



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
HIGH COURT CRIMINAL CASE NO.62 OF 2015

REPUBLICSTATE

-VERSUS-

JOSEPH MUMBA

GITENYI NDURA.....ACCUSED

RULING ON NO CASE TO ANSWER

The two accused persons, **Josephat Mumba** and **Gitenyi Ndura** were jointly charged in Kisii High Court for the murder of one **Lydia Kerubo Moindi** contrary to **Section 203** as read with **204** of the **Penal Code**.

The particulars being that on the 2nd day of August 2008 at Rigoma sub-location in Masaba District within Nyanza Province murdered **Lydia Kerubo Moindi**.

The prosecution summoned nine (9) witnesses to prove their case.

PW1-the father of the deceased and **PW2** the mother of the deceased both testified.

PW3 -Esther Nyamoita - the sister of the deceased testified that at 7.00p.m. on 2nd day of August 2008, she saw the two boys - the two accused persons, known by nick names of Gumo for the 1st accused and Mumbo for the 2nd accused, called or beckoned to her sister to go to them. She went to them. It was at 7.00p.m. her sister who was being beckoned was in the house with her. And it was raining at the time. She **-PW3** testified that she knew the two boys before and had been seeing them in her home;that they used to come and take her sister away. That it was not dark yet. She confirmed the two boys were the ones now in the dock.

PW4- Charles Ekari Mwamba- the area chief of Rigoma location

PW5 - Nyatichi Nyaboke - the sister to the 1st accused, Josephat Mumba testified that on 2nd August 2008 at 9.00p.m., she was at her house in Rigoma, and was passing behind the house of Josephat when she saw **Lydia Kerubo** lying on the bed it was 9.00p.m.

PW6 - Paul Chemanda Biwott, No.95052301 testified as an arresting officer of the two accused persons.

PW7- Superintendent -Mwenda Meme, then was Chief Inspector. He testified that the two accused persons recorded their respective statements before him. In particular he testified that the 1st accused

made a confession before him, he stated that he observed the provision of **Section; 29 of the Evidence Act** in taking the said confessions.

He further confirmed that the statement was recorded at Keroka Police Station on 03/08/2008.

PW8-David Saitoti No.88950 P.C. He was the investigating officer in this case.

On producing the statement of the two accused persons, the defence counsel objected prompting the court ruling whether or not the confessions by 1st accused is admissible.

On 5th June 2014, the Honourable court ruled that the objection and application to repudiate the statements of the 1st accused fails.

Thus the confession statement (**Exb-3**) is deemed admitted. Further, the court held the view that the prosecution witnesses **PW3** and **PW5's** evidence indicate that the accused persons were the last people to be seen with the deceased alive and nothing seems to indicate that the 1st accused was tortured prior to him giving the statement.

And for that, the investigating officer had authority to produce the statement in court under **Section 170 (1) of the Evidence Act.**

Mr. Ondari, the learned defence counsel, submits that the prosecution has not proved a prima facie case against the accused persons to be put on their defence.

The link between the testimonies of **PW3** and **PW5** on one hand and the confessions of the 1st accused, is prima facie, that the two accused persons being the last persons seen with the deceased and the 1st accused's confessions explaining the death of the deceased, is sufficient prove that the two be put to their defence in this case.

Accordingly, the two accused persons are hereby put on their defence in the matter of the death of **Lydia Kerubo Moindi.**

Orders accordingly.

Dated and delivered at Nyamira High Court this 14th day of September 2016.

C.B.NAGILLAH

JUDGE

In the presence of:-

Ondari for the accused persons

Konga for the State

Mercy - Court clerk