



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 71 OF 2014

REPUBLIC.....STATE

VERSUS

JASON RIOBA ASANGO.....1ST ACCUSED

SOSPETER ALOYS NYAKUNDI.....2ND ACCUSED

WYCLIFE MOKAYA NYAKUNDI.....3RD ACCUSED

RULING

1. Jason Rioba Asango the 1st accused and Wyckliffe Mokaya Nyakundi the 3rd accused are charged with offence of Murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that, On the 7th day of June 2014, at unknown time at Iranda in Kisii Central District within Kisii County in the Republic of Kenya , jointly murdered Erick Ochwangi Asango. The case against the 2nd accused Sospeter Aloys Nyakundi alias Sem was terminated by way of *nolle prosequi* on the 1st February 2017. The prosecution proceeded with the case against the 1st and 3rd accused persons. 3 witnesses testified.

2. Pw1 Charles Onyiego Orina testified that the deceased Erick Ochwangi Asego is his brother's child. The 1st accused person is the brother of Eric the deceased. He did not know the 2nd accused person. That on the 8th June 2014 he was asleep in his house. He heard screams woke up and hurried to the place where the screams were behind my house. On reaching there he found Erick dead in his house. Eric had been cut with a panga or something like a shoka axe behind the head and the left side of the face and the arms. There were people there who rang Nyakoe Police came and the body was taken to Nyangena mortuary. That Jason is the brother of Eric. He is older than Eric. They were not staying in one house. At times they would fight because of land. They did not have a physical confrontation before this. That Jason had been seen during the day at home on this day. During cross examination he testified that Rioba had knifed Eric before and he had warned him. That Rioba killed Eric. Jason was seen during the day. He did not see Eric being beaten. He did not report to the police at any other time that Eric and Jason had fought. He has no treatment notes that Eric even went to hospital for treatment. In re-examination he testified that Jason had injured Eric with a knife in the stomach and Eric was treated in hospital he was stitched. It was just the same week.

3. Pw2 Julius Ondieki Matara testified that Eric Ochwangi Asago is my cousin. The 1st accused is the brother of the deceased he does not know the 2nd accused person. That on the 8th June 2014 at about 8.30p.m he got a call from my friend Evans Nyakwara who told him that my cousin called Eric Asago had been killed. He went to Eric's place. There were many people including the police. Inside the house he found the body at the door with injuries on the head .He called Jason and asked him where he was Jason told him he was at Nyangena hospital and had taken a child to hospital. He asked him to come home as his brother had been killed. Jason did not come. There was no one in Jason's house. He testified that his cousins would quarrel. There times he would sit them down and advise them not to quarrel. Their father divided the shamba before he died. There is a place their father had set aside as a burial ground. The deceased wanted to plough the place and Jason refused saying he was older and he had children. That was the source of their quarrels. There is a time they quarreled and at one time the deceased injured Jason on the hand.

4. Pw3 was No.87583 P.C. Gilbert Koech currently attached to Swamp Police Post in Trans-Mara County the investigating officer testified that on the 8/6/2014 at around 8.30p.m he was at Nyakoe Police Patrol Base when his in-charge called Joab Onyapindi received a phone call that a dead body was discovered at Nyandiba village within Trans Mara Sub-location. They went to the scene found the deceased Eric Ochwangi Asago. He was leaning on an exit door in the sitting room of his house. He had deep cuts on the head on the left neck and right shoulder. They removed the body to Nyangena Hospital mortuary. He recorded statement of witnesses where he zeroed in on the 3 accused person namely Jason Rioba Asango the brother to the deceased who is the 1st accused person, No.2 was Sospeter Aloys Nyakundi and the 3rd accused Wycliffe Mokaya. He received information that the 1st accused person had a long standing land dispute with the deceased person. That in the month of May 2014 the deceased assaulted the 1st accused person and left hand fractured the 1st accused's left hand and in turn on the 29/5/2014 the 1st accused person stabbed the deceased with intent to kill him. He received information that the 3rd accused person

