



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO.49 'B' OF 2009
REPUBLICPROSECUTOR
VERSUS
GREGORY MOI SISI.....1ST ACCUSED
JULIUS ATEA2ND ACCUSED

RULING

Background

1. The accused persons herein GREGORY MOI SISIA and JULIUS ATEA are charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 22nd day of February 2009 at Buhuru market Munganga sub location, East Wanga location in Mumias district within western province jointly with others not before Court murdered PETER TOMIA MAKARI. They both pleaded not guilty.

Prosecutions Case

2. Five witnesses were called by the Prosecution to testify. PW1 PETER MUGANDA was attracted to the scene of crime at about 12.00 midnight on the night of 21/02/2009 after he heard noises coming from his posho mill which is behind his house. At the scene he found about seven (7) people who were running away from the posho mill. They told him that robbers wanted to break into Mustafa Osundwas shop. Together with the seven (7) people they went to Osundwa's shop and saw that there had been attempts to break into the shop. As they walked around PW1 realized that he did not see his watchman. He decided to go to his posho mill and check. On arrival he saw the door to the posho mill had no padlock but was closed. He opened the posho mill where he saw the body of the watchman lying dead with the left hand tied with a manila "PMFI – 1". He then called the OCS Mumias who gave him the number of Corporal Chelanga. He went to the AP camp at Sianda and took three (3) AP Officers and they went to the scene.
3. At the scene, they found another watchman who had been beaten but was live. They took him to Makunga Rural Demonstration Centre in Mumias East where he was admitted because of his critical injuries. Police from Mumias took the body of the deceased to the mortuary. He recorded his statements. Thereafter the Police arrested two (2) suspects but he wasn't there during the arrest.
4. On cross examination by Mr. Mwebi for the accused persons he admitted that he did not see the two accused persons at the scene and that nothing was stolen from his posho mil. PW2 Mustapha Osundwa Lutomia testified that on the 22/02/2009 at 6.00a.m he discovered that there was an attempt to break into his business premises at Buhuru market. On enquiring he was informed by

