



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL CASE NO. 20 OF 2015**

**REPUBLIC.....PROSECUTOR**

**=VRS=**

**JOSEPHINE KWAMBOKA KINARO.....ACCUSED**

**RULING**

The accused person is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 24<sup>th</sup> June 2012 at Nyagesengi village, Nyamira North District within Nyamira County in the Republic of Kenya the accused killed James Kinaro Mauti.

The accused pleaded not guilty to the charge. In the ensuing trial the prosecution called three witnesses. After the close of the prosecution's case, Mr. Ondigo, Counsel acting for the accused, submitted that the accused has no case to answer. Therefore, at this stage I am enjoined to determine whether or not there is evidence that the accused person committed the offence (**see Section 306 (1) of the Criminal Procedure Code**).

I have considered the evidence and submissions of the Advocate for the accused person and my finding is that there is no evidence that the accused committed this offence. Other than proving that the deceased in this case was in fact killed, the prosecution did not tender any evidence either direct or circumstantial that points to the accused as the killer. I dare say that the case against the accused person is based on suspicion.

Pw1, a brother of the deceased, arrived at the scene and found the deceased lying in his house dead. It was his evidence that he rushed to the scene after hearing the accused's distress call that the deceased had been attacked by robbers. However, he did not find or see the alleged robbers and because the deceased had told him that he and the accused were estranged and their son who lived only two meters had not heard a commotion in their house, he suspected the accused had killed his brother, her husband. The said son was not called as a witness and even though this court issued warrants of arrest for his arrest and that of his other brothers they were not brought to court to testify. In the words of Counsel for the prosecution they were unable to execute the warrants. This court is therefore left with evidence of the three witnesses who were not eye witnesses to the crime. Pw1 arrived at the scene after the crime was committed, Pw2 was a doctor who attended court to produce a post mortem on behalf of his colleague who could not be found without further delaying the matter and Pw3 was the investigating officer whose evidence against the accused person was based on what witnesses who did not come to testify had told him. His evidence is so to speak hearsay. If his decision to charge the accused was based on the fact that her son did not hear a commotion in the deceased's house that day and so there were no robbers, then he should have ensured that that son came to court to give evidence otherwise what the witness told him is hearsay. A conviction can never be based on hearsay or suspicion and I agree with Mr. Ondigo that the accused should be acquitted at this stage.

I accordingly enter a finding of not guilty under Section 306 (1) of the Criminal Procedure Code and order that she be set at liberty forthwith unless otherwise lawfully held.

**Signed, dated and delivered in open court this 5<sup>th</sup> day of December 2018.**

**E. N. MAINA**

**JUDGE**