



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL CASE NO. 17 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES WAKHUNGU RASTO Alias MUSUNGU.....1<sup>ST</sup> ACCUSED**

**KENNEDY WASWA SIFUNA Alias SHIDA.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The two accused are 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 night of 16/17<sup>th</sup> March, 2013 at Simuli Village Sirigoi Sub-location in Navakholo District within Kakamega County jointly with others not before court they murdered Paul Makokha Wekesa Alias Saulo (herein referred to as the deceased).
2. The case for the prosecution is that the accused and the deceased were co-villagers. The two accused are neighbours. That on the material day the deceased and his sister PW2 were working in a shamba near the homes of the accused. At 1 p.m. they were paid by the person who had employed them. They went to the home of the 1<sup>st</sup> accused to look for change. She left the deceased there and went for other work.
3. That on the same day at 6 p.m. the deceased left his home and told his wife PW4 that he was going to buy cigarettes at the house of the 1<sup>st</sup> accused. He did not go back home. That on the same day a neighbor PW3 left the deceased and other people drinking alcohol at the house of the 1<sup>st</sup> accused. On the following morning PW2, PW3 and PW4 received reports that the deceased had died. The area Assistant Chief PW1 also received the report. They found the body of the deceased outside his gate. It had panga cuts. They followed the flow of blood stains upto the gate of the 1<sup>st</sup> accused. They were referred to the home of the 2<sup>nd</sup> accused. They found the 2<sup>nd</sup> accused. His clothes had blood stains. They went to his house where they found a mattress and some children clothes with blood stains. Some other items in the house had blood stains. At the scene where the body was the head was found covered with a trouser of a small boy. The clothe was identified to belong to the son of the 2<sup>nd</sup> accused. Policemen were called. The two accused were arrested.
4. The police took the body to Kakamega Provincial General Hospital. On the 2/3/2013 Dr. Mchana PW5 conducted a postmortem on the body. He found it with 4 cut wounds on the top of the skull, right cheek, back of the skull and on the left side of the head. It had defence injuries on the upper limbs. Internally it had fracture of the skull where the wounds were. The doctor formed the opinion that the cause of death was due to sharp trauma following assault. The doctor completed the postmortem report. The two accused were charged with the offence. During the hearing the doctor PW5 produced the post mortem report as exhibit, P.Ex1. The policemen who visited the scene and the investigating officer did not turn up to testify in the case. The prosecution thereupon closed its case.
5. The court is now being called upon to determine as to whether the prosecution has established a *prima facie* case against the accused persons.
6. A *prima facie* case was described in the case of **Ramanlal Trambaklal Bhatt –Vs- Republic (1957) EA 332** as follows:-

***“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one***

***“which on full consideration might possibly be thought sufficient to sustain a conviction.”***

***This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case.***

*Nor can we agree that the question whether there is a case to answer depends only on whether there is*

*“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.”*

*A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie,” 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.”*

7. PW3 stated in his evidence that he left the deceased drinking alcohol at the house of the 1<sup>st</sup> accused. That there were other people such as Kevin and Isaya in the house of the 1<sup>st</sup> accused.

8. PW1, 2 and 3 stated that they followed blood flow from the deceased's gate to the house of the 1<sup>st</sup> accused. That they also found blood stains in the house of the 2<sup>nd</sup> accused and that his clothes were blood stained. That some clothes of his child were blood stained.

9. Going by the evidence of PW3 the accused are not the only persons who were in the company of the deceased on the night that he died. PW3 left the deceased and other people drinking alcohol in the house of the 1<sup>st</sup> accused. The people included Kevin and Isaya. He did not name the others that he left in the company of the deceased. He did not state how many they were.

10. The state is relying on circumstantial evidence to nail the accused. For evidence to qualify for circumstantial evidence it has to meet three tenets as was stated in the case of **Abanga Alias Onyango –Vs- Republic, Cr. Appeal No. 32 of 1990 (UR)**, that:-

*“1. The circumstances from which an interference of guilt is sought to be drawn, must be cogently and firmly established;*

*2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

*3. The circumstances taken circumstantively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”*

11. In **Republic –Vs- Kipkering Arap Koskei & Another 16 EACA 135** it was held that:-

*“In order to justify interference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”*

12. In this case the prosecution did not prove that the accused were the only people who were in the company of the deceased on the day he met his death. Though the clothes of the 2<sup>nd</sup> accused and items in his house were reported to have had blood stains they were not produced in court. There was no report tendered in court to prove that the said blood stains matched the blood of the deceased. The police who investigated the case do not seem to have recorded statements from the other people who were in the company of the deceased on the night he died. The evidence available does not point solely to the guilt of the accused persons.

13. In the foregoing I find that the prosecution has not established a *prima facie* case against the accused. It is for the prosecution to prove the charge against the accused beyond reasonable doubt and not for them to fill up the gaps left out by the prosecution. If the accused were to be placed to their defence and opted to exercise their right of remaining silent there is no evidence on which they can be convicted.

14. The upshot is that the accused have no case to answer and they are acquitted of the charge that they are facing under the provisions of Section 306 (1) of the Criminal Procedure Code.

**Delivered, dated and signed at Kakamega this 23<sup>rd</sup> day of July, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

No appearance for accused

Miss Omondi for state

Accused - present

Court Assistant - George

14 days right of appeal explained.