

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. 10 OF 2018

THE STATE.....PROSECUTOR

=VRS=

1. ENANI NYAMWANDA.....1ST ACCUSED

2. JOSHUA MOMANYI OGECHI.....2ND ACCUSED

3. DOUGLAS NYANGONGO.....3RD ACCUSED

RULING

The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the night of 8th and 9th June 2018 at Kenyoro Sub-location in Nyamira North Sub-county, Nyamira County they murdered Joshua Orang’o Gechiko.

They pleaded not guilty to the charge and the prosecution called seven (7) witnesses to prove its case. At this stage this court is required to determine whether there is evidence that the accused persons committed the offence – **See Section 306 (1) of the Criminal Procedure Code.**

Having considered the evidence in support of the charge carefully my finding is that the prosecution has not established a prima facie case against the accused persons sufficiently to warrant all or any of them to be put on their defence.

The Post mortem report produced by Dr. Onguti Hudson (Pw7) who performed the post mortem on the body of the deceased states that the cause of death was strangulation and blunt injury on the head leading to bleeding into the brain. No doubt the death of the deceased was the result of a human hand. It was also unlawful as it was not caused for lawful cause or at least no one claims it was. It is also clear from the doctor’s opinion that the killing was deliberate. The person who occasioned the trauma to the head and the strangulation clearly intended to kill the deceased. The ingredients of murder were therefore proved beyond reasonable doubt. What has not been proved at all is that it is the three accused persons who murdered the deceased.

The charge against them revolved around the evidence of Dickson Ondieki Nyagwencha. This is the witness who claimed to have been with the deceased and allegedly saw him being dragged to a tree by the accused persons. However, when considered closely his evidence was very inconsistent. He begun by giving evidence that was completely at variance with what he told the police. When prosecution Counsel Miss Okok applied to treat him as a hostile witness and to cross examine him, he admitted he had lied to the court and promised to tell the truth. Even then his testimony was that he and the deceased had gone to a chang’aa den to partake of chang’aa and that the deceased left when he was told that no more chang’aa would be sold to him. The witness, Dickson (Pw1) alleges to have left shortly afterwards. He stated that as he was leaving he met Momanyi (2nd accused) who demanded to know why he was leaving so early and who shoved him aside when he refused to go back to buy chang’aa for him (accused 2). The witness stated that after being shoved by the 2nd accused he heard three (3) people saying **“wacha kugonga mwingine”** meaning **“stop hitting another.”** He also allegedly heard the deceased saying **“mbona wewe unanigonga”** which translated means **“why have you hit me.”** He disputed that he saw the accused persons dragging the deceased and further stated that although he recognized the voices of the people who were speaking he could not tell who exactly uttered those words. It was also his evidence that he was so drunk that he could not make the trip to his home and he slept on the way. There are several reasons why this evidence is not credible. One is that the witness was very inconsistent and even admitted to lying to this court. His evidence was at variance with what he told the police and even in the witness box he kept changing his testimony. The first thing that one notices is that he could not and was not in a position to bring to his memory what transpired on that night. To begin with although he alleges to have been with Ateyi (Pw4), Ateyi vehemently denied they were together that night. Secondly the 2nd accused is exonerated by his own testimony. If the deceased and those men he alleges were the accused persons were speaking at the same time as his encounter with the 2nd accused, then at what point did he recognize his (2nd accused’s) voice as the one saying **“don’t hit another”**. The 2nd accused could not have been in two places at the same time. How can the testimony of one who was so drunk that he could not find his way home be trusted to convict the accused persons? My finding is that the evidence of this witness is not trustworthy. It is not credible either and cannot be relied upon to found a conviction against the accused persons. The investigating officer – Sgt. Baraza (Pw6) conceded that other than the evidence of this witness there was no other evidence to incriminate the accused persons. It is my finding that Dickson (Pw1) could not have identified or even recognized the deceased’s attackers in the condition/state of mind he was in. He had taken a lot of chang’aa to the extent that he could not go home.

The only other witness who gave evidence tending to the guilt of the accused persons was the deceased’s brother Alfred Ondieki (Pw5). He told this court that the 2nd and 3rd accused had threatened the deceased. His evidence was that the deceased had told him about the threats by

the 2nd accused and had reported threats by the 3rd accused to their mother. Their mother Dorika Bonareri Chakwa testified as Pw3. She did not mention any such threats reported to her by the deceased. The allegations by Pw5 are just that – allegation and while they may found a strong suspicion that the accused persons committed the offence they are not sufficient to found a conviction against them.

A prima facie case is established if a reasonable tribunal properly applying its mind to the evidence would convict the accused persons were they to remain silent when put on their defence. I am not satisfied that any reasonable tribunal would convict on the evidence before me. Accordingly, I find that there is no evidence that the accused persons committed this offence. I find them not guilty of the charge of murder and acquit them under Section 306 (1) of the Criminal Procedure Code. They shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in open court this 13th day of June 2019.

E. N. MAINA

JUDGE