



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**CRIMINAL CASE NO. 43 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NARU OLE SAGUDA.....ACCUSED**

**RULING**

**NARU OLE SAGUDA** hereinafter referred as the accused stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged in the particulars of the charge sheet that on or around the 19<sup>th</sup> day of January 2015 at Nalepo Village in Kajiado North Sub-County within Kajiado Count, accused murdered MARGARET NGATHA MAINA hereinafter referred to as the deceased.

The accused was represented at the trial by Saenyi advocate while the prosecution was conducted by Mr. Akula the Senior Prosecution Counsel. The accused denied the charge. The prosecution called eleven (11) witnesses to prove their case.

Under the provisions of Section 203 as read together with Section 204 the prosecution is required to prove beyond reasonable doubt the following elements of the offence:

- 1. The death of the deceased.**
- 2. That the deceased died as a result of unlawful act of commission or omission.**
- 3. That in causing the death of the deceased, there was malice aforethought or intention to kill.**
- 4. That the death was caused by the accused.**

These are ingredients the prosecution set to establish with the eleven (11) witnesses on record.

**PW1** a neighbor of the accused and deceased testified that on 19/1/2015 she heard the deceased calling her children. At the same time she saw accused running after her and when they reached near a river deceased did not managed to cross. The accused made attempts to lift her so that they cross together.

It was further her testimony that this did not happen but accused instead undressed the deceased drew his Maasai sword and hit her. The accused left the river side alone for home. PW1 told this court that she got concerned on what must have happened to the deceased, raised an alarm. It was also her testimony that she called the neighbor whom they travelled together to the river while deceased was likely to be found to establish what happened that she did not accompany accused home. On arrival at the scene it was PW1's

testimony that the accused was lying on the ground with cut wounds and bleeding from the injured area. At the time she raised an alarm occasioning other members of the public and neighbours to respond by running towards the scene.

**PW2** a neighbor to the accused and deceased also testified that on the material day the 19/1/2015 she saw them walking together appearing drunk because deceased had difficulty in walking steadily. PW2 further stated how the accused was trying to assist the deceased walk along particularly when they reached a river crossing. That in a short while she did not see the deceased but accused walking alone towards their home. PW2 further told this court that she heard screams from PW1 and on rushing to the scene found deceased had suffered injuries. It was PW1 and PW2's testimony that the chief of the location was informed who in turn telephoned the police who took over the investigations and carried away the body of the deceased.

**PW3** also stated how she was awakened by screams from a nearby downstream. On arrival at the scene she found that deceased had been killed. That was also the evidence of PW4 a neighbor to the accused and deceased who responded to the screams and confirmed that they were in respect of the death of the deceased.

**PW5** stated that while in a women meeting on 19/1/2015 one of them received a telephone call that the deceased, one of her neighbours has been killed. According to her testimony she left the meeting for the scene where it was said the deceased had been murdered. PW5 further stated that on arrival she saw the deceased covered with some clothes with blood oozing from the back. This was also the evidence of PW6 who visited the scene following a response to the screams. PW6 confirms not noticing the deceased having suffered injuries to the neck.

**PW7** testimony was in respect who prior to the 19/1/2015 the children if the deceased sought refuge in her home for the reason that they were being chased from home by the accused. In her testimony she did provide safety for the children in the two occasions and their parents came for them later. PW7 further testified that on 19/1/2015 she heard an alarm which she responded to confirming that accused had killed the deceased.

**PW8** told this court that on 19/1/2015 she met the accused and deceased walking together towards their home. In the course of the journey, the accused who was in possession of a Maasai sword, drew the sword knocked it down three times threatening to cut one Daniel their neighbor.

According to PW9's testimony, the deceased had to plead with the accused not to use the sword to injure Daniel or anybody. PW8 further stated that the intervention by the deceased did not seem to go well with the accused. The accused in response told the deceased that he will no longer beat her but finish her completely. In her testimony when she arrived at home they parted ways with the accused and deceased and left them to proceed further towards their homestead. PW8 further testified that before the dust will settle down from the time they parted ways, she heard screams that accused has killed the deceased. This made her to rush to the scene where she confirmed the sad news that deceased was no more.

