

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 34 OF 2007

REPUBLIC PROSECUTOR

VERSUS

**1. JOSEPH SHITANDI)
2. HENRY ATEYA)..... ACCUSED**

RULING

After the close of the prosecution and the defence cases, both the DPP and the defence counsel filed written submissions on case to answer. I am required under Section 306 (1) of the Criminal Procedure Code (Cap. 75) to determine whether the two accused persons have a case to answer. A case to answer is a case where if the accused keeps quiet, the evidence of the prosecution should be such that a conviction will result.

The prosecuting counsel Mr Oroni, submitted that the prosecution had fulfilled the requirements of **Section 48, 50 and 66** of the Evidence Act **Chapter 80** of the Laws of Kenya, and therefore the accused persons have a case to answer. Mr. Ondieki, learned counsel for the accused persons, on the other hand, has argued that the prosecution evidence is full of assumptions and was inconsistent. That the accused persons have no case to answer and should be acquitted under **Section 306** of the Criminal Procedure Code (Cap.75) of the Laws of Kenya.

Indeed a young girl Rose Taabu aged 13 years was killed in a cruel manner through stabbing. The post-mortem form which was produced in photocopy by Dr. Dickson Muchama PW6 on behalf of Dr. Oreke, showed that the deceased died due to internal haemorrhage secondary to a penetrating injury in the abdomen. The prosecution did not explain why the original post-mortem form was not produced. However, it is not a disputed fact that the deceased was killed and found in a sugarcane plantation.

The issue is whether the two accused persons, or one of them, killed the child Rose. The evidence that connects the 1st accused Joseph Shitandi Babu and the 2nd accused Henry Ateya to the crime is that of a single witness PW2 Samuel Musumba a Std. three pupil aged 10 years. It was his evidence that some people, including the two accused, came to their house at night after 9.00 p.m., roughed them up and took the deceased away. That he saw them in the light of a match stick. He said that he saw a Ateya outside the house because there was moonlight. He saw Baabu, the 1st accused in the house through the light of a match stick.

It was alleged that a sword belonging to the 1st accused was found near the body of the deceased. The 2nd accused was arrested because he was a cousin of the 1st accused. Both accused were arrested much later.

I have evaluated the evidence on record. In my view, no prima facie case was established against any of the two accused persons. The evidence of identification at the scene by the PW2 was far from positive. He was a young man. The incident occurred at 9.00 p.m. It was a dark night, or at least dark in the house. The light from a matchstick, in my view, is ordinarily insufficient light to identify someone at night. Besides, the witness did not state how close he was with the 1st accused when he identified him. In addition, the witness must have been totally scared during the night attack when both his parents were absent from the house as they had gone for a funeral. The sword said to belong to the 1st accused which was found near the body was also not positively identified as belonging to the 1st accused. There is no evidence that PW2 informed the neighbours or the police when he first came into contact with them,

about his alleged identification of the 1st accused as one of the robbers.

With regard to the 2nd accused, the only evidence to connect him to the crime was that PW2 said that he saw him outside the house through the moonlight. Again the description of the moonlight was not given. There was no evidence tendered on how bright the moon was that night. Whether it was full moon, whether there were clouds and how close the witness came to the 2nd accused and for how long in order to remove any doubt of mistaken identity.

Though I appreciate that the life of a young girl has been lost, justice demands that I have to consider whether indeed there is evidence that it is the accused persons that killed her. The duty or burden is on the prosecution to establish or tender evidence that connects the accused to the crime. The prosecution merely tendered evidence herein which merely raises suspicion. Such evidence is not adequate to establish that they committed the crime. See **Sawe -vs- Republic [2003] KLR 364**. Though it is wrong to kill somebody, it is also wrong for the court to find fault in people against whom there is no evidence, or sufficient evidence.

With the evidence on record, I find that both accused have no case to answer. No prima facie case was established against them. It is my duty to acquit them and I do so under Section 306 (1) of the Criminal Procedure Code.

Dated and delivered this 13th day of March, 2014

George Dulu

J U D G E