

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 89 OF 2014

(Formerly Kisii High Court Criminal Case No. 89 of 2013)

REPUBLIC.....PROSECUTOR

-versus-

ISAACK MWITA MAGENA alias MWITA MUSA..... ACCUSED

RULING

1. Following the death of one **FRANCIS NGODI MWITA** at Gibaroa village in Kuria East District within Migori County on the 22nd day of July 2013 (hereinafter referred to as "***the deceased***"), **ISAACK MWITA MAGENA alias MWITA MUSA** (hereinafter referred to as "***the accused person***") was arrested and arraigned before the High Court at Kisii (***Sitati, J.***) on 01/05/2013 and faced the information on the murder of the deceased contrary to **Section 203** as read with **Section 204** of the Penal Code, Chapter 63 of the Laws of Kenya.
2. The accused person denied the information and he was put up for trial but before the commencement thereof, the case was transferred to this Court upon the establishment of a High Court station for hearing.
3. This case was then handled by ***Majanja, J.*** who took the evidence of the first three witnesses before he was transferred from the station. The rest of the evidence was thereafter taken before me upon compliance with **Section 200(3)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya.
4. In a bid to prove the charges, the prosecution called a total of seven witnesses. **PW1** was one **NELSON MWITA**, the father to the deceased. **PW2** was **CONSOLATA NYANONKWE**, the wife to the deceased and **PW3** was **MARWA GATI MOTATIRO**, a motor cycle (*boda boda*) rider. The investigating officer one **No. 81670 Corp. HELEN KOECH** testified as **PW4**. **PW5** was **MOSABI PAUL MWITA**, a brother to the deceased. The arresting officer **No. 73685 Sgt. PETER KIPTOO** of Kehancha Police Station testified as **PW6** and **Dr. SAMMY RUWA MWATELA** testified as **PW7**.
5. At the close of the prosecution's case, the Defence Counsel, **Mr. Sagwe** made brief oral submissions that no case had been made to warrant the accused person to be placed on his defence. The State relied on the record.
6. In this matter, there is no dispute as to the fact that the deceased died. That was proved by all the witnesses who testified before Court.
7. None of the witnesses however saw the accused person kill the deceased. All the witnesses who testified on how the deceased was before he died stated that it was one **GITURA MOSES** who had informed them that the accused person had killed the deceased. The said person was however not availed as a witness to shade some light on the matter and there was no justification for such failure. (See **Bukenya & Others -versus- Uganda (1972) EA 549** and **Nguku -versus- Republic (1985) KLR 412**).
8. The effect of such evidence is that it amounts to hearsay and is not evidence in law. There is also no iota of any circumstantial evidence pointing to the accused person. That being so, the prosecution's case was built on quicksand and remains hollow. It cannot stand.

9. The upshot is that there is nothing on record to link the accused person with the death of the deceased. This Court therefore finds no basis at all in law in placing the accused person on his defence. Even if this Court is to close its legal eyes and place the accused person on his defence, that will not yield anything much in law and will amount to wasting the already limited judicial time.

10. Having found that there is no nexus at all between the death of the deceased and the accused person, then pursuant to **Section 306 (1)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya, I find that the accused person herein namely **ISAACK MWITA MAGENA alias MWITA MUSA** is **NOT GUILTY** of the murder of **FRANCIS NGODI MWITA** and he is hereby acquitted accordingly.

11. The Accused person shall forthwith be set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of June 2017.

A.C. MRIMA

JUDGE