



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 74 OF 2012

REPUBLICPROSECUTOR

V E R S U S

RISPER MUHONJA BOHE 1ST ACCUSED

FRANCIS MALEYA AGESA.....2ND ACCUSED

RULING

1. The two accused persons herein *Risper Muhonja Bohe* and *Francis Maleya Agesa* are charged with the offence of Murder Contrary to *Section 203* as read with *Section 204* of the *Penal Code*.
2. It is alleged that on 29th September 2012 at Mwein village in Nandi County, they jointly murdered *Daniel Ngusare*.
3. Each of the accused persons denied the charges. In support of its case, the prosecution called a total of four witnesses.
4. At the close of the prosecution case, learned counsel *Mr. Kenei* made written submissions on behalf of each of the accused persons under *Section 306(1)* of the *Criminal Procedure Code* but learned prosecuting counsel *Ms Odour* elected not to make any submissions at that stage.
5. I have carefully considered the evidence adduced in support of the prosecution case in its entirety alongside the written submissions made on behalf of each accused person by learned counsel *Mr. Kenei*. I find that there is no direct evidence linking any of the accused persons to the murder of the deceased since none of the four witnesses who testified in this case witnessed the assault on the deceased that led to his death.
6. The prosecution's case is based on circumstantial evidence to the effect that the body of the deceased was found in a forest which was near the 1st accused's house; that a blood stained panga (PMFI 2) was recovered from accused's house while a blood stained broken cooking stick was recovered from her kitchen.
7. According to PW3, he arrested the accused persons because they were identified by their area chief (PW2) as the suspects for the murder but in his evidence, PW2 did not give any incriminating evidence against the accused persons except the claim regarding the recovery of the panga and cooking stick from the 1st accused's house.

8. It is also important to note that the prosecution failed to call crucial witnesses in support of its case. This is despite the fact that the court gave the prosecution ample time and opportunity to call all its witnesses but it failed to do so for reasons that are on record. Consequently, the investigating officer was not called to testify in this case to explain why he decided to charge the accused persons with the offence of murder.

9. Though PW2 claimed that he recovered a blood stained panga and cooking stick respectively from 1st accused's house, there is no evidence that the same were subjected to forensic examination to confirm whether they were indeed the murder weapons. In the absence of forensic evidence to prove a connection between the recovered items and the murder of the deceased, the evidence relating to their recovery does not add any value to the prosecution case. The same argument applies to the discovery of the deceased's body near 1st accused's house because such discovery does not amount to evidence that any of the accused persons murdered the deceased.

10. In view of the foregoing, I agree with learned counsel's submissions that the evidence adduced by the prosecution in this case totally failed to link the accused persons to the commission of the offence as charged. It is my finding that the evidence is insufficient to establish a prima facie case against any of the accused persons to justify putting them on their defence. Putting the accused persons on their defence on the basis of such evidence would ultimately amount to an exercise in futility because if they opted to exercise their constitutional right of remaining silent, the evidence would be insufficient to sustain a conviction. It would also be tantamount to requiring the accused persons to prove their innocence which would fly in the face of the cardinal principle of criminal law that the burden of proof in criminal cases rests solely on the prosecution and never shifts to an accused person.

11. For the foregoing reasons, I am satisfied that the accused persons do not have a case to answer. I consequently enter a finding of not guilty and acquit each accused person under *Section 306(1)* of the *Criminal Procedure Code*.

Each accused shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of February, 2017.

In the presence of:-

Both accused

Mr. Kenei for the both accused

Ms Mutheu for the State

Mr. Lobolia Court Clerk