- Roselyne Namanse and Nyamori Murami that robbers had attempted to break into his shop and had also injured his watchman Charles Ongure. He was also told about the murder of the deceased herein who was a watchman at PW1's shop. He confirmed this information from PW1 after going to PW1's place. He too recorded his statement.
5. PW3 Mohammed Nyongesa Ndeti also a watchman in the same area told the trial Court that on the 21/02/2009 he was on duty at 11.00pm at Malava clinic which is behind the shops where the incident herein occurred. He saw five (5) people and they were talking amongst themselves. He heard them asking for him and he decided to hide in the sugarcane plantation and they then left. In the morning he went home where he heard of the murder of the deceased herein. He recorded his statement.
 6. On cross examination he maintained that he saw 5 people but could not identify anyone of them nor did he see what they did. PW4 Sgt Benjamin Chelanga No.65405 investigated the case herein. After receiving a report of the murder, he proceeded to the scene together with IP Muriuki, PC Ngeno and PC Korir Ole Shankik.
 7. PW4 stated that during investigations he found that six (6) men armed with crude weapons had attacked the deceased and another guard who was guarding the shop of Mr. Mustapha (PW2). He also gathered information from ROSELYN NAMANZE and MAUREEN who were asleep in the hotel and who claimed to have recognized the voice of GREGORY SHISIA. No arrests were made that day. They took the body of the deceased to Kakamega Provincial General Hospital mortuary for post mortem. He also testified that after the incident the area Chief called a Baraza where Julius Ateya and Moi Sisia were arrested by members of the public. They took the two suspects to Mumias Police Station and placed them in custody. He took the two suspects for psychiatric examination where they were confirmed to be of sound mind. He pointed out the two suspects (accused) who were in the dock.
 8. On cross examination by Counsel for the accused PW4 confirmed that he was the Investigating officer and that only one person identified the accused persons. This was Charles Obachi who died before he testified. He also testified that the two ladies Roselyne Namanze and Maureen Murambi told him they identified the voices of the attackers. He also testified that he did not carry out voice identification. He was taken through his Investigation Report. He told the Court that Rosemary and Maureen told him about the voice recognition only in their statements. He added that when PW1 called him PW1 did not mention anybody's name and that his diary did not indicate anybody's name not even the names of the accused herein.
 9. PW5 WINSTON ONGALO a Senior Medical Officer at Kakamega County Hospital and a qualified doctor produced the post mortem report which was prepared and filled by Dr. Orike O.B which was marked as "PEXh 1".
 10. At this point upon the close of the Prosecution case this Court is required to critically examine the evidence on record in order to determine whether a prima facie case has been established to warrant the accused persons being called upon to give their defence. Mr. Mwebi Counsel for the accused persons submitted at length and maintained that the Prosecution has not made out a case to require the accused persons to be placed on their defence for the offence of murder. He submitted further that PW4 the Investigating officer's evidence was hearsay and that the two (2) ladies mentioned by him (PW4) were not called to testify.
 11. This Court has critically considered the evidence by the five (5) prosecution witnesses. It is true that on the night of 21/02/2009 / 22/02/2009 there was an attack at Buhuru market where PETER TOMIA MAKARI a watchman at a posho mill owned by PW1 was murdered.
 12. PW5 confirmed the cause of death of the deceased whereas PW1 saw the body of the deceased lying dead at the scene. PW4 is the only one who has placed the accused persons at the scene of crime. He relied on what he was told as an investigating officer. He also claimed that the only person who saw the accused at the scene had passed on and therefore he could not be called as a witness.
 13. The question which this Court has to determine is whether a prima facie case has been established. A prima facie case means the establishment of a rebuttable presumption that an accused person is guilty of the offence he/she is charged with. In the case of **Ramanlal Trambaklal Bhatt –vs- R [1957] E.A 332 at 334 and 335** the Court stated 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 is made out if, at the close of the Prosecution, 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 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 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.”

- 14.From the definition of murder under Section 203 of the Penal Code, the State has the onus of proving that death has occurred and that, that death was caused by an unlawful act or omission of the accused person before the Court and that the accused persons caused that death with malice aforethought.
- 15.When the evidence of the Prosecution in this case is put to the test, the standard laid down by the law as enunciated in the Bhatt case (above). The question that arises is this: can this evidence pass the test? Can this Court properly directing its mind to the law and that evidence convict the accused persons if no explanation is offered by the defence given that the onus of proving a criminal case lies with the Prosecution? This Court is of the considered view that this evidence cannot pass the test.
- 16.Even though there is proof that the death of the deceased occurred, there is no proof that it was caused by an unlawful act or omission of the accused persons or either of them and that the accused acted with the intention of causing that death. Life is sacrosanct and any person who unlawfully causes the death of another must face the legal consequences. But before those consequences can befall the offender, there must be proof that he/she is the person who caused the death.
- 17.In the instant case, there is no iota of evidence to suggest that either one or both accused persons caused the death of the deceased. None of the witnesses told the Court that they saw the accused persons at the scene nor did any of them allege that that they were found in possession of any items that may have been stolen during the incident.

Conclusion

- 18.In the premises, I find and hold that no sufficient evidence has been placed before this Court to warrant putting the accused persons on their defence. I therefore make a finding that the accused persons, Gregory Moi Sisia and Julius Atea are not guilty of the murder of PETER TOMIA MAKARI.
- 19.I acquit them under Section 306 (1) of the Criminal Procedure Code, unless they are otherwise lawfully held, they are to be released from prison custody forthwith.
- 20.Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this

10th day of February, 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Omwenga.....for State

Miss Shirika for Mwebi (present).....for Accused Persons

Mr. Lagat.....Court Assistant