



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL CASE NO. 59 OF 2011.

REPUBLIC ::PROSECUTOR

VERSUS

ZAINA NAMENGE WAWIRE::::::::::::::::::::::::::::1ST ACCUSED

MOSES ZABLON MBIRI::::::::::::::::::::::::::::2ND ACCUSED

R U L I N G

1. The accused persons, Zaina Namenge Wawire and Moses Zablon Mbiri were charged on an information filed in court on 30th November, 2011, with the offence of murder contrary to section 203 as read with 204 of the Penal Code.
2. The particulars were that on the night of 24th and 25th November, 2011 at Lusheya Village, Shibinga sub location in Mumias District within Kakamega County jointly with others not before court murdered Joseph Stephen Chitechi.

Mr. Athunga , learned counsel, appeared for the two accused persons, whereas Mr. Oroni , learned counsel, appeared for the office of the Director of Public Prosecutions. The plea was taken on 13th December, 2011, where the accused persons pleaded not guilty. The hearing of the case commenced on 14th May, 2012.

3. PW1 was Kweyu Chitechi. His evidence was that on the morning of 25th November, 2011 at 6.00 a.m., he was at his home when he was informed that there was noise at his mother's home. He went there and found his brother Joseph Stephen Chitechi dead. The deceased had injuries on his neck. His hand was raised up. His body was on the farm of Mzee Otota.
4. PW1 called the Assistant chief who in turn called Administration Police Officers. They called Police Officers from Mumias Police Station who went to the scene and took the deceased's body to the mortuary. On 28th November, 2011, PW1 identified the deceased's body for post-mortem.
5. PW2, Kennedy Okombuli Chitechi adduced evidence that he knew the 1st accused person as a friend to his deceased brother who had separated with his wife. In April, 2011, he heard complaints from the 1st accused person's home that she was a friend to his deceased brother Joseph Stephen Chitechi. The 1st accused person's home gave the warning. PW1 told his mother to talk to the Assistant Chief so that the parties could be reconciled. He informed the court that his mother did so.

6. On the early morning of 25th November, 2011 at about 6.00 a.m. he was informed that the deceased had died. PW2 went to the scene and saw that the deceased had a swollen neck. He was bleeding from the nose and mouth. PW2 called the Assistant Chief who called the Police. PW2 attended the post mortem of the deceased on 28th November, 2011, where he identified the body to the Doctor. PW2 informed the court that the 2nd accused person is the brother-in-law to the 1st accused person. On cross-examination, PW2 informed the court that it was his mother who received the warning.
7. PW3, Francis Angara Wandako testified that on the 24th November, 2011 during the day, he met the deceased who told him that he was going to see the 1st accused person, Zaina. The time when he met the deceased was at 11.30 p.m. It was PW3's evidence that as he was going to work on 25th November, 2011 he came across some people who were crying and others yelling. As he reached the road he was asked why he was going to work yet his brother Joseph Chitechi had been killed. PW3 turned back and went to the scene which was near the Assistant Chief's home. He saw that the deceased had finger nail marks on the neck. One of his hands was raised up and it had scratches. The Police went to the scene and collected the body.
8. PW3 testified that the deceased had inherited the 1st accused person but he had heard that there was another man who was also claiming that she was his wife. The 1st accused person's home was 30 metres from where the deceased's body lay. PW3 did not know the other man who was claiming the 1st accused person as his wife. On cross examination, PW3 informed the court that the deceased told him that he was going for a burial commemoration ceremony for the 1st accused person's mother-in-law. PW3 stated that at the Administration Police office, he identified the deceased's bicycle which had been recovered.
9. PW4, Dr. Boniface Nyombile Ndalul produced the deceased's post mortem report on behalf of Dr. Oluoch who conducted the post mortem. The deceased's body was decomposed. It was bleeding from the nose and mouth. Dr. Oluoch filled in the post mortem form that there was a collection of blood between the skull and the brain, on the left side of the deceased's head. The cause of death was established to be severe head injury, secondary to trauma. PW4 produced the post-mortem report as PExh. 1.
10. PW5, Bakari Manyang was the Assistant chief of, Lushea sub location. He testified that on 25th November, 2011, at about 7.00 a.m. he received a report from Mzee Saleh who informed him that he had found a dead boy on his land. PW5 called the Chief and saw Joseph Stephen Chitechi alias C.J's body. At the scene he also saw the 1st and 2nd accused persons who had been made to sit down. He was informed by one Evans Rupia that the 2nd accused person had been drinking chang'aa at the 1st accused person's place. He handed over the two accused persons to Administration Police Officers.
11. PW6, Shaban Wanyama testified that on 25th November, 2011 he went to a posho mill after 5.00 p.m. He heard that the deceased had died and that his bicycle was lost. PW6 saw the bicycle inside a farm with banana plants belonging to the 1st accused person. PW6 identified the bicycle in court, it has the words "Mzaliwa C.J." written at the back. As PW6 was going to report to the chief he met Police Officers on the way to whom he reported that he had seen the deceased's bicycle he informed the court that the 1st accused person's house is near the banana plants where he saw the bicycle. He stated that there is a road passing near the bananas. He did not see anyone at the banana farm.
12. The prosecution through Mr. Oroni, learned Prosecuting Counsel, on 26th May, 2015 informed the court that it had only one more witness, the Investigating Officer, to call before closing its case. The prosecution was granted adjournments on 28th May, 2014, 10th July, 2014, 12th November, 2014 and on 2nd November, 2015, when this court granted the prosecution the last