**PW9** the scene of crime officer was called to the scene to take photographs which she developed and produced as exhibit 1(A) (1-6). **PW10** told this court that he investigated the case by recording statements from witnesses, arranging for postmortem to be conducted and later recommended for a charge of murder to be preferred against the accused. **PW11** the pathologist testified how she examined the body of the deceased and filed the postmortem report. In her opinion the cause of death of the deceased was as a result of neck injuries due to a sharp object.

At the close of the prosecution case, the defence counsel Mr. Saenyi urged the court to make a decision pursuant to Section 306 of the Criminal Procedure Code. Section 306 (1) of the Criminal Procedure Code provides:

**“When the evidence of the witnesses for the prosecution has been concluded, the court if it considers that there is no evidence that the accused or any one of several accused committed**

**the offence, shall after hearing, if necessary any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.**

**(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any) to give evidence on his own behalf or to make an unsworn statement, and to call witnesses in his defence and in all cases shall require him or his advocate if any to state whether it is intended to call any witnesses as to fact other than the accused person himself: and upon being informed thereof, the judge shall record the fact.”**

Under the provisions of Section 306 the trial court is required to evaluate the evidence by the prosecution to establish whether sufficient evidence has been adduced in support of the charge against the accused person.

Section 306 (1) envisages a situation where an accused person is entitled to an acquittal if at the close of the prosecution case the ingredients of the offence have not been proved to the required standard. The threshold on the burden of proof is recognized by law at this stage should not be beyond reasonable doubt. The evidence so presented must be sufficient to call for an answer by the accused person.

The second limb under Section 306 (2) if the court finds that the prosecution has adduced minimum sufficient evidence to prove the offence against the accused, the court shall call upon the accused to answer the charge or his defence in any of the alternatives provided therein.

In exercising discretion to make a determination whether the prosecution has made out a prima facie case are well laid principles in the ***R.T. Bhatt v Republic [1957] EA 332*** provides guidance where the court held inter alia that:

**“A prima facie case is not a case proved beyond reasonable doubt, but a case where a reasonable tribunal properly directing its mind on the law and evidence could convict it no reasonable explanation is offered by the defence”.**

It is trite that the burden of proving the guilty of any accused person or person solely lies with the prosecution unless the circumstances brings the case within any exception or exemption or qualification to the operation of the law creating the offence which accused is charge of. Section 107 (1) of the Evidence Act Provides thus:

**“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

**Section 109:**

**“The burden of proof as to any particulars fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of such fact shall lie on any particular person.”**

It is therefore the burden of the prosecution to prove the elements of the charge of murder against the accused to warrant him to be placed on his defence under the provisions of Section 306 (1) of the Criminal Procedure Code:

**“If the court finds the evidence adduced by the prosecution witnesses fails to prove essential ingredients of the alleged offence a return of the record of not guilty ought to be entered and**

**accused acquitted.”**

However, on the other hand when the evidence adduced by the prosecution is of such a nature that it satisfies the criteria under Section 306 (2) of the Criminal Procedure Code where a reasonable tribunal could safely convict as such, then an accused person should be called upon to give an answer in rebuttal.

## **DECISION**

I have in this case evaluated the evidence of the eleven (11) witnesses vis viz the charge of murder facing the accused person. I bear in mind that at this stage in exercising discretion the standard of proof required is not that of beyond reasonable doubt given the fact that accused is yet to testify in his defence.

Being guided by the principles in the ***R.T. Bhatt v Republic (Supra)*** i am satisfied that a prima facie case has been made out by the prosecution against the accused to warrant him to be put on his defence under Section 306 (2) of the Criminal Procedure Code. The provisions of the said section explained to the accused and his rights to state and answer to the offence.

**Dated, delivered in open court at Kajiado on 7<sup>th</sup> day of November, 2016.**

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**R. NYAKUNDI**

**JUDGE**

### **Representation:**

Accused

Mr. Saenyi advocate for the accused.

Mr. Akula for the Director of Public Prosecutions

Mr. Mateli Court Assistant