



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL (MURDER) CASE NO. 35 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

ISMAEL BATTON SAKWA.....ACCUSED

RULING

Introduction

1. On the 25.05.2011, the accused person herein appeared before the Deputy Registrar of this honourable Court pending his appearance before a Judge of the High Court for plea. On 22.06.2011, he was produced before Hon. Mr. Justice Luka Kimaru to answer to the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the 8th day of May, 2011 at Mushibi Village, Isongo Location in Mumias District within Kakamega County, he murdered BASHIRI SAKWA. Upon denial of the charge, the case was fixed for mention on 06.07.2011 for plea bargain, but on the 06.07.2011, defence counsel informed the court that the accused person was not willing to enter into a plea agreement. The case was thereafter fixed for hearing on 02.11.2011.

2. On 02.11.2011, Mr. Nyikuli who was holding brief for M/S Andia told the court that the accused person was willing to enter into a plea agreement, and for that reason, the case was fixed for mention on 23.01.2012, but on that day, indications were that the accused person was not sure whether or not to go for plea bargaining. The case was therefore fixed for hearing on 23.06.2012

The Prosecution Case

3. The only witness who gave evidence in this case on 25.06.2012 was Hildagad Makokha a village elder in Isongo sub-location, Ebusiali Village. His evidence was to the effect that on 26.05.2011 at about 7.00pm, a woman took a young boy to his home on allegations that the child had been abandoned on the road. On the following morning and using the particulars given to him by the woman who had brought the child, PW1 took the child to the home of the father but on arrival thereat, he found the house deserted. PW1 took the child to the woman who had brought the child to him the previous evening and gave firm instructions to take the child to the father who was a bodaboda operator.

4. Later that same day which was 27.05.2011, the child's father went to PW1 looking for his child and together with the father of the child, pw1 went to the home of the woman with whom PW1 had left the child. The child was reunited with the father and the two went home. For some two or so days, the child spent some of the time at his father's home and some of the time at the home of PW1 and at one point PW1 got information to the effect that the child had been returned to the mother.

5. While at the market, PW1 was informed that the child had returned to his home. He went home, picked

up the child and returned it to the father, but some days later, PW1 was told that a child's body had been found in river Lusumu. PW1 testified that the accused herein was the father of the child.

6. Since 25.06.2012, the prosecution never availed any other witness in court when the case came up for hearing on 22.1.2012, 24.09.2013, 19.05.2014, 03.11.2014, 26.11.2014, 28.01.2015, 09.02.2015 and 05.05.2015. On 02.11.2015, the prosecution had 3 witnesses, but defence counsel was absent, so the case could not proceed. On 09.02.2016, the case could not proceed because of lack of witnesses. The case was fixed for further hearing on 18.04.2016, but on that date, defence counsel, M/S Andia was absent though there is no indication whether or not the prosecution had any witnesses. On 13.06.2016 the case was fixed for hearing on 03.10.2016, but on that day no witnesses were availed.

7. Because of the long history of this case where the prosecution had for over 4 years save for one occasion on 02.11.2015 when there were witnesses but defence counsel was absent, failed to avail witnesses. The court declined the prosecution's application made on 03.10.2016 for an adjournment. The prosecution was thus forced to close its case.

Submissions on No Case to answer

8. Neither the defence nor the prosecution tendered any submissions on whether or not the accused person should be put on his defence.

Analysis and Determination

9. There is no doubt in this case that the only evidence placed on record is that of PW1, a village elder in the area where the accused lived. Apart from telling the court that the accused was the father of the child whose body was found floating in river Lusumu, and apart from testifying that on two occasions he took the deceased to the accused, he said nothing else about how the deceased died and whether, either directly or indirectly, it was the accused who killed the deceased.

10. Section 203 of the Penal Code defines the offence of murder as causing death of another person by an unlawful act of omission with malice aforethought. Section 206 of the Penal Code defines malice aforethought, so that to make any finding that a person has a case to answer on a murder charge, there must be proof of death and cause of death, whether directly or circumstantially and it must also be shown that the accused had the requisite malice aforethought in committing the offence.

11. The question that arises for determination is whether in this case, the prosecution has proved death and its cause, and whether it has also shown, though not with finality, that the accused person is the one who caused the death with malice aforethought and therefore liable to be placed on his defence in keeping with the principles set out in the case of **Bhatt –vs – R[1957]EA 332**.

12. Applying my mind to the evidence on record, I have reached the conclusion that the prosecution has not established a prima facie case requiring the accused person to be put on his defence. The fact and cause of death have not been proved. The prosecution has not placed a finger on the accused as the person either directly or indirectly that he is the one who killed the deceased. That being the case, the provisions of Section 206 of the Penal Code cannot come into play.

Conclusion

13. In conclusion, it is my considered view that there is no evidence that the accused person herein committed the offence of murder. Accordingly, I find him not guilty of murdering BASHIRI SAKWA. He is acquitted under Section 306(1) of the Criminal Procedure Code.

14. Unless he is otherwise lawfully held, the accused person shall be released from prison custody forthwith.

Orders accordingly,

Ruling delivered, dated and signed in open court at Kakamega this 11th day of October, 2016

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Jamsumba(present).....for Prosecution

.....Miss Rauto for Andia (present).....for Accused

.....Mrs. Polycarp.....Court Assistant