



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL MURDER NO.95 OF 2010

REPUBLIC..... PROSECUTOR

VERSUS

CHARLES TATIRO IRESA ACCUSED

RULING

1. The accused person herein, Charles Tatiro Iresa, is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 12th January 2010 at Misani village in Masangora sub location, Kehancha Division of Kuria West District within Migori County, he murdered Jonnes Tibaya Mohere. The accused pleaded not guilty and the case has been ongoing.
2. Briefly the facts of the case are that on the fateful day, the deceased and his wife, Christine Wankio Tibaya (PW1) were returning home from a wedding in Tanzania when they met with the accused's mother by the name Mama Ngita. The deceased remained behind to talk to Mama Ngita as PW1 walked towards their home. As the deceased and Mama Ngita talked, the accused emerged from the side of their home and attacked the deceased by cutting him fatally on the left leg.
3. The prosecution intended to call 7 witnesses to prove that there was bad blood between the accused and the deceased because of a love affair the deceased had with the accused's mother, and that the accused was indeed seen cutting the deceased. The prosecution also intended, through the testimony of the 7 witnesses, to show that the deceased died as a result of the injuries inflicted upon him by the accused.
4. The prosecution however called only 4 out of the 7 intended witnesses. PW1, Christine Wankio Tibaya is wife of the deceased. Her testimony was to the effect that: On 12th January 2010, she and her husband were returning from a wedding visit to Tanzania. It was about 6.00 p.m. And it was raining. They took shelter for a while and then started off again via the accused's home. As they passed by they met the accused's mother. PW1 left the deceased talking to accused's mother as she went ahead. PW1 could not follow the conversation between the deceased and the accused's mother.
5. Then PW1 saw the accused emerge from their (accused's) home. He was armed with a panga and went straight to where the deceased and accused's mother were. The accused cut the deceased on the leg. By then the time was about 7.00 p.m. There was moonlight and the deceased and accused were about 10 metres away from where she stood. After the deceased was assaulted, PW1 ran to her home to call her brother in-law and to inform him of what had befallen the deceased.
6. On arrival back at the scene, both the accused and the deceased were not present, but there was a blood trail which led to the river. At about 4.00 a.m. on the 13th January 2010, the body of the deceased was

found at the river. He was still bleeding from the injury on the left leg and also from the head.

7. On cross examination, PW1 testified that though the time of the incident was about 7.00 p.m., there was moonlight. She had also referred to the moonlight in her evidence in chief. PW1 also stated that the accused's home, is far from her own home; that she knew as a fact that the accused and the deceased had some differences between them over the deceased's love affair with accused's mother, and that before he attacked the deceased on that fateful evening, the accused was heard to say; **“who allowed you to have an affair with my mother,”** though the accused and the deceased had never quarreled over the issue. PW1 also stated that she clearly saw the accused attack the deceased from a distance of between 3-5 metres. PW1 also said that the deceased and accused's mother had talked for roughly 8 minutes before the accused emerged and attacked the deceased.

8. PW2 was Samson Singira Mohere, a brother to the deceased. He testified that at about 7.00 a.m. On 13th January 2010, while he was selling meat at his butchery, he was informed by his son, Josephat Mohere Singira (not called as a witness), that the deceased had been killed. He rushed back home and accompanied other family members to search for the deceased. The body was found at the river. PW2 then went to look for his other brother John Tibaya and together they went to Kehancha police station and made a report. An officer from the police station accompanied them. The doctor who performed the postmortem examination on the body of the deceased also accompanied them to the river. Upon completion of the postmortem examination, the deceased's body was released to the family for burial on 14th January 2010. PW2 stated further that he was not aware of any differences between the deceased and the accused though he was informed after the deceased died, that the deceased had been killed over a love affair between him and the accused's mother. PW2 explained that according to clan links, the accused person was like a brother to him and to the deceased.

9. Samson Mohere testified as PW3. He testified that on 11th January 2010 at about 8.00 p.m., he was informed by PW1 that the deceased had been attacked by the accused as he and PW1 returned from a wedding celebration in Tanzania. He said the body of the deceased was found the following morning by the river. After postmortem examination, PW3 and other family members buried the deceased. Inc cross examination, PW3 stated that when he went to the scene on the evening of the alleged attack, he found neither the accused nor the deceased's body.

10. PW4 was NO.91253 PC Simon Pasha Wachira, the Investigating Officer in this matter. He testified that on 13th January 2010, he was on duty at Kehancha police station when he received a report of the deceased's death. Together with other police officers, PW4 proceeded to the river where they found the deceased's body lying in a trench. The deceased had a deep cut wound on the left leg. After removing the body from the trench, a postmortem examination was conducted by Dr. Okello of Kuria District Hospital.

11. PW4 also testified that the deceased's body lay only a few metres from the home of the accused's mother, Mama Ngita. The home had already been set ablaze and the accused's mother had fled.

12. PW4 further testified that during investigations, he established that the deceased had been attacked by the accused as he (deceased) and PW1 made their way home from Tanzania. That the attack took place near the home of the accused's mother. That the deceased tried to escape but could not go far because of the deep cut on the left leg which was bleeding profusely. At the time when the deceased's body was found, the accused was at large but on the 27th October 2010, the accused was apprehended at Taranganya villlage by AP's.

13. PW4 also testified that upon interrogation of members of the public and relatives of the deceased, he established that the deceased was killed because of a love affair he had with the accused person's mother, a relationship that was not acceptable within the community.

14. At the close of the prosecution's case, Mr. Soire, counsel for the accused submitted that the prosecution had not established a *prima facie* case against the accused person to warrant his being put on his defence. Counsel also submitted that the evidence of the 4 prosecution witnesses fell far short of

establishing the following:-

1. *That the body that was interred was the body of the deceased;*
2. *That if the body was that of the deceased, what the cause of his death was;*
3. *That the injuries suffered by the deceased, allegedly at the hands of the accused were the cause of the deceased's death.*

15. Counsel urged the court to find that there is no sufficient evidence against the accused and to make a finding that he is not guilty of the offence charged and to acquit him accordingly.

16. The State wholly relied on the evidence on record and urged the court to put the accused person on his defence.

17. It is worth noting that at this stage, the prosecution does not have to prove its case against the accused person beyond any reasonable doubt. That stage is for another day. What the prosecution needs to prove at this point is that the evidence on record is not merely one “*which on full consideration might possibly be thought sufficient to sustain a conviction; nor is a prima facie case made out simply because 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.*” See **Bhatt -vs- R.[1957] EA 332**. In the case of **Wibiro alias Musa -vs- R[1960] EA 184**, the East African Court of Appeal sitting at Nairobi clearly stated that “**a prima facie case does not mean a case proved beyond reasonable doubt.**”

18. Applying the above principles to the instant case, and considering the evidence that is on record, I have reached the irresistible conclusion that the prosecution has established a *prima facie* case against the accused person requiring him to give his side of the story. Accordingly, and pursuant to **Section 306 (2)** of the **Criminal Procedure Code**, I find that the accused has a case to answer either by giving a sworn or an unsworn statement. The accused is also at liberty to remain silent and to let the court decide the case on the evidence that is before it. In each case, the accused has a right to call witnesses.

19. It is now upon the accused person, through his advocate to let the court know whether he will give evidence on oath, or will give unsworn testimony or whether he does not wish to say anything in his defence. The accused shall also inform the court whether he intends to call any witnesses.

Orders accordingly.

Dated and delivered at Kisii this 03rd day of July, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Majale (present) for the State

Mr. S.M. Sagwe for J.O. Soire for the Accused

Mr. Bibu - Court Assistant