



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 36 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RAJAB MOI OSANYA..(DECEASED).....1<sup>ST</sup> ACCUSED**

**MOSES ABWOTO AMWEYE ALIAS MUSA....2<sup>ND</sup> ACCUSED**

**R U L I N G**

**Introduction**

1. Rajab Moi Osanya and Moses Amboto Amweye alias Musa were 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 25<sup>th</sup> day of July, 2012 at Shibunje Village in Butere District within Kakamega County jointly with others not before court, murdered Abdallah Wesamba. They both denied the charge when they appeared for plea on 9<sup>th</sup> October, 2012. The case has been ongoing since then. Rajab Moi Osanya has since died.

**The Prosecution Case**

2. The prosecution called five (5) witnesses. PW1 Mohammed Omuganda Shilo as well as PW2 Bahari Makokha Omukanda are brothers to the deceased. PW3, Zaituna Auma Makokha is an aunt to the deceased. The prosecution case was that on 25<sup>th</sup> July, 2012, the two accused among other motor bike riders took the deceased away from Tavern Inn to the home of PW3 (Zaituna) where the deceased also had a house. The two accused and other bodaboda riders suspected the deceased to have stolen a motor bicycle belonging to one of them. When the accused failed to produce the motor bike, as demanded by the bodaboda riders, he was beaten and cut on the head with an axe and a hoe before being set on fire. The home was also razed to the ground.

3. The matter was reported to Butere Police Station the same day. The police went to the scene and took away the body to St. Mary's Hospital mortuary, Mumias awaiting post mortem examination. The post mortem examination was conducted by Dr. Duncan Oluoch of St. Mary's Mission Hospital on 26<sup>th</sup> July, 2012. As Dr. Oluoch was not available to testify Dr. Juma Oyombe testified on his behalf as PW5. According to the postmortem report, the deceased had multiple cut wounds on the head and the limbs. He also had third degree burns on the soles of his feet and on his hands. The report further showed the deceased suffered a skull fracture and inhalation burns in his airway.

4. The doctor formed the opinion that the cause of death was head injury with haemorrhagic shock. The duly signed and stamped post-mortem report was produced as PExhibit 3 while the statutory declaration form was produced as PExhibit 6.

**Submissions**

5. At the close of the prosecution case, counsel for the accused submitted that the prosecution had not made out a prima facie case to warrant putting the accused on his defence namely that the prosecution has not proved both actus reus and mens rea against both accused. Counsel also submitted that only one witness, PW3, was an eye witness and further that PW2, who was at the scene kept his distance in such a way that he could not clearly see what was happening to the deceased who was being assaulted by a mob. In summary counsel submitted that one WESONGA whose name featured prominently during the proceedings is the person who was seen assaulting the deceased. He has never been arrested. Counsel urged the court to set the accused free at this stage.

**Applicable principles**

6. In **OKethi Okale – vs – Republic [1965] EA 559**, the Court of Appeal for Eastern Africa held among other things that in a criminal case,

the court should consider the evidence as a whole and not to single out some portion of the evidence and leave out others. So, even at this stage, this court is under a duty to consider the whole of the prosecution case, though it is not the court's duty at the present moment to determine whether the case is very strong or weak. A decision on whether a case is very strong or weak is to be made after hearing both parties to the combat. It is however important to note, as was held in **Bhatt – vs – R [1957]EA 332** that no amount of worthless evidence shall be sufficient to establish a prima facie case. The evidence that qualifies to establish a prima facies case is such that the court would be prepared to convict if the accused chooses to say nothing in answer to the prosecution case against him.

### **Analysis and Determination**

7. I have now carefully analysed the evidence on record, and in particular the testimonies given PW2(Bahari) and PW3(Zaituna) which evidence finds support in the post mortem report given by Dr. Oyombe and I am satisfied that the prosecution has established a prima facie case to warrant putting the accused in this case on his defence. I accordingly proceed to do so.

8. In defending himself, the accused may give sworn or unsworn evidence. In giving sworn evidence, the accused may be subjected to cross examination both by the court and the prosecution. Unsworn evidence is not subject to any form of cross examination. The third alternative is for the accused to remain silent and let the court determine the case on the evidence before it. If the accused chooses to testify, whether sworn or unsworn, he has a right to call witnesses.

9. The accused may now indicate to the court what mode of defence he intends to make.

Orders accordingly,

**Ruling delivered, dated and signed in open court here at Kakamega on this 10<sup>th</sup> day of April, 2018**

**RUTH N. SITATI**

**JUDGE**

In the presence of

.....Mr. Ngetich.....for state

.....Miss Wambani holding brief for Mr. Nandwa.....for accused

.....Polycap Mukabwa.....Court Assistant