



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 13 OF 2010

ALFRED NYAKUNDI ONDARA).....ACCUSED/APPPLICANTS

BENARD KOROSO MICHIEKA)

VERSUS

REPUBLIC.....RESPONDENT/PROSECUTOR

RULING

1. The two accused **Bernard Koroso Michieka and Alfred Nyakundi Ondara**, are charged with murder, contrary to **Section 2013** read with **Section 204** of the penal code, in that on **the 22<sup>nd</sup> January 2010, at Nyankononi Masaba South District Nyanza** Province, jointly with others not before court murdered **Joel Nyandusi Siringi**. At the close of the case for the prosecution a total of seven (7) witnesses testified against the accused. Their collective evidence has been examined by this court with a view to determining whether or not it has set out a prima facie case to warrant that the accused be placed on their defence.

2. In essence, a “*prima facie*” case is one in which a reasonable court properly directing it’s mind to the law and the evidence before it would convict if no explanation is offered by the defence. Such evidence must not only be sufficient but also credible enough to establish the material ingredients if any one charge facing an accused person. Thus, a scintilla of evidence nor any amount of worthless discredited evidence would not suffice for purposes of establishing a “*prima facie*” case.

3. Herein, the deceased is said to have been found murdered after he had been lured from his house by a group of people suspected to be the accused and others. The first accused (**Bernard**) was suspected on ground that his voice was allegedly identified by a son of the deceased (pw4). The second accused (**Albert**) was suspected on ground that a blood stained axe was found in his house and after having been implicated by the first accused. Otherwise, no evidence of visual identification was led against them by the prosecution.

Suffice to hold that the evidence implicating both accused was essentially circumstantial.

4. Consideration being given to the fact that the first accused was no stranger to pw4 as he normally undertook some duties at the deceased’s home for a fee and also that other suspects including the second accused were mentioned by him, it may safely be stated that a “*prima facie*” case has been established against him by the prosecution.

As for the second accused, the evidence against him was firstly, that of an accomplice and secondly that of possession of the suspected murder weapon i.e. an axe.

The accomplice evidence was insufficient for want of corroboration and the Government Analyst report was inconclusive in so far as it did not link the second accused to the murder of the deceased. The blood stains on the axe and the piece of cloth were not compared with blood samples from the deceased to determine the linkage between the two. It would appear that no blood samples were taken from either the second accused or the deceased.

The evidence of possession was also insufficient. It was not established that the second accused lived alone in his house such that it could be said that he was in actual possession of the axe to the exclusion of any other person.

5. In sum, the evidence against the second accused was insufficient for purposes of establishing a “*prima facie*” case. He therefore does not have a case to answer and is hereby acquitted. The first accused has however, a case to answer and may now be placed on his defence.

**J.R. KARANJA**

**JUDGE**

[Delivered and signed this 1<sup>st</sup> day of December 2015].