



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL CASE NO. 102 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**HENRY NYABUTO OGACHI.....1<sup>ST</sup> ACCUSED**

**THOMAS MATWETWE.....2<sup>ND</sup> ACCUSED**

**RULING ON A CASE TO ANSWER**

1. The accused persons herein **HENRY NYABUTO OGACHI** and **THOMAS MATWETWE OROKO** were jointly charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence were that on 11<sup>th</sup> November 2011 at Bosoti village, Bosoti Sub-location in Kenyena District within Kisii County, jointly with others not before the court, murdered **SAMUEL OYUNGA OGACHI**.

2. The prosecution's case was supported by the evidence of a total of 7 witnesses. A summary of the prosecution's case was that the deceased was on 11<sup>th</sup> November 2011 found murdered on a footpath next to his home.

3. PW1, Joseph Mosingi Nyagwando, PW2, Elijah Moganchi Oriko, PW3 Joyce Ayunga and PW4 Isaac Oroko Mecheo were the deceased's neighbours. They testified that on the material day at about 8.30p.m., they heard screams emanating from the direction of the deceased's home. They all arrived at the scene of the crime at different times and found the deceased lying dead on the footpath with a cut wound on his neck. They stated that there was a radio and a knife next to body of the deceased. They further stated that they did not witness the actual killing of the deceased as they arrived at the scene after the deceased had already died.

4. PW5, Samson Omwange, identified the body of the deceased before the post mortem examination was performed on it while PW6, Nailo Alenga was the clinician who performed the post mortem examination on the body of the deceased.

5. The investigating officer (PW7) did not testify in Court but his written statement was, by consent produced as evidence after which the prosecution closed its case and this court as at this stage tasked with the duty of determining whether or not a prima facie case has been established against the accused persons so as to warrant their being placed on their defence.

The answer to the question on whether or not a prima facie case has been established can be found in the oft cited case of **Ramanlal Trambaklal Bhatt -Vs- Republic (1957) E.A. 332** wherein the court held:

***"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not 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.***

***"(ii) The question whether there is a case to answer cannot depend 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."***

6. In the instant case, as I have already stated in this ruling, none of the prosecution witnesses who went to the scene of the murder tendered any evidence that even motley linked any of the accused person to murder of the deceased.

7. The only evidence that appeared to link the accused person to the said murder was in the written statement of CPL Anderson M. Ngua who stated that he arrested the duo on the fateful night because he found them a few meters from the scene of the murder where they had allegedly been rounded up and that the clothes of the accused persons had fresh blood stains whose origin they could not explain. The said blood-stained clothes were neither produced as exhibits in court nor were they subjected to experts analysis by the government chemists in order to establish firstly, if the alleged stains were human blood and secondly if the blood came from the body of the deceased.

8. I find that the statement by the investigating officer did not carry any weight in this case since his evidence was based on hearsay and was not tested through cross examination.

9. Even though the investigating officer alleged that he submitted some blood samples to the government chemist for analysis, I find that this claim was an empty allegation in view of the fact that no analyst's report was presented in court to support the prosecution's case against the accused persons.

10. My finding is that the prosecution's case was based on mere speculation and guess-work as there was no scintilla of evidence linking the accused persons to the murder. In the circumstances, placing the accused persons on their defence in the face of such worthless evidence would be tantamount to assisting the prosecution to fill in the gaps in their own case which should not be the case in view of the well-hackneyed principle in Criminal Law that the burden of proof rests on the prosecution and must be beyond reasonable doubt.

11. It is quite regrettable that the life of an innocent man was lost in a horrific and brutal attack. The deceased's friends and family members are entitled to a closure if only the perpetrators of the heinous crime can be brought to book. In the instant case, however, I find that placing the accused persons on their defence in the absence of sufficient evidence by the prosecution would be an exercise in futility and I therefore find that no prima facie case has been established against the accused persons so as to warrant their being placed on their defence.

12. Consequently, I acquit both the accused persons under Section 306 (1) of the Criminal Procedure Code and direct that they be set at liberty forthwith unless they are otherwise lawfully held.

Delivered, dated and signed in at Kisii on **6<sup>th</sup>** of **March** 2018.

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the State
- Mr. Mogire for the Accused
- Omwoyo court clerk