adjournment. Come the 8th of February, 2016, the prosecution did not avail the Investigating Officer. This court declined to grant another adjournment. The prosecution then closed its case.

13. At this juncture, this court is required to rule on whether or not the two accused persons have a case to answer based on the evidence adduced by the prosecution. In doing so, I am guided by the case of **R. Vs. Jagjivan M. Patel and Others (1) T.L.R. (R) 85**, where the court stated thus:-

“..... all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if it is believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

14. In the instant case, the evidence available connects the 1st accused person to the deceased through PW2 who testified that the 1st accused person was a woman friend to the deceased. He further said that a warning was issued to the deceased from the 1st accused person’s home. The evidence does not disclose the specific person who issued the warning. All that PW2 said was that the warning was issued to the deceased’s mother, who did not adduce evidence.
15. PW3 adduced evidence that he met the deceased at 11.30 p.m., on 24th November, 2011. The deceased told him that he was going to see the 1st accused person. The evidence of PW5 that the accused person was drinking chang’aa at the 1st accused person’s house is hearsay as the person who gave him that information, one Evans Rupia, did not testify in court. PW3 informed the court that another man whom he did not know was claiming the 1st accused person was his wife.
16. Although the deceased’s bicycle was seen by PW6 inside a farm with banana plants belonging to the 1st accused person, there was no evidence adduced to show that it was taken there by the 1st and 2nd accused persons or by either of them .
17. In the case of **Ramantalal Trambaklal Bhatt Vs. Republic (1957) E.A. 332**, the standard of proof as to whether the prosecution has established a prima facie case was stated as follows:-

“The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought to sustain a conviction. The question of whether there is a case to answer cannot depend 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.”

18. I find that the evidence adduced by the prosecution does not directly or indirectly connect the 1st and 2nd accused persons to the commission of the offence. I therefore hold that a prima facie case has not been established to put the 1st and 2nd accused persons on their defence.
19. I find them not guilty of the charge of murder contrary to section 203 as read with 204 of the Penal Code. I hereby acquit the 1st and 2nd accused persons under the provisions of Section 306 (1) of the Criminal Procedure Code. Each one of them shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **1ST** day of **MARCH, 2016**.

NJOKI MWANGI

JUDGE.

In the presence of

..... for the 1st and 2nd accused persons.

..... for the Respondent.

.....Court Assistant