REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 17 OF 2016

(MURDER)

(CORAM: J.A. MAKAU – J.)

REPUBLIC …….... PROSECUTOR

VERSUS

COLLINS OTIENO OBAKO ..…….. ACCUSED

RULING

1. The Accused **COLLINS OTIENO OBAKO i**s charged with an **offences of murder contrary to section 203 as read with 204 of the Penal Code.** The particulars of the offence are that on the 13th day of November, 2012, at Barkowino, Bondo District, within Siaya County, murdered one **COLLINS OTIENO.**

2. This case commenced before Hon. Chemetei J. who heard three prosecution witnesses before this case was transferred to Siaya High Court. That this Court gave directions after hearing the accused that the case do proceed from where it had reached. I heard one witness before the prosecution closed their case.

3. The Prosecution called 4 witnesses in support of the charge. The facts of the Prosecution's case are, that on 15th November, 2012, the Accused with another person went to the home of Augustine Onyia Ogango (PW1) and asked for water to drink. After drinking water, the two left for Okwaro Aloo's home and returned back to PW1's home drunk and took a panga from his kitchen. PW1 left for Bondo and found blood stains on the road but did not know what had happened. On returning home he was informed that his panga (MFI-1) had been used. PW1 went to Ratanga and found Obako, the Accused, in company of PW1's son Augustino Odhiambo, who told him, Obako, the Accused had taken the panga and used it to cut the deceased. PW1, found his panga with his son. PW2, Florence Agutu Otieno testified that on 13.11.2012, at around 12.30 pm, Collins Obako, the Accused in company of another, visited her place and told her they wanted alcohol but did not have money. PW2, gave the Accused the alcohol and he gave her, his phone as a security for the money which he offered to pay at 4.00 pm. That the two left for work at Ratia Polytechnic but they did not return. That while the two were at PW2's home they did not fight or quarrel. PW3 Japheth Okol Juma testified that on 13.11.2012, he found somebody in his home with cuts who he did not know, that he went and returned with Judith Ochieng, who took the person to Bondo sub-county hospital to save his life as he was bleeding from the head, PW3, later heard that the person had died. PW3, testified that he did not see the Accused at his compound. PW4, David Ombok, testified that on 13.11.2012 at around 6.00 a.m. he was at his home when his nephew Collins Otieno was killed near Ratia Polytechnic. That two girls told him that his nephew had been cut and was bleeding profusely. PW4 instructed his son Henry Ochieng, to visit the scene and find out what was happening. PW4

followed him and got information that his nephew had been taken to Bondo Sub-County Hospital, where he went and found the deceased's body covered with blood and noted cuts on the legs and below armpit. He talked to him and he told him Obako had cut him, which Obako, PW4 did not know and he then passed on.

4. Upon the close of the Prosecution's case, the defence Counsel relied on her written submission and highlighted on the same on no case to answer, whereas the Prosecution relied on the evidence adduced before the Court.

5. In **Republic V Andrew Mueche Omwenga, Criminal case No. 11 of 2008 (2009)eKLR, Honourable Justice D.K. Maraga** as he then was, stated as follows:

> ***"…. What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the accused's state of mind at the time; usually intention or recklessness is required. The Latin maxim-actus non facit reum, nisi mens sit rea – "the act itself does not constitute guilt unless done with a guilty mind," encapsulates this principle."***

6. Malice aforethought is very important ingredient for the offence of murder. The Prosecution has to prove facts which establish malice aforethought. **Section 206 of Penal Code** sets down the facts which constitute malice aforethought as follows:-

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:***
>
> > ***a. An intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or not;***
> >
> > ***b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be cause;***
> >
> > ***c. an intent to commit a felony.***
> >
> > ***d. An intention by the act or omission facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony."***

7. In determining whether, the accused in this case has a case to answer, I think it is appropriate to define what a "*prima facie* case" is:- In the case of **Bhatt V Republic (1957) EA 332,** the definition of *prima facie* case is well stated by the Court of Appeal as follows:-

> ***"Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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 is true as Wilson J said that the Court is not required at the stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively. That the defence has been heard. 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."

8. In **Republic V Hezron Maina Wanga and Another Criminal Case 15 of 2014, Hon. Lady R.W. Sitati** held:-

> ***"…..means rea, which is an ingredient under Section 206 of the Penal Code, namely the carrying out of the unlawful act or omission is satisfied when there is evidence proving any of the circumstances set out under the said Section. Regarding the establishment of malice aforethought where it is shown that the attack on the deceased was spontaneous with no evidence of there having been a prior plan to attack the deceased it cannot be said that the killing was with malice."***

9. At this stage, it is sufficient for the Court to critically look at the evidence on record and determine whether such evidence as it is meets the threshold as set out in the **Bhatt Case** (***Supra***) in regard to what constitutes a ***prima facie*** case. The strength of evidence establishing a ***prima facie*** case must be the kind of evidence upon whose strength the Court could convict if the defence does not give any explanation rebutting that evidence or opts to say nothing to rebut such evidence. It is also worth noting that at this stage the prosecution does not have to prove its case beyond reasonable doubt, for proof beyond reasonable doubt is required when the defence has also given its evidence or has closed its case either way.

10. I find that it would be unsafe to base an order on a case to answer on the deceased alleged dying declaration which was made in absence of the Accused and which was not subjected to cross-examination. I further find no satisfactory corroboration as PW4 never stated the dying declaration was made in presence of any other person and which person gave evidence to corroborate PW4's evidence on the dying declaration. I find that there was no other evidence direct or circumstantial pointing towards the guilt of the Accused such as forensic test.

11. In **Donald Agwata Achira V Republic, Criminal Appeal No. 47 of 2003(2003) eKLR at Kisumu,** it was held as follows:-

> ***"….. In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward, a theory not canvassed in evidence or in counsel's speeches. A trial judge should approach the evidence of a dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration."***

12. In the instant case no eye witness was called by the Prosecution. The cause of death was not proved nor did the Prosecution prove who caused the deceased's death nor was malice aforethought proved. No evidence was adduced to the effect that the Deceased and the Accused quarreled or fought at the time they were taking alcohol or thereafter.

13. On the deceased dying declaration in the case of **Shadrack Mbaabu Kinyua V Republic in Criminal Appeal No. 163 of 2011 (Nyeri) the Court of Appeal** stated thus:-

> ***"…. The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this Court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval ….. it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R.V.Eliigu s/o Odel and Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused ……. But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is a satisfactory corroboration."***

14. In the instant case, though no postmortem report was produced, there is no other evidence linking the Accused with the death of the deceased save for the dying declaration which lacks corroboration and which was purportedly made in absence of the Accused to PW4. PW4 did not know the person mentioned by the deceased. I find that it would be unsafe to find that the Accused have a case to answer solely on the basis of the alleged dying declaration by the deceased to PW4.

15. In view of the above, I find the evidence placed before me insufficient, to warrant the Accused being put on his defence. I find the Accused has no case to answer. Accordingly I make a finding that the Accused is not guilty of murder of the deceased and is accordingly acquitted under the provisions of Section 306 (1) of the Criminal Procedure Code. I direct that the Accused be set at liberty forthwith unless otherwise lawfully held.

DATED AT SIAYA THIS 20TH DAY OF JULY, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 20TH DAY OF JULY, 2017.

IN THE PRESENCE OF:

M/S. AKINYI ODHIAMBO FOR THE ACCUSED

MR. ODUMBA FOR STATE

COURT ASSISTANTS:

1. L. ODHIAMBO

2. L. ATIKA

J. A. MAKAU

JUDGE