



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL CASE NO. 52 OF 2010**

REPUBLIC.....PROSECUTOR

VERSUS

DOUGLAS OSORO SIANYI NYABONGOYE.....ACCUSED

**RULING ON A CASE TO ANSWER**

1. The accused herein, DOUGLAS OSORO SIANYI NYABONGOYE is facing the charge of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the offence were that on 3<sup>rd</sup> September 2004, at Nyamaware sub-location in Kisii District within Nyanza Province, the accused murdered **DANIEL NYABONGOYE MOTAROKI**.

2. The accused had previously been tried and convicted by this court (differently constituted) on 13<sup>th</sup> March 2009, which conviction was quashed and sentence set aside on 18<sup>th</sup> June 2010 by the Court of Appeal sitting at Kisumu in Criminal Appeal No. 105 of 2009 whereupon the court of Appeal ordered that the accused be tried afresh.

3. At the retrial, the prosecution called total of 4 witnesses who testified before Justice Asike Makhandia, my predecessor in this case. I have perused the proceedings taken before the said Judge and noted that evidence was tendered by the said 4 witnesses as follows:

4. **PW1 KENNEDY OTWORI OTUCHO** testified that on 3<sup>rd</sup> September 2004, he heard screams emanating from the deceased's home and rushed there only to find the deceased bleeding profusely from cut wounds all over his body. The deceased succumbed to the said injuries later and according to PW1, he heard the accused's mother and sister one NYAKIRARIO, say that it was the accused who had killed the deceased. PW1 however said that he did not know who had killed the deceased.

5. **PW2 ISAAC OGOCHO OTUCHO** also testified that he heard screams from the deceased's home on the material day and rushed to the scene where he found that the deceased had been cut all over the body.

6. **PW3 WILFRED OTUCHO** similarly heard the screams from the deceased home. He stated that he rushed to the scene where he heard the deceased screaming and saying that 'Boyi' had killed him. He testified that he found the accused at the scene, tried to apprehend him but he escaped from the scene. On cross-examination, he said that it was the accused who assaulted the deceased and that he saw the accused assaulting the deceased.

7. **PW4** was **MELLEN NYABOKE NYABONGOYE**. She testified that the deceased was her husband

and that on 3<sup>rd</sup> September 2004, at about 8p.m, she was called by the deceased who seemed to be in distress and on going to where the deceased was, she found him alone and bleeding profusely. She screamed for help and members of the public came and assisted her to take the deceased to the hospital where he succumbed to his injuries.

8. The prosecution then closed its case without producing the post mortem report which it claimed, could not be traced. Mr. Omwenga for the accused then submitted that the prosecution had not made out a prima facie case against the accused to warrant him to be placed on his defence because no medical evidence had been adduced to establish if indeed the deceased died and the cause of his death. The prosecution relied on the evidence on record.

9. In the case of **Ramanlal Trambaklal Bhatt vs Republic [1957] EA 332 at 334 and 335**, the court explained what constitutes a prima facie case as follows:

*“Remember 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 evidence could convict if no explanation is offered by the defence.”*

10. Going by the dictum in the above-quoted case, the question that this court now has to determine is if the evidence tendered in the instant case by the 4 prosecution witnesses meets the threshold of a prima facie case.

11. In a murder trial, the prosecution bears the onus of proving the case beyond reasonable doubt. The prosecution must prove that the deceased died; that the accused caused that death, how the death was caused, and that the accused, with malice aforethought intended to cause that death. In the event that malice aforethought is lacking, the offence committed becomes manslaughter and not murder.

12. In the instant case, there was oral evidence not disputed by the defence, that the deceased died, there was however no medical evidence to prove the cause of the death.

13. The prosecution, during the trial alluded to the fact that the post mortem report that had earlier been produced at the initial trial whose outcome was overturned by the Court of Appeal, could have been misplaced or was lost. The prosecution was granted numerous adjournments that ran for over 6 years from 4<sup>th</sup> April 2011 to 13<sup>th</sup> September 2016 to enable it avail the post mortem report but was unable to do so thereby forcing the closure of its case without the said report. This allegation on the missing post mortem report cannot take away or lessen the burden on the prosecution to tender evidence, to prove its case beyond reasonable doubt. At this stage I am satisfied that a prima facie case has been established against the accused since PW3 testified that he saw the accused assaulting the deceased.

14. I find that the evidence on record is sufficient and establishes a prima facie case requiring the accused to be put on his defence. I find that the accused herein, DOUGLAS OSORO SIANYI NYABONGOYE has a case to answer.

15. Under the provisions of **Section 306 (2) of the Criminal Procedure Code**, this court hereby informs the accused person of his right to inform this court how he wishes to give his evidence, whether by taking oath or without taking oath. The accused person has also been informed of his right to call witnesses in

his defence and to inform this court how many witnesses he wishes to call.

**Delivered, dated and signed in at Kisii on 7<sup>th</sup> of November, 2016.**

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Otieno for the State

Mr. Okenye for Omwenga for the Accused

Omwoyo court clerk