Wickliffe had fled to Mau Narok whilst the 1st accused person had fled to Ranganga sub-location the home of his in-laws. The 1st accused person and the 2nd accused persons were arrested by members of the public and escorted to Nakoye Police Patrol Base on the 9/6/2014. The 3rd accused person was arrested on the 13/6/2014 after he contacted police officers attached to Mau Narok Police Station. The 3rd accused person was arrested by No.81521 P.C. Stephen Kana. He went to Mau Narok Police and collected the accused person. On the 13/6/2014 a post mortem was done on the body of the deceased by Dr. Omare. He formed opinion that the cause of death was due to cardio-arrest secondary to cerebral damage following multiple cut wounds to the head. He escorted the 3 accused persons to Kisii Teaching Referral Hospital for mental assessment. Dr. Jumba confirmed they were fit to stand trial. The 3 were then arraigned before this court to face the charge of murder. He produced the post mortem report P. Exhibit No. 1. He testified further that the 1st accused person sought help from the 2nd and 3rd accused person to assist him with the mission of eliminating the deceased over land issues. During cross-examination he testified that he recorded the statements of the eye witnesses. That the 3rd accused recorded a statement stating that on the 8th June he was at Mau Narok inside his house. That a member of public called me and told him the 3rd accused was involved. That the person has not testified. That he did not dust the place. He cannot tell the time the deceased was killed. That he learnt that the 1st accused asked 3rd accused person to help eliminate the deceased. That the 1st accused person made good his threats to kill the deceased but could not confirm that threats were reported to the police station.

5. Submissions were made at the close of the prosecution case. Mr. Momanyi for the accused submitted as follows; that there was no eye witness brought to court to say that the fatal injuries inflicted upon the deceased were done by either the 1st or 3rd accused persons. That even if the court was to rely on circumstantial evidence there is no nexus between the deceased and the 2 accused persons. That there was no investigation carried out all the investigation officer did was just to record statements. That even the key witnesses have not come to court. PW1 was sleeping in his house when he heard screams from the home of the deceased. He didn't know what had happened. PW2 was far away on a market when he got a called Evans informing him of the deceased's death. Evans should have recorded a statement and the persons who were at the same to show how the deceased met his death. It is a serious crime and the police should have been ... serious in their investigations. That there is no evidence offered by prosecution to warrant her being put on their defense and they seek that the accused persons be released. Mr. Otieno for the state stated that he was relying on the evidence on record.

6. At the close of the prosecution case the court has a task to determine if a prima face case has been made out against the accused persons which warrant them being put on their defense. A prima facie case is "*one on which a reasonable tribunal, properly directing its mind to the law and evidence, could convict if no explanation is offered by the defense (see Ramanlal Trambaklal Bhatt vs.R [1957] E.A.332).*" The evidence establishing a prima facie case must be the sort of evidence upon whose strength the Court could convict if the defence says nothing to rebut such evidence. At this stage the Prosecution does not have to prove its case beyond reasonable doubt; for proof beyond reasonable doubt is required when the defence has also given its evidence, or has closed its case.

7. I move next to consider the evidence adduced. Pw1 recalled that he heard screams he went out and found the deceased injured and dead. He did not see those who had caused the said injuries. Pw2 was informed of the deceased's death. Pw3 acted on information he received to arrest the accused persons. There was no eye witness to the murder of the deceased. Pw3 acted on information that the deceased and the 1st accused were on bad terms that they used to quarrel and that the 1st accused had issued threats to kill the deceased. There was a suspicion that the 1st accused was involved but no cogent evidence was lead on this. The prosecution has failed to adduce any evidence that the accused persons were involved in the murder. It could be that the 1st accused and the deceased his brother used to quarrel a lot but this alone without evidence that he was involved in causing the injuries which caused the death of the deceased is insufficient to warrant the 1st accused being put on his defense. The evidence adduced against the 3rd accused is that he was asked by 1st accused to help do away with the deceased. The investigation officer failed to produce the witness who gave him this information. I agree with the defense counsel that this is a case which the police failed to thoroughly investigate. They have shown that one Erick Ochwangi Asango died but they have failed to connect any of the accused persons to his death. All in all I find that the Prosecution has failed to establish a prima face case to put the 1st and 3rd accused persons on their defense and I acquit Jason Rioba Asango and Wyckliffe Mokaya Nyakundi of the offence of murder. Each is acquitted of the said offence and each is at liberty to go unless lawfully held.

Dated signed and delivered this 11th day of October 2018

R.E. OUGO

JUDGE

In the presence of;

1st Accused Present

2nd Accused Present

Mr. Momanyi Absent

Mr. Otieno for the State

Court Clerk M/s Rael