



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL (MURDER) CASE NO. 46 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

MUSA OLANDO.....ACCUSED

CORAM: LADY JUSTICE RUTH N. SITATI

RULING

Introduction

1. On 2nd September, 2013, the accused herein, MUSA OLANDO was produced before the court when the prosecution asked for more time to complete investigations into allegations of murder against him. On 12th September he pleaded not guilty to a charge of ***murder contrary to section 203 as read with section 204 of the Penal Code***. The allegation against the accused is that on the 29th day of August, 2013 at Maringo Estate Kakamega Municipality in Kakamega Central District within Kakamega County he unlawfully murdered ITUNDA MOI.

2. As a result of the plea of not guilty, the prosecution was under a duty to avail evidence in support of the charge. A total of seven (7) witnesses were called by the prosecution in this regard.

The Prosecution Case

3. Briefly the prosecution case is that on the evening of 29th August, 2013 at about 7.30pm, Cleigh Adolwa Haruna, PW2 and Jackson Barako Lihanda also known as Brown, PW3, were seated in a small hotel within Maringo Estate, which is a slum area within Kakamega Municipality. PW2 (Cleigh) at the material time operated a video show business where people came in and paid to watch shows of their choice, while PW3 (Jackson) used to work as a handcart pusher. Cleigh and Jackson were friends and on that evening they were together at the hotel taking tea and a dish of maize and beans respectively.

4. Before Cleigh went for his cup of tea, the machines for the video show were on and the clients who had paid were watching. Among Cleigh's clients was the deceased. While at the hotel, both Cleigh and Jackson heard noises from the video show room, which noises suggested that some of the clients were quarrelling. Cleigh rushed back to the room where the show was going on, switched off the machines and asked everyone to go away. Though most of the people left, the accused and the deceased did not go away. Both were angry and appeared drunk. The deceased was particularly angry because he felt he had not got value for his money and wondered why the accused should interfere with his (deceased) leisure time. The verbal quarrel soon escalated into a scuffle. The deceased seemed to have overcome the accused, but suddenly, the accused pulled out a long knife from under his clothes and stabbed the deceased in the chest. The deceased fell down and started bleeding profusely.

5. On seeing what had happened to the deceased, Cleigh ran to his Landlord's house which was about (seventy) 70 metres from the scene. Accompanied by the landlord, Cleigh went back to where the deceased was lying on the ground. By that time, all the other people who had been at the scene had run away.

6. The matter was reported to the police. The first report was made to the Administration Police and later to regular polices who visited the scene and removed the deceased's body to Kakamega General Hospital Mortuary for preservation. By that time the accused had run away from the scene and gone to his home in Luvambi, where his father, Ernest Owotse Juma, PW4, lived with the rest of the family.

7. On 30th August 2013, PW4 (Ernest) was informed by a friend that the accused had killed a friend of his (accused's). Ernest took the earliest opportunity to inform the police and also asked the police to go to his home in order to arrest the accused number 226783 APC Stephen Owuor, PW5 of Matioli Police Post went to Ernest's home as requested, arrested the accused and took him to Kakamega Police

Station.

8. On the morning of 30th August, 2013, at about 5.00am, the deceased's mother, Gladys Alimula Anderea who testified as PW1 got information about the death of the deceased. At about 8.00am, she went to the scene, but by that time, the body of the deceased had already been removed to the mortuary. PW1(Gladys) made her way to Kakamega General Hospital Mortuary where she confirmed the death of the deceased. Gladys later attended the postmortem examination which was conducted on the body of the deceased on 3rd September 2013. Other people who attended the postmortem examination were two brothers of the deceased as well as PC Asin who is since deceased.

9. Dr. Dixon Mchana Mwaludindi, PW6 (Dr. Mchana) carried out the post mortem examination. According to the post mortem report produced in court as Pexhibit 3, the deceased who was in his late 20's had a single stab wound below the 2nd intercostal space at the costochondral junction; oblique in shape and measuring 1.5x1cm. There was no abrasion collar, no defence injuries. There was also no evidence of medical intervention. The post mortem examination also showed perforation of the muscles of the respiratory system, the pulmonary trunk and the esophagus. In Dr. Mchana's opinion, the cause of death was external bleeding secondary to penetrating chest injury namely stab wounds. Dr. Mchana also produced the P3 form concerning accused who was certified fit to stand trial.

10. The investigating officer was number 935669 Police Constable Wangari Mithegi who testified as PW7. The investigation officer's evidence was given against a backdrop of constant interruptions relating to admission or otherwise of the accused's statement under enquiry that was taken by one Chief Inspector Paul Wambugu who was never availed to testify. PW7 visited the scene of crime and after the same was photographed the body of the deceased was removed to the mortuary. PW7 produced a number of exhibits. Navy blue jacket, Pexh 5, a maroon stripped T-shirt P-exhibit 6, black cap with a yellow strip P-exhibit 7 and a pair of black gumboots as Pexhibit 8. The exhibit memo to the Government Chemist was produced as Pexhibit 9, pair of the blue sandals and a red cap were produced as Pexhibits 10 and 11 respectively. It is to be noted that the Government Chemist was not availed to testify.

Issues, Analysis and Determination

11. The issue that arises for determination at this stage is whether the prosecution has established a prima facie case requiring the accused to be placed on his defence. The principles to be applied by this court in determining whether or not a prima facie case is established are now well settled. Cases such as *Bhatt versus R [1957] EA 332* are in point on the issue, to the effect that if the evidence is such that the court would be prepared to convict if the accused person said nothing in response, then a prima facie case would have been established.

12. Applying the above principles to the instant case, I am satisfied that the prosecution has established a prima facie case requiring the accused person herein to be put on his defence. I now proceed to put him on his defence.

13. In defending himself the accused may give sworn or unsworn evidence or he may choose to remain silent and let the court decide the case on the evidence that is before it. If he gives sworn evidence, he is subject to cross examination both by the court and the prosecution. If he gives unsworn evidence, no questions will be put to him. In both scenarios, the accused is at liberty to call witnesses.

14. I now call upon the accused to indicate in what manner he will defend himself.

It is so ordered.

Ruling written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Ruling delivered, dated and countersigned in open court at Kakamega on this 12th day of October, 2018

WILLIAM MUSYOKA

JUDGE

In the Presence of

Mr. Ondieki for Appellant

Mr. Ngetich for Respondent

Eric/Polycarp - Court Assistants