



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 46 OF 2014

REPUBLICPROSECUTOR

VERSUS

CYRUS NYENZO.....ACCUSED

RULING

The Charge

1. The accused herein, Cyrus Nyenzo is 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 31st day of August, 2014 at Malimali Sub-Location in Kakamega East District within Kakamega County, he murdered Erick Muyeshi. On the day of plea, the accused denied the charge, hence these proceedings.

The Prosecution

2. The prosecution called five witnesses, though the record shows there were seven witnesses. Dorcas Ayuma Muyeshi, the mother of the deceased as well as the accused testified as PW3 and also as PW5. The doctor who had initially been lined up to testify as PW4 was stepped down before he could even give his name to the court. He later testified as PW7 and produced the post mortem report which was marked as PExhibit 1.

3. Though no eye witness was called to testify, the facts of the case are that the accused and the deceased who are uterine brothers got into a fight over some amount of money. At the time, both of them were at the home of their other brother, Milton Shamala Muyeshi who testified as PW2. All the witnesses arrived at the scene after the event and saw that deceased had deep cut wounds on the head and neck. Milton Shamala Muyeshi testified that when he got home, he found the accused hiding in his (Milton's) bedroom with a panga secured between his legs. Milton also testified that accused gave him the reason for the fight and the eventual fatal injuries.

4. Dr. Peter Kosohole Asaava conducted the post mortem report in the body of the deceased on 4th September, 2014. Regarding the injuries Dr. Asaava who testified as PW7 stated that the deceased had significant cuts on the hands and the head. The left hand had a cut on the palm. There was along cut wound on the left upper jaw as well as five deep cut wounds covering the whole head, extending from scalp into the bone and into brain matter.

Submissions

5. At the close of the prosecution case, Miss Wilunda, counsel for the accused submitted that the prosecution had not established a prima facie case against the accused to warrant his being put on his defence. Counsel submitted that all the evidence for the prosecution was infact hearsay. Counsel urged the court to apply the principles set out in the celebrated case of **Bhatt – vs – R [1957]EA 332** and to set the accused free at this stage. She also relied on two other cases: - **Sewe – vs – Republic and Kakamega HCCR Case No. 49 of 2009 Republic – vs – Gregory Moi Sisia & another.**

Analysis and Determination

6. I have analysed the evidence on record. I wish to point out that at this stage, the court does not have to decide whether the evidence on record can prove the case against the accused beyond any reasonable doubt. I however know that no amount of worthless evidence is sufficient to establish a prima facie case. The evidence that would establish a prima facie case must be such as would make the court to convict if the accused said nothing in response thereto.

7. Upon examination of the evidence on record, I am satisfied that the prosecution has established a prima facie case warranting the accused

herein to be placed on his defence. The accused may now proceed to defend himself by giving either sworn or unsworn evidence. If he gives sworn evidence, he may be asked questions both by the court and the prosecutor. The third option open to accused is for him to remain silent and let the court decide the case on the evidence that is before it. If the accused testifies, whether or not under oath, he has a right to call witnesses.

Orders accordingly.

Ruling delivered dated and signed in open court at Kakamega this 18th day of April, 2018

RUTH N. SITATI

JUDGE

In the presence of;_

Mr. Ngetich (present)for state

Mr. Nyikuli holding brief for M/S Wilunda for accused

Polycap.....court assistants