REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL (MURDER) CASE NO.32 OF 2012

REPUBLIC …….…… PROSECUTOR

VERSUS

MORRIS KARANI ALANDO…. …….…….. ACCUSED

R U L I N G

1. The accused person herein Morris Karani Alando is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars being that on the 16th day of August 2012 at Chebumaywa village, Senende location in Hamisi district within Vihiga County in Western province he murdered ALFRED ATONYA MANERA. He denied committing the offence. The case has been ongoing since 29/05/2014.
2. At the close of the Prosecution case Mr. Atulo, Counsel for the accused person submitted that the Prosecution had failed to establish a prima facie case warranting the accused person being put on his defence. Counsel urged the Court to acquit the accused under the provisions of Section 306 (1) of the Criminal Procedure Code Cap 75 of the Laws of Kenya. Mr. Oroni, Prosecution Counsel did not respond to the submissions of no-case to answer.
3. The Prosecution in this case called three witnesses: Herbert Mudaki as PW1, No.49851 Police Constable David Mwai as PW2 and No.2008134366 APC Rafiki Boya Kazungu as PW3. PW1 told the Court that on 16/08/2012 while he was in Nairobi he received a telephone call from his wife Marion informing him that the deceased had been killed by his son. PW1 confirmed to Court that the deceased was his brother while the accused is son to the deceased. He also told the Court that the accused herein is a trouble-some person.
4. PW1 also confirmed to the Court that he did not witness the incident and further that the accused person does not ordinarily live at home but visits occasionally. He could however not say whether on the material day the deceased who usually drank alcohol had taken any alcohol.
5. PW2 testified that on 16/08/2012 while he was at Serem Police Station, he received a report of the Murder from his OCS and together with the OCS, they visited the scene and found the body of the deceased lying beside the road. On observation, PW2 noticed that the deceased's neck was almost severed from the body. While still at the scene PW2 and the OCS received a call from Hamisi DC's office that a suspect in connection with the murder of the deceased had surrendered to the police. The suspect they were told about is the accused person herein. The body of the deceased was removed to Vihiga District Hospital mortuary for preservation.
6. On return to the Police Station PW2 found the accused person at the Station. He was shown a knife that had no blood and a gunny bag that contained several items among them a pair of sandak shoes. During cross examination, PW2 denied that the accused herein had gone to Hamisi DO's

office to report the death of the deceased.

7. PW3 testified that on 16/08/2012 while he was on duty at Hamisi district headquarters, the accused went to him and reported that he (accused) had killed his father using a panga. That the panga which the accused person was carrying was blood stained. PW3 then reported the matter to the duty Corporal who later visited the scene in the company of other Police officers. Later the accused was escorted to Serem Police Station for further action; PW3 produced the panga as PExhbiti 1 and a blood stained dotted grey T-shirt as PExhibit 2. A pair of faded green long trousers was produced as PExhibit 3. On cross examinationPW3 stated that though he had produced the exhibits his statement to the Police did not say anything about recovery of exhibits.
8. The Prosecution was unable to avail other witnesses after several adjournments and was thus forced to close its case without the evidence of the investigating officer, the doctor and witnesses who may have witnessed the incident.
9. After considering the evidence of the 3 prosecution witnesses as above stated the issue for determination is whether the said evidence establishes a prima facie case requiring the accused person to be out on his defence. A prima facie case was defined in the case of **Bhatt –vs- R [1957] EA 332**. It was held in that case that a prima facie case is not 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.
10. In the judgment read by SIR NEWNHAM WORLEY, President of the Court of Appeal, the learned JJA expressed themselves thus on what constitutes a prima facie case:-

> **"Remembering 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 is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. 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 the evidence could convict if no explanation is offered by the defence."**

11. Applying the above principles to the instant case, I find and hold that the Prosecution has not established a prima facie case to warrant the accused person being put on his defence. There was either poor investigation of the case or some lethargy on the part of the Prosecution to call relevant witnesses to support its claims against the accused person. No explanation was given by the State as to why the Investigating officer was not called to buttress the testimony given by PW3 that the accused surrendered to the Police and admitted to having killed the deceased. The only inference that this Court can draw is that the Prosecution failed to call those witnesses because they were likely to give evidence that was adverse to the Prosecution.
12. In the premises and for the reasons above given, I make a finding that there is no sufficient

evidence that the accused herein, Morris Karani Alando committed the offence as charged. I accordingly acquit him of the charge of Murder under Section 306 (1) of the Criminal Procedure Code.

13. Unless the accused person is otherwise lawfully held, he is to be released from prison custody forthwith.
14. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 11th day of November 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Omwenga (present) for State

Mr. Wekesa for Atulo (present) for Accused

Mr. Okoiti - Court Assistant