



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL CASE NO. 27 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAVIOUR WASWA.....1<sup>ST</sup> ACCUSED**

**CHRISPINE WASIKE ALIAS FRIDAY.....2<sup>ND</sup> ACCUSED**

**RULING**

1. **Saviour Waswa** and **Chripine Wasike** alias **Friday** are charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that on the 24<sup>th</sup> day of October, 2017 at Changara area, in North Teso sub county of Busia County, they murdered James Otikir.

2. The facts of the prosecution case are that the deceased was last seen alive on 24<sup>th</sup> October 2017 in company of the two accused persons. The trio were partaking alcohol together and left after a quarrel. The following morning the deceased was found unconscious and passed away on the way to the hospital. The post mortem indicated that he died as a result of severe head injury.

3. In Black's Law Dictionary, 10<sup>th</sup> Edition, Prima facie case has been defined as follows:

***1. 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.***

4. The test as to whether a prima facie case has been established to warrant an accused to be called upon to tender his defence was prescribed in the case of

**Ramanlal Trambaklal Bhatt vs. Republic (1957) E.A. 332.** In the same case at 335 the court defined a prima facie case in the following terms:

***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.***

We can therefore deduce that if no conviction can be based from the evidence on record if an accused opts to exercise his Constitutional right to keep mum, then no prima facie case has been established.

5. The only evidence that linked the first accused to the offence is that of Francis Juma Makana (PW2) who testified that the first accused was in the bar where he was. When he (accused 1) went outside, he heard a voice say:

**"Leave me alone"**

He did not recognize this voice. He however changed during cross examination and attributed the voice to the deceased. The deceased was his nephew and since they came from the same area, he ought to have known his voice. This witness has credibility issues. He cannot be heard to say he did not recognize the voice but later change and claim that the voice was that of the deceased. In his statement to the police he indicated that the first accused beat the deceased on the shoulder but in his evidence in court he indicated that he (PW2) never left the bar.

The court of appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, 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 that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.***

This description fits this witness; he cannot be relied upon to tell the truth.

6. According to the evidence of Titus Walukusi Omondi (PW1), on 24<sup>th</sup> October 2017 at about 6 p.m., he was in the home of Boyi with the deceased where they were partaking Uganda Waragi. Chrispine Wasike alias Friday (accused2) went and called the deceased out and asked him for his radio. A struggle ensued over the radio and the duo walked away. However, during cross examination, he said it was an argument and not a struggle. This version differed from that of Titus Imo (PW3). In his evidence, he (PW3) said that in company of others who must have included PW1, they found the deceased and the second accused taking Uganda Waragi. The two had exhausted the stock and the deceased gave them what he had bought. The deceased and the second accused left without telling them where they were going. He testified that the deceased was drunk and that the two did not leave while quarreling. The evidence by these two witnesses cannot be reconciled.

7. Article 50(2) (i) of the Constitution of Kenya provides as follows:

***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 not to testify, I cannot convict either of them. This therefore means that the prosecution has not established a prima facie case against each accused.

8. I accordingly make a finding of not guilty and acquit each accused under section 306 (1) of the Criminal Procedure Code. Each is set at liberty unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 19<sup>th</sup> day of February, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**