



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 94 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

HASSAN OKEMWA.....ACCUSED

RULING

The accused **HASSAN OKEMWA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

“On the 25th day of October, 2013 in Gilgil District within Nakuru County, jointly with others not before court murdered SAMWEL AMTAI CHISIRE”

The accused entered a plea of ‘Not Guilty’ to the charge. His trial commenced on 23/6/2014 before **Hon. Justice Anyara Emukule** who heard the evidence of the first five (5) prosecution witnesses. Following the transfer of the Honourable Judge to Mombasa High Court, I took over the matter and heard the remaining five (5) witnesses. A total of ten (10) witnesses were called by the prosecution in support of the charge.

PW1 SALOME NYANCHOKA ONDUSO told the court that on 25/10/2013 her young grandchildren were playing in her compound. One of the children came across a dead body in the thicket. The child alerted **PW1** who in turn alerted the chief. Next to the body was found a cap.

PW3 MURIAM KEMUNTO was a seller of local brew in her house at Kiambogo. She told the court that on 25/10/2013 she began to sell her brew at about 4.00pm. At 5.00pm the accused came to her house to partake of the brew. At 7.00pm **PW3** who was feeling unwell retired to bed she left the accused who was her son outside with the deceased and one ‘Aden’.

The next morning **PW3** heard screams from the neighbours. She went to check and found a body dumped near the thicket fence. Police later came and arrested both **PW3** and her son. **PW3** was later released whilst her son (the accused) was charged with the offence of murder.

PW6 M K a young girl aged 15 years was a sister to the accused and a child to **PW3**. She told the court that on the material day she saw the accused and another armed with sticks and panga’s beating the deceased. She then saw the two carry away the body of the deceased.

Upon the close of the prosecution case this court must now analyze the evidence on record and make a determination as to whether a prima facie case had been established to warrant calling upon the accused person to defend himself.

The definition of what constitute a prima facie case was expounded in the classic case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] E.A 332** where it was held thus

“A mere scintilla of evidence can never be enough.....”

The court went onto state that

“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 the evidence could convict if no explanation is offered by the defence”.

In any case of murder the prosecution must prove beyond reasonable doubt the following key ingredients of the charge

- The fact as well as the cause of death of the deceased
- That the accused by an unlawful act or omission caused the death of the deceased
- That said unlawful act or omission was done with malice aforethought

In this case the fact as well as the cause of the death were proved to the required legal standard. **PW3** was the mother of the deceased. She confirms having seen the mutilated dead body of her son.

PW10 DR. TITUS NGULUNGU was the doctor who produced the post-mortem report. He testified that the body had severe cuts and fractures on the head, mouth and jaw. The cause of death was found to be ‘**severe head injury occasioned by blunt force trauma**’. **PW10** produced the post-mortem report as an exhibit **P. exb 4**. This was expert medical evidence and was not challenged by the prosecution. It is clear that the deceased met his death due to a grievous assault to his person.

In this case out of the ten (10) witnesses called by the prosecution only one being **PW6** claimed to have seen the accused and another man assaulting the deceased. **PW6** told the court that she was with her other siblings when she witnessed the incident. **PW5 PETER MAKORI** was the brother of **PW6**. However **PW5** denied having seen anything at all.

It is a well established principle in law that a fact in issue may be proved by the evidence of a single witness. However the evidence of that witness must be scrutinized very carefully by the court in order to rule out the possibility of any error or mistake. In **MAITANYI Vs REPUBLIC [1986] KLR 198** the court held as follows

“1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description”

PW6 told the court that this incident occurred at about 7.00pm. Undoubtedly darkness had already set in **PW6** did not mention the existence of any source of light, either electric or otherwise which enabled her to see and identify the accused.

This court was able to observe the demeanour of **PW6** as she testified. She was belligerent, difficult and hostile and appeared very reluctant to be in court. Her demeanour raised serious doubts regarding her veracity of a witness and her evidence cannot be relied upon.

Aside from this unreliable eyewitness account, the prosecution is relying on the fact that the accused was left by **PW3** outside the house with the deceased. However there is evidence that there was a third person whose name is given as ‘**Aden**’ who was also outside with them. This ‘**Aden**’ has absconded and had not been traced to date. The very real possibility that it was this ‘**Aden**’ who fatally assaulted the deceased cannot be ruled out.

On the whole I find that this is a case in which if the accused exercised his legal option not to present any defence to the charge, then the evidence on record would not be sufficient to merit a conviction. No prima facie case has been proved. I therefore enter a verdict of ‘**Not Guilty**’ and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 16th day of June, 2017.

Ms Kerubo holding brief for Ombati

MAUREEN A. ODERO

JUDGE