BIDII AREA** near **KAYOLE POLICE STATION** within **NAIROBI** County jointly murdered **JOHN OWICH ODIKRE**. They pleaded not guilty to the said charges before Korir J, on 25<sup>th</sup> February 2014. After several false starts at hearing, on 1<sup>st</sup> February 2016, their trial commenced before the said Judge who took the evidence of two witnesses before proceeding on transfer.

2. On 20<sup>th</sup> July 2017, directions were given under the provisions of section 200 and thereafter the cause proceeded for further hearing before me with the remaining twelve prosecution witnesses, at the end of which the parties made oral submissions on whether the prosecution had established a prima facie case to enable the court put the accused persons on their defense, the subject of this ruling.

**SUBMISSIONS.**

3. On behalf of the prosecution, Mr. Okeyo submitted that prima facie case was established through the oral testimony of the thirteen witnesses and documentary evidence tendered. It was stated that the fact and cause of death was established by Dr. Oduor as stab wound to the neck, which was not a natural death. It was contended that PW1, 2, 3, 4 and 13 directly linked the accused persons to the death. It was PW13's evidence that prior to the death of the deceased ,the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> accused were seen armed with a knife that had been bought whose purpose was not explained even after he inquired. The following day, the body of the deceased was recovered.

4. He submitted that the accused person's behavior thereafter was very unusual, they did not join the clan members in fundraising for the funeral of the deceased and the 2<sup>nd</sup> accused moved from his Kayole residence to Kibera, confirming that he was the mastermind of the killing, having been financed by 4<sup>th</sup> accused from their rural home, who after the murder, ran away from home. It was submitted that all the accused persons were linked to the murder through the evidence tendered.

5. It was submitted that malice aforethought was established through the evidence which showed that there was animosity between the accused persons and the deceased over the inheritance of their father's land and that is why the 2<sup>nd</sup> and 4<sup>th</sup> accused who were the Brothers of the deceased planned to eliminate him so as to get access to the said land. It was contended that the said planning proved malice aforethought. It was submitted that prima facie case was therefore established.

6. On behalf of the accused persons, Mr. Odero, submitted that there was no evidence tendered to show that the 4<sup>th</sup> accused had sent money for the purpose of killing the deceased. It was stated that PW1 the wife of the deceased confirmed that the same had established a home in his

father's land and that it was the 4<sup>th</sup> accused who had invited the deceased and helped him establish mandazi business in the city. It was contended that there was no evidence linking the accused persons to the murder of the deceased and that mere suspicion cannot form a basis for conviction in a criminal trial for which the case of **MOSES LIPAA SAWALA AND 3 OTHERS VS REPUBLIC [2009] eKLR** was tendered in support.

7. It was submitted further that an alleged confession of the 1<sup>st</sup> Accused which linked the 2<sup>nd</sup> and 3<sup>rd</sup> accused with the offense was rejected by the court and that PW3 the prosecution star witness only testified under warrant of arrest and was at the material time in possession of the deceased mobile phone which he used to communicate with people on allegation that it had been given to him by the police but no inventory was produced of the items recovered from the deceased. It was therefore submitted that PW13 got the phone from the deceased and was aware of how the same died, which accounts for why he had been hiding while the accused persons have been in custody.

8. It was contended that the investigator did not assist the court, the mobile phone of the deceased was allegedly given to PW13 without being analyzed, and neither did they produce the mpesa records of the 4<sup>th</sup> accused to show that he has sent money. It was therefore submitted that no prime facie case was established as stated in the case of **RAMANLAL T. BHATT v REPUBLIC [1957] EA333** which requires that based on the evidence tendered, should the accused persons opt not to say something they can still be convicted.

#### **DETERMINATION.**

9. To sustain a conviction on a charge of murder, the prosecution is under both legal and evidentiary obligation to prove beyond any reasonable doubt, the fact and the cause of death of the deceased, that the said death was caused by an unlawful act of omission on the part of the accused persons with malice afore thought.

10. At this stage of the proceedings all that the prosecution is required to do, is to establish a prima facie case as was stated in the case of **BHATT v. REPUBLIC [supra]** as follows;

**“All the court has to decide at the closed of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether . If believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in boarder line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be sufficient to sustain a conviction”.**

11. Justice J.B. OJWANG as he then was in the case of **REPUBLIC V. SAMUEL KARANJA KIRIA CR.CASE NO.13 of 2004** quoted with approval by this court in the case of **REPUBLIC V. DAVID MWANGI GITHAMBU [2020] eKLR** stated that a detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused on his defense as too much details in the Trial court's ruling could compromise the evidentiary quality of the dense to be mounted.

12. With the injunction of Justice Ojwang in mind, the fact and cause of the deceased not being in dispute, having looked at the evidence of **PW13 BRIAN OTIENO**, Who was living and engaging in the same trade with the 1<sup>st</sup>, 2<sup>nd</sup> accused and the deceased and who put them together on the material night, PW2, PW6, PW9, PW10 and PW12 all who tendered evidence on the motive of the offence as corroborated by the evidence of PW8 the Investigating Officer and without saying too much thereon, I am satisfied that the prosecution has established prima facie case as required under the provisions of Section 306 of the Criminal Procedure Code to enable me put all the accused persons on their defense which I hereby do.

13. Being a live to the constitutional rights of the accused persons under article 50(2) (I) and (k) the accused persons may now through the advised of their Advocate on record chose how the wish to defend themselves. And it is ordered.

**Dated, signed and Delivered at Nairobi this 21<sup>st</sup> day of May, 2020 through Google Teams.**

**J. WAKIAGA.**

**JUDGE.**

**In the presence of:-**

Ms Onunga for the State

Mr. Odero the Accused

Accused present

Court assistant- Karwitha