

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 41 OF 2015

REPUBLIC.....PROSECUTOR

=VRS=

1. DANIEL AREBA.....1ST ACCUSED

2. JOHN KEBASO NYAKUNDI.....2ND ACCUSED

RULING

The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on 15th May 2010 at Bosamaro Chache Location in Nyamira District within Nyanza Province jointly with others not before court they murdered Rodgers Onkeo Mogeni. They both pleaded not guilty to the charge.

At the trial, the prosecution called five (5) witnesses and at this stage I am required to determine whether there is evidence that the accused persons committed this offence. This is in accordance with Section 306 (1) of the Criminal Procedure Code which states: -

“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the Advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”

Of the five (5) witnesses called by the prosecution, none was an eye witness. Pw1, the Assistant Chief testified that he was in his house when he received a telephone call that one of his subjects was being lynched in a maize plantation. He reported the matter to Administration Police Officers in his area and also to Nyamira Police Station but by the time he arrived at the scene the person had been killed. Pw2 (David Obare Mogeni) told the court that the deceased was his nephew and that when he got a call that he was dead he went and identified the body for purposes of a post mortem which was done at Nyamira District Hospital on a date he could not recall in May 2010.

Pw3 (Freddie Bobongo Abuba) was stood down for what the prosecution said was giving evidence which was at variance with what he had told the police. He was not recalled for purposes of further examination in chief and cross examination and we can therefore safely find that his testimony was of no value. In any event the same favoured the accused persons and indeed exonerated the 2nd accused. Pw4 (Dr. Samuel Ombati) produced the post mortem report on behalf of his colleague who had left for further studies. He gave evidence that in the opinion of that doctor (Dr. Bosire) the deceased died as a result of cardiopulmonary arrest due to intercelebral haemorrhage as a direct cause of penetrating head injury with superficial burns. Other than confirming that the deceased died and that he was lynched, this evidence does not point to the accused persons as the perpetrators of the offence.

Pw5 (Corporal Kariuki Njeru) told this court that he did not investigate this case and all that he told this court was what he gathered from a file handed over to him by a PC Yumbi Allan who could not attend court as he was guarding examinations. Even had he been the one who had come to testify, the finding of this court would have been that there is no evidence either direct or circumstantial pointing to the accused persons as the perpetrators of this offence. In the premises I enter a finding of not guilty and acquit the accused persons under Section 306 (1) of the Criminal Procedure Code. They shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered this 5th day of December 2018.

E. N. MAINA

JUDGE