



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL CASE NO. 39 OF 2013

REPUBLICPROSECUTOR

VERSUS

PIUS ONGARO OSALA.....ACCUSED

RULING

Introduction

1. The accused herein Pius Ongaro Osala has been charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the 27th day of July, 2013 at Emukusa Village, Ebutanyi Sub-Location within Vihiga County he murdered Samuel Sikalo Adiado. He pleaded not guilty to the charge and the case proceeded for hearing. He was initially represented by M/S Masake advocate but when Mr. Masake failed to turn up on numerous occasions, the conduct of the case was taken over by Mr. C.M. Shifwoka, advocate.

The Prosecution Case

2. A total of six (6) witnesses were called by the prosecution. The Assistant Chief of Ebuyani Sub-Location who was the first to testify (PW1) told the court that he received a report on the 27.7.2013 from Noah Ongaro and others that accused had assaulted his son Samuel Sikalo until the child died. He went to the scene where he found the deceased's body and called the police who came and took the body to Dolphine Mortuary. PW2 testified that on the 27.7.2013 the accused went to his home while drunk at about 11.00am and assaulted the deceased.

3. PW2 said he refused to help the child because he feared the accused who is known to be aggressive and ferocious and could easily assault him. According to him the accused left and returned at about 6.00pm in the evening and continued to assault the deceased. The following day he heard that the deceased had died. He notified the area Assistant Chief (PW1) who called the police who took the body to the mortuary.

4. PW3 testified that he met the accused very early in the morning at about 7.30am on the 28.7.2012. Accused told him that his son had died while he was disciplining him. He testified that the accused was not drunk that morning. He made enquiries from PW2 who was not aware of the said death. They went to the scene and found that the child had died. He added that the child was 4½ years old. Later the police came and took the deceased to the mortuary.

5. PW4 stated that she was in her farm on the 27.7.2012 at about 11.00am when he heard the accused

talking to his two children telling them that she was not going to feed them. He was shouting abusive words to them. After a while she saw the accused heading to Luanda. In the evening she went to the accused's home and found him lying down. He was drunk. He testified that the accused who normally drinks was quarrelsome and would assault his children and wife often.

6. PW5 Dr. Philip Athero performed a post mortem on the body of the deceased on the 24.08.2013 at Dolphin nursing home. He opined that the cause of death was severe head injury.

7. Pw6 No.63897 PC Laban Gatura from Luanda police station explained to the court what he did after receiving the information of the death of the deceased on the 28.7.2013. He went to the scene accompanied by other officers where they found the dirty body lying on a sofa set. They took the body to Dolphine nursing home mortuary. Later he arrested the suspect and charged him with the offence herein after recording witness statements which pointed to the accused as having beaten the child.

8. Pw6 stated that the accused did not report to them about the death of the deceased who is his son. They arrested accused on the 28.7.2013. The prosecution closed their case at this point.

Submissions

9. The defence counsel Mr. Shifwoka filed written submissions on no case to answer. He submitted that none of the witnesses saw the accused assault the deceased and no one eluded to where deceased may have been hit or with what.

10. He adds that the post mortem report by the doctor does not assist the prosecution case because his opinion is not conclusive, and further that PW6 did not give a description of accused house nor were any photographs taken. The blood seen by PW6 was not taken for analysis to ascertain whether it was the deceased's blood. He maintained that the evidence in this case was circumstantial with glaring gaps which is insufficient to convict the accused.

11. Counsel relied on two authorities which this court has considered. Mr. Jamsumba SPPC Counsel relied on the evidence on record.

Determination.

12. What this court is required to determine at this stage is whether a prima facie case has been established against the accused person to warrant his being placed on his defence for the offence of murder. In the celebrated case of **Ram Lal Trambaklal Bhatt – Vrs – Republic [1957]EA 332** it was stated that;-

“..... the question whether there is a case to answer cannot depend 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 evince can never be enough nor can any amount of worthless discredited evidence.”

13. Earlier in that case the court cited the following passage from the judgment of **Wilson J in R.Vs – Jagjivan Patel and others TLT(R) 85** with reference to Section 205 of the Criminal Procedure Code. “..... all the court has do decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his 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 the conclusiveness of the prosecution evidence, it yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

14. In this case the prosecution has shown that the deceased died following allegations that the accused

had earlier assaulted the deceased on the 27.7.2013 in the morning and later that evening. Both PW2 and PW3 testified to that fact, and the deceased was found dead in the house the next morning. The accused himself is said to have informed one of the witnesses that the child had died.

15. For the reasons set out above this court finds that the prosecution has established a prima facie case against the accused person which requires him to be placed on his defence. He is accordingly placed on his defence and informed of his rights under section 306(2) of the Criminal Procedure Code.

Orders accordingly,

Ruling delivered, dated and signed in open court at Kakamega this **2nd day of March 2017**

RUTH N. SITATI

JUDGE

In the presence of:-

.....Mr. Shifwoka (present).....for Accused

.....Mr. Ng'etich (present).....for State

.....Mr. Polycap.....Court
Assistant.