

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO.13 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JAMES NDENDA MAYIYA.....1ST ACCUSED

BENARD ATIYA NATSE.....2ND ACCUSED

RULING

1. The accused persons herein are charged with the offence of murder contrary to **Sections 203** as read with **Section 204** of the Penal Code. The particulars are that *on 08-12-2008 at Kitambazi Village within Tambua location, in Vihiga District within Western Province jointly with others not before court murdered ALEX VUSERA*. They both denied the charges and were represented by Mr. Fwaya Advocate.

2. The trial in this case commenced de novo on the 19/07/2011 and was heard by two (2) judges before this court took over on 3rd February 2015. In the course of the trial, the prosecution called six (6) witnesses, at the end of which, the Defence counsel, Mr. Fwaya orally submitted that the prosecution evidence was based on suspicion and was not sufficient to warrant putting the accused persons on their defence. Mr. Ngetich for the Prosecution relied on the evidence on record and maintained that a prima facie case has been established to warrant putting the accused persons on their defence.

3. This Court has carefully gone through the entire evidence adduced by the prosecution, and considered the submissions by learned counsel. The prosecution by close of its case was required to establish such a case where, if the accused persons do not offer any defence then the court could convict on the evidence on record.

4. In my view the prosecution evidence on record establishes a prima facie case against the accused persons. As submitted by Counsel for the accused Mr. Fwaya the connection between the accused persons herein and the deceased is that they were all together in the evening coming from a drinking spree and the accused and others escorted the deceased home. I find that the fact that the accused persons were with the deceased before he met his death may imply that they knew or may have known what led to his death. They were heard shouting by PW3 which confirms that they were all together with the accused. PW3 helped in the arrest of the two accused persons. Taking all that evidence into account, I have reached the conclusion that the prosecution has made a **prima facie** case to warrant putting the accused persons on their defence on the murder charge preferred against them.

5. Accordingly, I rule that the accused persons have a case to answer in accordance with **section 306 (2)** of the Criminal Procedure Code. They may give sworn or unsworn evidence or even choose to remain silent and let court decide the case on the evidence before it. If any of them chooses to give sworn evidence, they will be subjected to cross-examination. Whichever option they choose, they have a right to call witnesses. I now call upon the accused persons to make their election on how they intend to proceed with their defence. It is so ordered.

Delivered, dated and signed in open court at Kakamega this 11th day of March 2015

RUTH N. SITATI

JUDGE

In the presence of

Mr. Ngetich for State

Mr. Fwaya (present) for Accused

Mr. F. Juma Court Assistant