



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL CASE NO. 32 OF 2015**

REPUBLIC.....PROSECUTOR

VERSUS

HELLEN KEMUNTO.....ACCUSED

**RULING ON A CASE TO ANSWER**

1. HELLEN KEMUNTO MORAA was charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. It was alleged that on 29<sup>th</sup> May, 2015 at Bochura village in Kisii Central District within Kisii County in the Republic of Kenya murdered **JARED ATANDI**.
2. The prosecution called only one (1) witness, No. 67867 P.C. Alfred Nasio, the investigating officer in support of their case. His evidence was that on 29<sup>th</sup> May 2015, he received a report of murder from Buchura village whereupon he visited the scene where he found the body of the deceased lying in a napier grass farm. He enquired what has transpired from the people around the scene and one Dennis Mosoti, informed him that he had seen the deceased and accused talking before the deceased fell down and the accused who had a jembe, ran away from the scene.
3. PW1 stated that while he was still at the scene, the accused who had been apprehended by members of the public was brought to him together with a jembe that had allegedly been recovered from her. PW1 produced the Post Mortem report and the jembe as Pexhibit 1 and 2 respectively.
4. He added that the recorded statements from several witnesses including the said Dennis Mosoti but stated that none of them was willing to come and testify in court. The prosecution then closed its case with only the testimony of PW1.
5. Before an accused person is placed on his/her defence, the prosecution is expected to establish a prima facie case against him/her. The standard of proof of a prima facie case was laid down in the famous case of **Ramanlal Trambaklal Bhatt vs Republic (1957) EA 332** as follows:

***“Remember that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is 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.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree***

*that the question whether there is a case to answer depends 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... it may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and evidence could convict if no explanation is offered by the defence.”*

6. In the instant case, I find that there was no evidence whatsoever, linking the accused to the charge of murder save for the hearsay evidence tendered by PW1. PW1 claimed that one Dennis Mosoti told him that he (Dennis) saw the accused talking to the deceased before the deceased fell down. This piece of evidence is, in my view, inadmissible hearsay evidence as the said Dennis Mosoti did not testify before the court to confirm the allegations made by the investigating officer.

7. While I appreciate that a life was lost and that the post mortem report produced by PW1 as Pexhibit 1 indicated that the deceased died due to a blunt trauma on the head, justice demands that it must be established, beyond reasonable doubt, that it is the accused who killed the deceased. The prosecution, as I have already stated in this ruling, did not tender any evidence that connects the accused to the crime of murder. A perusal of this file shows that the prosecution sought adjournments on numerous occasions to enable them secure the attendance of their witnesses to no avail as the said witnesses did not turn up in court for the hearing. It is quite unfortunate that in a serious case such as this one where human life was lost, witnesses can pull out of the case and fail to attend court. This means that the family of the victim of murder will not be able to get closure on the death of their kin. This is a scenario that must be discouraged at all costs as it can have the undesirable outcome of resulting in total breakdown of law and order when perpetrators of heinous crimes, such as the charge before the court, are allowed to roam freely without any legal action being taken against them. Securing the attendance of witnesses in court is the responsibility of the prosecution in conjunction with the police and the court can only facilitate that process by issuing summons to witnesses which this court did on 27th July, 2016. In an adversarial system such as ours, the courts hands are tied in instances where one party fails to present evidence in support of his case.

8. Be that as it may and turning to the matter before the court, I find that the evidence presented by the prosecution does not establish a prima facie case against the accused and consequently, I acquit her under **Section 306 (1) of the Criminal Procedure Code**. The accused shall be set at liberty forthwith unless she is otherwise lawfully held.

**Delivered, dated and signed in at Kisii on 13<sup>th</sup> of March, 2017.**

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Ouko for the State
- Mr. Bigogo for Ondari for the Accused
- Omwoyo court clerk