



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 29 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

RONALD SONGA IMBUYE.....ACCUSED

R U L I N G

1. The accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 24th May 2012 at Kambi ya Mwanza Lubao area in Kakamega North District in Kakamega County jointly with others not before court murdered Fredrick Rotich Morogo (herein referred to as the deceased).

2. The prosecution called 3 witnesses in the case - Vincent PW1, Patrick PW2 and Janet PW3. Their evidence was that the deceased was a motor cycle (boda boda) operator at Lubao market. That on the material day at around 6.45 p.m. Vincent and Patrick were at Lubao stage when the accused went to the stage and hired the deceased to ferry him to Kambi. The accused left with the deceased on the deceased's motor cycle. On the following morning Vincent and Patrick received information that the deceased had been killed. They went and found the deceased's motorcycle at Malaba Police Station. They went to Kakamega County Hospital where they found the deceased's body at the hospital mortuary. It had a smash mark on the head.

3. On the 25/5/2012 the grandmother to the deceased PW3 went to Kakamega County Hospital mortuary and identified the body to a doctor who performed a postmortem on the body. However the doctor who did so did not testify in the case.

4. The three witnesses recorded statements at Malaba Police Station. The accused was apparently arrested and charged with the offence. The investigating officer did not testify in the case.

5. At the close of the case for the prosecution the advocate for the accused **Mr. Nandwa** submitted that the witnesses who testified in the case did not see the accused commit the offence. That they also did not properly identify the accused person as the person who boarded the deceased's motor cycle. That they did not know the accused well but that no identification parade was done.

Further that there was no proof of death as no postmortem report was produced in court. That the investigating officer did not testify and there is thereby no reason as to what necessitated the accused person to be charged with the offence before court. That there was no evidence that the accused is the one who caused the deceased's death. That there is no prima facie case established against the accused to require him to be placed to his defence.

The state did not make any submissions in the case.

6. A prima facie case, it has been held, means-

“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.

Vincent PW1 and Patrick PW2 allege that the accused is the person who went away with the deceased on the deceased's motor cycle. On the following day they found the body of the deceased at Kakamega County Hospital Mortuary with an injury mark on the head.

7. The doctor who conducted the post-mortem on the body of the deceased did not testify. In **Ndungu Vs Republic(19850 KLR** the court of Appeal held that:-

“ in some cases death can be established without medical evidence .Of course there are cases for example where the deceased person was stabbed through the heart or where the head is crushed , where the cause of death would be so obvious that the absence of a postmortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution....”

8. In the case under consideration the cause of death of the deceased was not obvious. In fact the cause of death is not known. It was important that the doctor who conducted the post- mortem testified in the case. Without the evidence of the doctor the cause of death of the deceased is not known. The non-production of the post mortem report was fatal to the prosecution case.

9. The prosecution is relying on circumstantial evidence that the accused was the last person to be seen with the deceased. In the case of **Kipkeri Arap Koske Vs Republic(1949) EACA** the court held that in order for a court to convict an accused person based solely on circumstantial evidence , the

- a. Inculpatory facts must be incompatible with the innocence of the accused.
- b. The facts must be capable of no other conclusion or explanation except the guilt of the accused.

10. Further in Simon Musoka vs Republic (1958) EA 915 at page 719 it was held that :-

“ It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co – existing circumstances which would weaken or destroy the inference.”

11. The witnesses who testified for the prosecution did not testify as to where the body was found. The investigating officer is the one who could have led the court to this kind of evidence but he did not testify in the case.

The prosecution did not thereby adduce evidence that ruled out any co – existing circumstances that weakened or destroyed the inference of guilt on the part of the accused.

12. The upshot is that the prosecution has not established that the accused was involved in the death of the deceased. If the accused opted to exercise his right to silence he cannot be convicted of the offence. I find that the prosecution has not established a prima facie case against the accused. The accused has no case to answer and is acquitted of the charge vide section 210 of the Criminal Procedure Code.

Delivered, dated and signed court at Kakamega this 4th day of April, 2019.

J. NJAGI

JUDGE

In the presence of

Mr. Athunga Holding Brief Nandwa.....for appellant

Mr. Jumafor state

Accusedpresent

Court Assistant.....George