

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL CASE NO. 50 OF 2015

REPUBLIC.....PROSECUTOR

=VRS=

1. RONALD MOENGA MASAKI.....1ST ACCUSED

2. MARK ABUGA ONYAMBI.....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 consolidated charge being that on 25th November 2009 at Ogango village, Siamani Sub-location in Nyamira District within Nyamira County they murdered Menyenya Orango, deceased.

The accused persons pleaded not guilty to the charge whereupon the prosecution called eleven (11) witnesses to prove its case. At the close of the case for the prosecution, Mr. Bwonwong'a, Learned Advocate for the accused implored this court to find that the prosecution had not proved its case sufficiently to warrant this court to put the accused persons on their defence. He submitted that the evidence adduced was purely circumstantial. He submitted that all the prosecution witnesses did was to prove that they found the body of the deceased besides the road and that it had a cut on the neck. He submitted that there was no definite weapon that was stated to have been used and contended that on the fateful night the accused persons and the deceased were drunk. He submitted that although the chief (Pw1) advised the deceased to report the threats of murder, the deceased did not do so. Counsel contended that the exact time of murder was not proved and pointed out that Pw3 (the deceased's sister) had brought in the theory of the deceased's failed marriage which he wanted to restore. Counsel contended that there was no connection between the accused persons and the teacher who married the deceased's wife after they became estranged. He observed that neither the teacher nor the deceased's estranged wife were called as witnesses. Counsel also took issue with the fact that the police officers who came to testify were not the ones who investigated the case and noted that their evidence did not implicate the accused persons. Regarding the post mortem report, he submitted that the same did not disclose the weapon used to kill the deceased. He reiterated that the evidence of the witnesses was mostly hearsay.

Mr. Ochieng, Learned Counsel for the prosecution relied entirely on the evidence adduced and did not submit.

Before I can put the accused persons on their defence, I am required to consider whether there is evidence that the accused persons or any of them committed this offence (**see the Criminal Procedure Code**).

The offence of murder is established when it is proved beyond reasonable doubt that the accused person(s) of malice aforethought caused the death of the deceased by an unlawful act or omission – Section 203 of the Penal Code.

It is my finding that in this case the prosecution has not proved that the accused persons or any one of them caused the death of the deceased let alone establish that they did so by an unlawful act or omission and of malice aforethought. There was evidence that the day/night before the deceased's body was discovered, the accused persons and the deceased had had an altercation at a house where he had gone to partake some chang'aa. Paul Nyakundi (Pw8) told this court that they too had gone to that house for chang'aa and had found the accused persons assaulting the deceased. The deceased asked for their help and Zachary (Pw8) intervened and stopped the accused persons. It was at about 11pm. Pw8 testified that they left the house with the deceased and escorted him up to the gate of his home. They did not wait for him to go in. However, there was also evidence that the deceased was up and about the following day. According to Jared Nyauma (Pw2), the deceased joined them in the morning but when they asked him to help them carry some maize he told them he was going to work. Habina Mongare (Pw5) told the court that on the morning of 25th November 2009 (7 o'clock) he met the deceased and together they went to a kiosk where they used to keep their tools to pick the tools. They then went to work together and parted at 2 pm.

Pw5 testified that when he went back to the kiosk to return his tools he found the deceased there with one Nyaoma Nyaoma. He stated that it was not until the following morning that the deceased's body was found at Orango tea buying center. None of the witnesses could tell how or when the body got there and none of them knew who killed him. The case against the accused persons is hinged on evidence that they had an altercation with the deceased on the night of 25th November. That is not the night the deceased was killed. There is evidence that even after that altercation the deceased was up and about and even went to work. Up to that point it is apparent that the altercation did not affect the deceased. Indeed, there is evidence that he did not report matter to the police even though Pw8 implored him to do so.

It is my finding that there is no evidence either direct or circumstantial that the accused persons had anything to do with the death of the deceased person on 26th November 2013 and that what is there is suspicion that they could be the ones who killed him. In **Bhatt Vs. Republic [1957] EA 332** the court stated: -

“(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a

conviction.

(ii) The question whether there is a case to answer cannot depend only on whether there is “some” evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.”

In determining whether to put the accused persons on their defence, I must consider whether if they elect to remain silent I have evidence upon which I can convict them. It is my finding that whereas there is evidence that the deceased in this case was murdered and I do not doubt the credibility of the witnesses, there is no evidence that the accused persons committed the offence. I accordingly enter a finding of not guilty and acquit them 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 at Nyamira this 5th day of December 2018.

E. N. MAINA

JUDGE