



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 4 OF 2015

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....RESPONDENT

VERSUS

KENNEDY ODONGO ODERO.....ACCUSED

RULING

1. The Accused **KENNEDY ODONGO ODERO** is charged with an offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the 11th day of May 2012 at Omia Malo Sub-Location in Rarieda District within Siaya County Murdered **SOPHIA ACHOLA OBONGO**.

2. In criminal cases the burden of proof of the prosecution's case beyond any reasonable doubt lies with prosecution and never shifts and a prima facie case is made at the close of the prosecution's case, if the evidence is one which on full consideration might possibly in absence of explanation to the contrary be sufficient to sustain a conviction.

3. In the case of **R V Jagjiven M. Patel and Others I TLR 85** the Learned Judge stated thus:-

“All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply, its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion.”

4. In the instant case I heard seven (7) Prosecution witnesses. At the close of the Prosecution's case Mr. Rodgers Otieno, appearing for the accused requested the court to consider the evidence on record and make a ruling as to whether the Accused has a case to answer. He did not make any submissions, consequently M/s. Mourine Odumba, appearing for the State did not have an opportunity to similarly address the court as to whether the Accused has a case answers or not.

5. PW1, Pamela Anyango Odhiambo and PW2 Fredrick Odhiambo Omino placed the Accused at the scene of the incident and PW2 stated that the deceased told him he was raped by the Accused. He stated he noted dry blood on the face of the Accused who could not explain its source. PW3 Mary Aluoch Magoha identified the deceased's body to PW5 Dr. Patrick Omondi Choga who carried out the

postmortem on the body of Sophia Ochola Odongo. He formed the opinion of the cause of death to be due to severe anaemia with severe sepsis secondary to sexual assault as per exhibit 2. PW4, Collins Omondi Ouma, a Clinical Officer produced P.3. form exhibit P1, of Sophia Achola Obongo, dated 1.2.2012 which had been filled by Caleb Kadima and which indicated the deceased had tenderness on the neck on palpation, bruises on both labia majora and minora with possible penetration. There was also some facolith material on genitalia and on posterior border. The injury was classified as harm.

6. PW6, No. 90899 P.C. Sammy Kimanzi, received the reported of rape of the deceased from PW2 who brought the Accused to the Police Station. He booked the incident in the O.B. and recorded the Accused statement. The investigating officer charged the accused with an offence of incest at Bondo Law Courts in criminal case but before the case could be heard the complainant passed on and the case at Bondo Law Courts was withdrawn under **Section 87 'A' of Criminal Procedure Code** on 29.7.2012. The Accused was then charged with this offence.

7. I have very carefully considered the evidence of the prosecution witnesses specifically the evidence of Pw1 and PW2 who placed the Accused at the scene of crime and the alleged dying declaration by the deceased to PW2, as well as the evidence of the Clinical Officer, PW4 and that of the Doctor, PW5. I have also considered the evidence of PW6 the arresting officer and PW7 the Investigating Officer and I am alive to the fact that at this stage I am not required to apply my mind in deciding finally whether the evidence is worthy of credit or whether it is weighty enough to prove the case conclusively, thus beyond reasonable doubt. In holding the accused has a case to answer in my view would be justified, in a borderline case even where the court is not satisfied as to the conclusiveness of the prosecution's evidence. I refer to the case of **R V Jagjiven M. Patel & Others (Supra)**.

8. I am in view of the above satisfied that the Prosecution has established a prima facie case against the Accused person to warrant him being put on his defence. The Accused is accordingly placed on his defence.

DATED AND SIGNED AT SIAYA THIS 9TH DAY OF FEBRUARY, 2017.

J.A. MAKAU

JUDGE

Delivered This 9th Day of February, 2017.

In Open Court in the Presence of:

M/s. Odumba for State.

Mr. R. Otieno for Accused

Accused: Present in person.

C.A.

1. L. Atika

2. P. Ochieng

3. S. Ooro

J.A. MAKAU

JUDGE