



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE (MURDER) NO. 28 OF 2010

REPUBLIC PROSECUTOR

VERSUS

PETER MARWA MWITAACCUSED

RULING

1. The accused person herein, Mariko Mogesi Marwa was jointly charged with Peter Marwa Mwita and were arraigned before this court on 14th April 2010 on one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars being that on the 8th April 2009 at Nyamagenga Sub location in Kuria District of the Nyanza Province, jointly murdered John Mwita Gancha. They pleaded not guilty to the charge. During the pendency of the case, Peter Marwa Mwita escaped from lawful custody and is still at large.
2. When the case first came up for hearing on 12th July 2011, the state did not have any witnesses in court so it was adjourned to 17th November 2011.
3. On the 17th November 2011, PW1, Peter Bururio Marwa testified. The next witness, PW2, No.99015660 AP Cpl Paul Opiyo Okech, testified on 23rd January 2012. From then on until 19th June 2014 when the case came up again for hearing, the prosecution had called no other witness. There were no witnesses on the 19th June 2014 and since the prosecution had been granted a last adjournment, they had to close their case.
4. At the close of the prosecution case, Mr. Omwega, counsel for the accused submitted that the prosecution had not established a *prima facie* case that would make this court to put the accused persons on his defence. Counsel submitted that neither of the two witnesses who had testified so far told the court that they saw the accused person herein kill the deceased. Counsel also submitted that the prosecution had not adduced any medical evidence to prove the cause of death and whether that cause of death was linked to the acts or omissions of the accused person herein.
5. The state in response, relied on the evidence on record.
6. Briefly, the facts of this case are that on the 8th April 2009, the deceased in this case, John Mwita Gancha was in the house of his friend, one Tabitha Wagesa when the accused persons stormed the said house while armed with bows and arrows as well as a panga. The two accused persons then engaged the deceased in a conversation speaking in low tones. The two accused persons, together with the deceased, then left Tabitha's house. Shortly after the three men left, the first accused herein Peter Marwa Mwita drew an arrow and shot the deceased at close range. The fatal shot led to the death of the

deceased.

7. The State, in its opening address told the court that in arming themselves with deadly weapons, the accused persons had premeditated their action and therefore had malice aforethought to cause the death of the deceased.

8. The available evidence is that of PW1 and PW2. PW1 testified that on 8th April 2009 at about 8.00 p.m., he heard some screams from his neighbour's home which was about 2 km away. He did not however, respond to the screams. According to PW1, the screams were those of wailers. On the following morning at about 7.00 a.m., PW1 went to the neighbour's home and established the deceased had died. The deceased's body had an arrow injury on the left foot and a cut wound on one of the shoulders. Thereafter the matter was reported to the police before the deceased's body was taken to the mortuary where a post mortem examination was conducted. PW1 identified the arrow head that was removed from the deceased's body during postmortem examination. PW1 also testified that he did not see either of the accused persons kill the deceased.

9. PW2 was Number 99015660 AP Cpl Paul Opiyo Okech of Karumangucha AP Camp in Kuria East District. On 8th April 2009, he received an order for the arrest of the accused person herein who was suspected of having killed the deceased. The two accused persons were subsequently arrested and escorted to Kehancha police station. PW2 told the court that he did not know how the first accused was arrested.

10. The question that now arises for determination is whether from the evidence of the two prosecution witnesses, the prosecution has placed sufficient evidence before this court showing that the accused person committed the offence of murder as set out in the information dated 14th April 2010.

11. For the prosecution to meet the threshold of establishing a *prima facie* case, it must be shown from the evidence that:-

- *the deceased died;*
- *that the deceased died as a result of the action/omission on the part of the accused persons*

as provided under **Section 206** of the **Penal Code, Cap 63 Laws of Kenya**.

1. From the evidence on record, and though PW1 stated that the deceased died and that he attended the postmortem examination, there is no evidence before the court to show how the deceased died and who caused his death. It is also not clear from the evidence of PW1 whether indeed the body he alleged to be that of the deceased was the same body which was taken to the mortuary and a postmortem examination done on it.

2. In the circumstances, and for the reasons above stated, I find and hold that there is no evidence before this court that the accused person herein committed the alleged offence. It would therefore be an exercise in futility to put the accused on his defence. Accordingly, I make a finding of not guilty under **Section 306 (1)** of the **Criminal Procedure Code**.

3. Unless otherwise lawfully held, the accused person herein shall be released from prison custody forthwith.

4. Orders accordingly.

Dated and delivered in open court at Migori this 14th day of July, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Miss Owenga (present) for State

Mr. Omwega (present) for Accused persons

Mr. Bibu and Oure- Court Assistant