



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CR CASE NO. 20 OF 2012

REPUBLIC.....PROSECUTOR

VS

ROBERT ENGOI LEPHO 1ST ACCUSED

CHARLES LEURATI 2ND ACCUSED

RULING

Robert Engoi Lepho and **Charles Laurati** are jointly charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge are that on 4/11/2011 along Archers-Sarova Shaba Lodge Road in Isiolo District, jointly with others not before the court, murdered **Mohamed Halkano Okutu**. The accused denied committing the offence. The prosecution called a total of 7 witnesses. The accused were represented by Mr. Nyenyire Advocate while the prosecution was led by Mr. Mungai and Mr. Mulochi, Learned Counsel representing the State.

The two key witnesses in this case are **PW1 Francis Mkwe Ebenyo** and **PW2 Alois Ekutan** who recalled that on 4/11/2011, they were coming from Archers Post and that at a place between Complex and Dungai, they found Charles and Ari Lapoyo seated behind some stones and that they were armed with guns, an M16 and a G3. Before they reached at a place called Manyatta, they heard gun shots. They ran back and found that a tourist vehicle had been shot at; that the driver had died while one lady had been injured. PW2 said that the vehicle was attacked at the spot where they had seen the 2 accused and that the two accused were nowhere to be seen. PW1 and 2 both said that both accused are people they knew very well before that date.

PW3 Hussein Jilo Haro was on a motor cycle ridden by **PW5 Robert Laazo** on the way to Archers Post when they found the tourist vehicle had already been shot at and the deceased had died. Both of them confirmed that efforts to trace the perpetrators of the offence were futile.

PW4 Ismail Ali Galma was the nephew of the deceased and on 4/4/2011, he identified the body of the deceased to the Doctor before post mortem was conducted. He noted several gunshot wounds on the deceased's body.

PW6 CPL Joseph Ringine was the Investigation Officer in this matter. He visited the scene of crime after the report was made to Isiolo CID. He found that the vehicle had rolled, the driver was dead and a white woman was injured but the white man was not. He gathered that three people had been spotted near that scene before the shooting and that as a result of the information from witnesses, the two accused were arrested.

PW7 Dr. Mohamed Abdi Kadir of Isiolo Referral Hospital produced the post mortem report made by **Dr. Jane** on 4/11/2011 at Isiolo Hospital. The Doctor found that the deceased had sustained multiple gunshot wounds on the left side of the chest, rugged wounds on right upper arm, fractured right humerus and internally, left ribs were fractured, the right lung and the heard were severed. The Doctor formed the opinion that the deceased died due to cardio pulmonary arrest secondary to lung and heart injury with severe haemorrhage due to multiple gunshot wounds.

The issue at hand is whether the prosecution has established a prima facie case against the accused to warrant them to be placed on their defence. The East Africa Court of Appeal defined what a prima facie case is in the celebrated case of **Ramamlal Trambaklal vs Rep (1957) EA 332 pg 334** where the court stated:

“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 is made out if, at the close of the prosecution case, 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 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 “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”.

It is now my duty to analyse and examine the evidence adduced before this court to determine whether the standard set in the above case and which has been followed in many other cases, has been arrived at.

None of the witnesses witnessed the shooting. According to PW1 and 2, they had seen the two accused at the scene where the shooting took place. PW1 said that the shooting took place about ½ an hour after they had passed the scene of the shooting. PW2 also estimated that the shooting took place 20-30 minutes after they had left the scene. It means that from the time PW1 and 2 saw accused if at all, 20-30 minutes had lapsed. That was too long a time for anybody else to have reached that place within that time. There is no evidence that it is only the accused who could have been at the scene of the shooting at that time. That was a public road. It is also not possible to tell if the accused, if they were the ones seen at the scene by PW1 and 2, had not left the place before the shooting occurred.

From the evidence adduced by PW1 and 2, the identity of the two accused is not watertight. Though the offence is supposed to have occurred during the daytime, I believe it was around noon, yet PW1 said that the people he saw were seated behind stones, which were 2 metres high and he only saw their heads. PW2 on the other hand said the stones were 1½ metres high. If one is seated or crouching as alleged, I doubt that they could easily be seen from behind such high stones.

Further to the above, whereas PW1 told the court that the two people he saw waived at him, PW2 vehemently denied that the two ever waived or greeted them. Both PW1 and 2 said that the two people they saw were about 20-30 metres away. Because of the stones that prevented a clear view of the people who were hiding behind the stones, and the distance between them, this court is in doubt whether the identification was full proof.

Further, the Investigation Officer received information that the perpetrators were three armed men. PW1 and 2 only saw two. It is possible that there could have been another group of people.

It seems that the accused were arrested based on the evidence of PW1 and 2 alone. I have carefully evaluated their evidence and there being no other evidence, I find that the identity of the accused persons is in doubt. PW2 said that they knew the accused persons as bandits and that may have influenced accused's arrest. The accused are prime suspects but there is not enough evidence adduced by prosecution that would warrant the accused to be placed on their defence. If the court calls on the

accused to defend themselves, it would be tantamount to telling them to prove their innocence. In the result, both accused are acquitted of the offence under **Section 306 of CPC** and set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

11/2/2016

PRESENT

Mr. Kariuki for State

Mr. Igweta Holding Brief for Mr. Nyonyire for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused