

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 46 OF 2015

STATE.....-PROSECUTION

VERSUS

TINGA MOTURI OSUMO.....ACCUSED

RULING

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 night of 1st and 2nd March 2012 at Magere Sub-location in Nyamira County the accused murdered Makori Nyarere. The accused pleaded not guilty to the charge.

In the ensuing trial the prosecution called four witnesses. Briefly the prosecution's case as narrated by the three witnesses is that on the fateful day the deceased had gone to a chang'aa drinking den after collecting dues paid to him for his tea. While he was there the area Assistant Chief who was accompanied by the accused raided the home and the deceased together with the other partakers of the chang'aa fled to avoid arrest. The next morning, he was found lying dead under a bridge. The matter was reported to the Assistant Chief (Pw2) who acting on information from the area residents begun by arresting one Richard Mbacha who it was alleged had been with the deceased at his home the previous day. However, as the Assistant Chief was probing the matter one Alex Mbuchi told him that Tinga Osumo, the accused had been with the deceased at 8.00 p.m. on 1st March. It was then that the Assistant Chief apprehended the accused and handed him to the police. The accused was subsequently charged with this offence.

At this juncture this court is required to determine whether it is satisfied the accused person committed this offence (see Section 306 (1) of the Criminal Procedure Code).

Having considered the evidence in support of the charge my finding is that the prosecution did not adduce sufficient evidence to satisfy this court that the accused person killed the deceased.

To begin with the evidence implicating the accused person is based on hearsay. It is what the Assistant Chief (Pw2) was told by one Alex Mbuchi who was not called as a witness. The other two witnesses, a brother of the deceased and Pw3, one of the children of the illicit chang'aa brewer/trader did not themselves see the accused person with the deceased.

According to Pw1 it was Richard (not called as a witness) who told him that his brother had been drinking with the accused person. He himself did not see them together. On the other hand, the evidence of Pw3 was that the accused had gone to the chang'aa drinking den with the Assistant Chief but not the deceased. Pw3 told this court that it was the accused who poured the chang'aa and thereafter combed the homestead with the Assistant Chief. As for Pw4, the deceased's son, his evidence was that when he met his father at about 4 pm that day his father was alone. He was categorical that he did not see the accused person on that day. From the evidence the accused and the deceased were great friends. There is no evidence whatsoever that there was an encounter between them other than that which occurred at the chang'aa den. It may be that Alex saw them together but that is hearsay and cannot form the basis of a conviction. In any event even had such evidence been adduced seeing two people together does not itself give rise to an inference of murder. Circumstantial evidence must also be water tight. It is my finding that the evidence here does not even meet the standard of suspicion. To add it all the prosecution did not adduce evidence on the cause of death; no post mortem report was adduced and the evidence of the witnesses that the deceased had injuries on the head, neck and buttocks was not proved.

Accordingly, I find no evidence to warrant putting the accused person on his defence and therefore enter a finding of not guilty under Section 306 (1) of the Criminal Procedure Code. He shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Signed, dated and delivered this 11th day of October 2018.

E. N. MAINA

JUDGE