



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL CASE NO. 78 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMUEL MORARA KENYANYA.....1<sup>ST</sup> ACCUSED**

**ENOCK ONGAGA OCHOKI.....2<sup>ND</sup> ACCUSED**

**ALICE NYABOKE MORARA .....3<sup>RD</sup> ACCUSED**

**RULING ON A CASE TO ANSWER**

1. The accused persons herein **SAMUEL MORARA KENYANYA, ENOCK ONGAGA OCHOKI** and **ALICE NYABOKE MORARA** were on 16<sup>th</sup> September 2014 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 are that on 8<sup>th</sup> February 2014 at Mogenda market in South Gucha Sub-county within Kisii county jointly murdered **MARY BIKERI PHILIP**.

2. All the 3 accused persons pleaded not guilty to the offence and a trial thereafter ensued in which the prosecution called the evidence of 8 witnesses who, in summary, testified as follows:

3. PW1, MIKESON ONDARA PHILIP testified that he attended a meeting convened by the assistant chief to deliberate on a case of witchcraft in which it was alleged that the 1<sup>st</sup> accused’s child had been bewitched. At the said meeting, a ritual was conducted in which certain people in attendance, including the deceased herein, who was the mother of PW1, were to throw grass on the alleged bewitched boy and that the boy would be healed if the person who bewitched him threw grass on him. It turned out that several people threw grass on the boy but when it came to the turn of the deceased to perform the ritual the 3<sup>rd</sup> accused, who was the mother of the alleged bewitched boy and the wife of the 1<sup>st</sup> accused, started shouting and wailing while saying that it was the deceased who had bewitched her son thereby inciting the members of public who decided to mete out mob justice on the deceased by beating her with stones and all manner of missiles and that no amount of intervention by the local Administration Police in conjunction with the area assistant chief could stop them from lynching the deceased who died on the spot. According to PW1, the said meeting was announced by the 2<sup>nd</sup> accused.

4. PW2, John Oramini Manguti attended the said meeting and witnessed the ritual where the 3<sup>rd</sup> accused claimed that the deceased was a witch after which members of the public descended on the deceased with stones and that he later learnt that one Morara, the 1<sup>st</sup> Accused’s son had finally killed the deceased.

5. PW3 Dr. Willis Omwoyo performed the post mortem examination on the body of the deceased and

established the cause of death to be severe brain damage due to extensive head injuries together with fractures on the zygomatic frontal, temporal and occipital areas.

6. PW4 Caleb Okengo was the area assistant chief who presided over the ritual where the crowd became rowdy and lynched the deceased.

7. PW5 identified the body of the deceased for the purposes of a post mortem examination.

8. PW6 Cornel Murumbwa Manguti, also attended the “witch-bursting” ritual which was chaired by one Zacharia Nyakina Owino and addressed by the area chief (PW4) where he heard the 3<sup>rd</sup> accused asking PW4 why the deceased should not be killed whereupon one Nyaguka Morara who was the son of the 1<sup>st</sup> and 3<sup>rd</sup> Accused hit the deceased with a stone. The big crowd overwhelmed the chief and the police who had to run away for their lives thereby leaving the deceased at the mercy of the huge crowd who lynched her when the said Nyaguka Morara hit the deceased head with a big stone until her brain splashed out.

9. PW7 was APC Geoffrey Ondara who heeded the call by PW4 to come to his aid and control the rowdy crowd. He stated that the huge crowd overwhelmed him and his colleague one APC Benard Kariuki. He stated that the crowd did not burge despite the fact that they fired shots in the air and that they had run away in order to save their lives.

10. PW8 was PC Job Kipyegon, the police officer who investigated the case and made a decision to charge the 3 accused persons with the offence of murder.

11. At the close of the prosecution’s case, Mr. Ondari learned counsel for the accused submitted that a prima facie case had not been established against the accused persons to warrant their being placed on their defence because it was not shown that the accused persons actually threw the stone that caused the death of the deceased while Mr. Otieno, learned counsel for the state submitted that the accused persons had the common intention to kill the deceased as they were part of the mob that lynched the deceased.

12. At this stage of the proceedings, this court is tasked with the duty of establishing if the prosecution has established a prima facie case so as to warrant the accused persons being placed on their defence.

13. **Section 203 of the Penal Code** defines murder as follows:

**“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”**

14. **Section 206 of the Penal code** defines malice aforethought as follows:

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -**

**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

15. In the 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."*

16. In the instant case, I find that the prosecution established that the accused persons organized for a meeting in which it later turned out, that the common intention was to lynch the deceased.

17. Without saying much at this stage, I find that the prosecution has established a prima facie case against all the 3 accused persons to warrant their being placed on their defence.

18. Consequently, I place the accused persons on their defence. Under **Section 306 (2) of the criminal Procedure Code**, this court hereby informs the accused persons of their right to inform the court how they wish to give evidence, whether by taking oath or without taking oath. The accused persons have also been informed of their right to call witnesses in their defence and to inform this court of how many witnesses they wish to call.

**Delivered, dated and signed in at Kisii on 5<sup>th</sup> of March 2018.**

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno the State

- Mr. Bigogo for the Accused

- Omwoyo court clerk