



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 73 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

DOMINIC NYAKUNDI MBAKA Alias TOMMY.....ACCUSED

RULING

1. The accused person herein **DOMINIC NYAKUNDI MBAKA alias TOMMY** is charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**.
2. The particulars of the charge are that on 23rd December 2009 at Nyamosi village of Onywere Sub-location in Marani District within Nyanza Province murdered **PATRICIA KEMUNTO**.
3. The prosecution called a total of 7 witnesses after which it closed its case thereby setting the stage for this ruling on whether or not the accused person has a case to answer.
4. In the case of **R. vs Jagjivan M. Patel and others 1, TLR. 85**, it was held as follows:

“All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a 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 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 borderline case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion.”

+

5. The above cited case sets out the standard of proof on whether the prosecution has established a prima facie case or not.
6. In the instant case, it is worth noting that I only heard the evidence of PW7. Be that as it may, I have perused the typed proceedings of the witnesses who testified before my predecessor in this case, Justice Sitati.
7. Briefly, the testimony of the said witnesses were as follows:

PW1 Clemencia Bonareri saw someone she could not identify striking the deceased with a panga. After cutting the deceased, the attacker ran away and the deceased fell down and died on the spot.

PW2 Mary Mongina testified that she saw the accused kill the deceased on the road leading to Gesaka. PW2 was walking along the said road at the time of the attack and was categorical that she witnessed the killing.

PW3 Imelda Moraa also testified that she witnessed the accused killing the deceased right in front of her.

PW4 Charles Nyakundi came to the scene of the murder upon hearing screams but did not see the attack taking place. He identified the deceased as his neighbour Patricia Kemunto.

PW5 Samuel Onchere was the medical officer who produced the post mortem report in court which report confirmed that he deceased died due to severe cut wounds on the head and neck.

PW6 No. 87583 PC Gilbert Koech sought for time from the court to enable the investigating officer, who was then attending a training, to come and testify before the court.

PW7 No. 2333388 Chief Inspector Joseph Kyalo Mutungi investigated the case, visited the scene and recorded statements of some of the witnesses.

8. From the brief overview and summary of the evidence tendered by the prosecution witnesses, I find that the prosecution has established a prima facie case against the accused to warrant him being put on his defence. He is accordingly placed on his defence.

Delivered, dated and signed in at Kisii on **19th** of **July**, 2016.

W.A. OKWANY

JUDGE

In the presence of:

- Miss Mbelete for the State
- Mr. Bigogo for the Accused
- Omwoyo court clerk