



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**HIGH COURT CRIMINAL CASE NO.39 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**WILSON ALUSIOLA SHILALA.....ACCUSED**

**RULING**

1. Wilson Alusiola, herein referred to as the accused, 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 20<sup>th</sup> July 2014 at [Particulars withheld] village in Kakamega South District within Kakamega County he murdered C M, herein referred to as the deceased.

2. The prosecution case is that at the time that the deceased met her death she was a standard 5 pupil of 12 years of age. She was living with her parents at [Particulars withheld] village. The accused was staying with his grandmother, Zipporah Murunga in the same compound of the deceased's parents.

3. That on the 20<sup>th</sup> July 2014 at 9 am the deceased's mother PW2 went to church and left the deceased at home with her younger siblings. She returned home at 3 pm but did not find the deceased. She asked the other children where the deceased was but they could not tell. She started to look for the child among neighbours but she did not get her. That on the morning of the following day, she escorted the younger child to school. On her way back near the house of Zipporah Murunga, she saw the accused carrying a heavy load in a sack. She asked him what he was carrying. He hesitated to tell her but then told her that he was carrying arrow roots. The accused then returned towards the direction of a river where he had come from. The father to the girl PW3 reported the disappearance to the area chief PW5. On the 25<sup>th</sup> July 2014 the body of the girl was found in river Yala in a sack. The parents to the girl PW2 and PW3 went to the scene of the discovery and identified the body. PC Stanley PW4 of Iregi police patrol base went to the scene and collected the body. He took it to Mbale County Hospital. On the 26<sup>th</sup> July, 2014 a postmortem was performed on the body by a doctor at Mbale County Hospital. The doctor found the body with a tear on the perineum and a strangulation mark around the neck. The doctor formed the opinion that the cause of death was due to strangulation. The accused was then arrested and charged with the offence. During the hearing Dr Dickson Mchana PW6 produced the post-mortem report as exhibit on behalf of the doctor who conducted the postmortem.

4. At the close of the prosecution case, the advocate for the accused Mr Nyikuli, submitted that there is no prima facie case established against the accused. That there was no eye witness in the case. That the deceased's mother PW2 stated that she did not see what the accused was carrying in the sack that she saw him carrying. That the investigating officer PW4 did not find any evidence to link the sack to the accused. Consequently that there was no evidence to link the accused to the offence.

5. The prosecution in reply stated that they were relying on the evidence adduced before the court.

6. The only evidence to link the accused to the offence is that he was seen by the mother to the deceased PW2 carrying a load in a sack in the early morning of 21<sup>st</sup> July 2014. The witness said that she saw the accused coming from the direction of river Lukamere which is near river Yala. That the accused was walking towards the house of his grandmother. In cross-examination the witness said that she did not know what the accused was carrying in the sack. That she could not see clearly as it was abit dark. That the luggage looked like a sack. That she could not tell the colour nor the type of sack it was.

7. The investigating officer PW2 stated that when he went to the banks of river Yala, he found the body in a sack. That the body was in a T-shirt and a skirt. However neither the sack nor the clothes were produced in court as exhibits. Though the investigating officer said that the mother to the girl, PW2, identified the recovered sack as the one she had seen the accused carrying, the witness PW2 never stated in her evidence that she identified the recovered sack as the one she had seen the accused carrying. Her evidence was that she did not see clearly what the accused was carrying.

8. A prima facie case is one where a court will convict if no evidence is offered by the defence as was held by the Court of Appeal in the

case of *Ramanlal Trambaklal Bhatt v Republic* (1957) EA 332, that:

*“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 conflict 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 case,” 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.”**

9. In this case the only evidence to link the accused with the offence is that he was seen carrying a load in a sack in the early morning of 21<sup>st</sup> July 2014. The witness who claimed so PW2 was not even certain whether the luggage the accused was carrying was in a sack as it was abt dark. She said that the luggage looked like it was in a sack. In the premises there is no certainty that the luggage the accused was seen carrying was in a sack.

10. Even if the accused was seen carrying something in a sack, there was no evidence that the sack in which the body was recovered was similar to the one the accused was seen with. The recovered sack was not produced in court. The mother to the deceased did not identify the sack. The evidence relied on by the prosecution was weak and was based on suspicion. The evidence cannot lead to the conviction of the accused if he offered to give no defence.

11. In the foregoing I find that no prima facie case has been established against the accused. The accused has no case to answer and is accordingly acquitted under section 210 of the Criminal Procedure Code. The accused to be released forthwith unless lawfully held.

**Delivered, dated and signed at Kakamega in open court this 5<sup>th</sup> day of June, 2018.**

**J. NJAGI**

**JUDGE**

In the presence of:

Ng’etich for prosecution

N/A for accused

Ruto court assistant

Accused present