

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 73 OF 2015

THE REPUBLIC.....PROSECUTION COUNSEL

VERSUS

JOSEPH INDECHE AMAYOKA.....ACCUSED

RULING

1. Joseph Indech Amayoka is charged with murder contrary to section 203 of the Penal Code, Cap 63, Laws of Kenya, as read with section 204 of the Penal Code. The particulars of the offence allege that on 21st day of November 2015 at Mushukulu Village, Shiraha Sub-Location of Butere Sub-County within Kakamega County, he murdered Josephat Ombango. He pleaded not guilty to the charge on 10th December 2015.

2. The hearing of the prosecution's case commenced on 17th January 2017, when Humphrey Livingstone Eshirisia Lutta testified as PW1. He stated that on 19th November 2015 at around 7.30 PM he was on his way from a local trading centre called Emusanguli with one Alexander Shisia when he heard someone saying 'Shem mbona unaniua.' Which translated to 'Shem why are you killing me?' He and his colleague decided to walk in the direction that the voice was coming from. When they got there they found Shem hitting Josephat Ombango with a *rungu*. Upon seeing them Shem slipped away. The witness then telephoned the local village elder. Thereafter he and his colleague carried Josephat home and handed him to his mother. He told his mother at the hearing of the witness that it was Shem who had beaten him over his *panga* that Josephat had lost. The following day the witness assisted the mother of the Josephat to take him to the Butere Police Station and onwards to hospital, where he died on 21st November 2015. He said that he later established that Shem was also known as Henry Shem and also Joseph Indech Amayoka from Busia. He explained that he was known in the locality as Henry Shem. He pointed the accused in the dock as the person that he found at the scene with the deceased. He said they asked him why he was beating the deceased, but he did not talk to them, instead he just left. He said that he had known him for two years as a neighbour.

3. On cross-examination, PW1, said that the accused and the deceased were not fighting, instead Shem was beating the deceased, and they separated them. He said that they were not holding each other. He testified that his colleague had a torch whose light was bright. He said Shisia lit the torch when they got to the scene. He said he had known the accused as Henry Shem only to see his identity card later to discover that that was not his official name. He said the accused was wearing gumboots and a multi-coloured jacket. He said that the deceased was on the ground as the accused hit him on the head with a *rungu*. He testified that the deceased could neither stand nor walk but he could speak. He concluded by saying that the deceased died as a result of the beatings by the accused.

4. Christine Amanya Matsatsa, the mother of the deceased, testified as PW2. She said that PW1 and Alex Shisia carried the deceased to her house at about 8.30 PM on 19th November 2015. The deceased then explained to her how he had met Shem on the way and how he attacked him over a *panga*. He was said to have said that he was kicked until he fell down and then he was stabbed to the extent of his right ear being cut off and one of his eyes pierced. She took him to hospital the next day and he died the day after. She described Shem as a grandson, being a son of one of her stepsons. She said that she knew him since his childhood.

5. No other witnesses testified thereafter. On 22nd May 2018 the court adjourned the matter for the last time. When the matter came up again on 30th July 2018 the state did not avail witnesses, forcing the court to issue summons for the Officer Commanding the Butere Police Station (OCS) to explain on 25th September 2018 why witnesses were not being availed. Come 25th September 2018, the OCS did not attend court, and the state closed its case.

6. As the state has closed its case, I am required to make a ruling as to whether I should put the accused person on his defence. I am specifically required to determine whether a *prima facie* case with probability of success has been made out to warrant his so being put on his defence.

7. The elements of the offence of murder as defined in section 203 of the Penal Code are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought. From the material before me there is *prima facie* proof that the deceased in fact died. His mother, PW2, was with him in hospital when he passed away. She was not present when post-mortem was conducted on his body, but I am satisfied that her evidence is sufficient proof of the death. On cause of the death, there is insufficient evidence. Neither PW1 nor PW2 gave any coherent accounts of the injuries that the deceased had. There is no description whatsoever of the injuries that the two witnesses noted. Only PW2 talked about injuries, not in terms of what she herself noted, but in terms of what the deceased told her. PW1 merely said that the deceased was assaulted by the accused, he said nothing about any injuries. There is therefore no material that would prove that the deceased suffered injuries, from the alleged beating, that were life-threatening. In the circumstances the cause of death can only be speculated at this stage.

8. The burden of proof in criminal cases is beyond reasonable doubt. It should be established beyond any shadow of a doubt that the death of the deceased herein arose directly from the alleged beating that he is said to have allegedly suffered. It would be only after that is established that the accused can be called upon to give an account given that PW1 placed the accused squarely at the scene. The evidence on the exact cause of death of the deceased could only come from a doctor. Without such evidence I am not satisfied that a *prima facie* case exists to

require the accused to be put on his defence.

9. That being the case, I shall accordingly acquit him under section 306 of the Criminal Procedure Code. He shall be set free unless he is otherwise lawfully held.

DATED, SIGNED and DELIVERED at KAKAMEGA this 3RD DAY OF DECEMBER, 2018

W. MUSYOKA

JUDGE