

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

KEVIN OGOLLA ANYANGO.....ACCUSED

RULING

1. **Kevin Ogolla Anyango** 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 9th day of April 2016, at **Muyafwa** village, in **Nangoma** Location of **Busia** County, murdered **VTO**.
3. The test as to whether the prosecution has established a prima facie case was prescribed by the court of appeal in the case of **Ramanlal Trambaklal Bhatt vs. Republic (1957) E.A. 332** as follows:

It is 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.

In the instant case therefore, I will endeavour to find whether the evidence on record can be a basis for conviction if the accused opts to exercise his constitutional right as prescribed under Article 50 (2) (i) of the Constitution which states:

(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;

4. The evidence that tend to connect the accused to the offence is that of his wife and his mother. Linnet Lebushoi (PW1) is the wife of the accused. She testified that at about 9 p.m. on the material day, she ran into a bush and hid when the accused wanted to beat her. When she returned at about 10 p.m., she found her mother in-law carrying the deceased baby and informed her that she (the deceased) was sick. She assumed that the baby was sick from natural causes for she used to experience fainting episodes. However, later Sylvester Ouma (her brother in-law) informed her that it was the accused who hit the child with a stick. This evidence by the wife of the accused that implicated him to the offence was inadmissible hearsay for Sylvester Ouma was not called as a witness.

5. In her evidence, Annah Nabwire (PW6), testified that when PW1 ran away, she left the deceased with her. She (PW6) took the child to the accused. After a while, she heard the baby crying from outside where the accused had left her (the deceased). She picked her and took her to the house. When she collected the child, the latter was normal. Her daughter in-law collected the child from her and went away with her. She returned at about 11 p.m. crying and said the baby was dead. This evidence only raised suspicion of involvement by the accused. In the case of **Sawe vs. Republic [2003] KLR 354**, the Court of Appeal held inter alia:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

In the instant case, the suspicion introduced by the evidence of this witness is very weak and no guilt inference can be made from it.

6. From the foregoing analysis of the evidence on record, I find that the prosecution has not established a prima facie case against the accused. He is not guilty of the offence of murder. I accordingly acquit him of the offence of murder under section 306(1) of the Criminal Procedure Code and set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 6th day of May 2019

KIARIE WAWERU KIARIE

JUDGE