

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 37 OF 2011

THE REPUBLIC.....PROSECUTION

VERSUS

GEORGE OTIENO GARE.....ACCUSED

RULING

1. George Otieno Gare 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 20th day of May 2011 at Lukoye Estate Nucleus Sub-Location of Mumias District within Kakamega County, jointly with others not before the court he murdered Mokta Andambi, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 22nd June 2011.

2. The hearing of the prosecution's case commenced on 26th June 2012, when Dr. Nyubile Bonface testified as PW1. He stated that he conducted an autopsy on the remains of the deceased, and thereafter prepared and signed a post-mortem report dated 24th May 2011. He noted bruises over the thigh and gluteal region to the buttocks and hips area. He also noted cut wounds over the scalp on the right parietal region 4cm long and 3cm long. The neck region was said to have had rope marks. The wind pipes and trachea had been crushed. He opined that the cause of death was cardio-respiratory arrest due to asphyxia following strangulation, which caused the blood to stop for lack of oxygen. He was not cross-examined.

3. Herman Kinyanji Chenani testified as PW2. He stated the deceased was his son, and that he attended the autopsy on 22nd May 2011 and identified the body for that purpose to PW1.

4. No other witnesses testified thereafter. The matter came up several times for mentions and hearings, and was adjourned for various reasons. On 2nd May 2018 the court adjourned the matter for the last time, and allocated it a date for hearing on 25th June 2018. Come 25th June 2018 the matter was adjourned to 26th September 2018 on the reason that the investigation officer had been admitted in hospital. On 26th September 2018 the state again asked for an adjournment on the ground that it did not have witnesses in court. The adjournment was declined on the grounds that the court had on 2nd May 2018 given a last adjournment. The state then closed its case.

5. As the prosecution case has closed, I am required in law to give 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. What amounts to a *prima facie* case was stated in *Ramanlal Trambaklal Bhatt vs. R* (1957) EA 332 as one in which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

6. 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 father, PW2, identified his remains for post-mortem purposes. On cause of the death, PW1 conducted the autopsy and concluded that he died of asphyxia following strangulation. No evidence was led as to the role the accused played in the causation of the death of the deceased. There is therefore no material that would suggest that the accused was linked to death of the deceased.

7. The burden of proof in criminal cases is beyond reasonable doubt. It should be established beyond any shadow of a doubt in this case that the death of the deceased herein arose directly from an act or omission on the part of the accused. It would only be after that is established that the accused can be called upon to give an account. I do not therefore have before me material upon which I can convict if the accused were not to offer explanation. I am not satisfied that a *prima facie* exists to warrant the accused being put on his defence.

8. That being the case, I shall accordingly acquit him under section 306 of the Criminal Procedure Code, Cap 75, Laws of Kenya, of the charge of murder contrary to section 203 of the Penal Code. He shall be set free unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 3RD DAY DECEMBER, 2018

W MUSYOKA

JUDGE