

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 8 OF 2017

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

JONA ASHIOYA NDUSO.....ACCUSED

RULING

1. Jona Ashioya Nduso is charged with murder contrary to section 203 of the Penal Code, Cap 63, Laws of Kenya, as read with section 204 of the Penal Code. The particulars of the offence allege that on the night of the 23rd and 24th of February 2017, at an unknown time, at Eshibuye market, Bunyore North Location, Elukongo Division, Emuhaya Sub-County, within Vihiga County, he murdered Millicent Achieng Otieno, hereinafter referred to as the deceased. He pleaded not guilty to the charge on 23rd March 2017. The first hearing was slated for 4th October 2017, but the case for the prosecution commenced on 21st November 2017, when two witnesses testified. In total three witnesses testified.

2. The first witness, PW1, was Patrick Ogutu, who Narrated how on the evening of 23rd February 2017, he was served by the deceased at a bar and restaurant called Lamkom at Elukongo. On 24th February 2017, he accompanied other senior government security officers to a house at Esibuye market where it was alleged a woman had been killed. He found the body of a woman, the deceased, who turned out to be the woman who had served him at Lamkom the previous evening. It was said that she had disagreed with her husband over drinks the previous evening. She died in a dwelling house, and had bruises on her neck. He and his colleagues found a crowd at the scene. He said that he did not know the accused person. Prior to that incident.

3. PW2 was Dr. Dickson Mchana, the pathologist who did the autopsy on the body of the deceased. She had fractures of the ribs, a bruise on the left lung, a fractured spleen, an injury into the small intestines, and a swelling of the brain. According to him, the cause of death was assault, which resulted in internal bleeding. The next witness, PW3, Number 98469 Police Constable Daniel Karanu Njeri, testified on 20th October 2021. He investigated the case, and he gave details of what he did in the course of his investigations.

4. No other witnesses testified thereafter. After PW3 testified, the prosecution closed its case. Mr. Khayumbi, Advocate for the accused, opted not to submit, and invited me to rule on whether there was a case to answer based on the evidence on record.

5. My duty at this stage is to decide whether to put the accused person on his defence or not, that is to determine whether a *prima facie* case has been established to warrant putting the accused on his defence. What amounts to a *prima facie* case was stated in *Ramanlal Trambaklal Bhatt vs. R* (1957) EA 332 (Sir Newnham Worley P, Sir Ronald Sinclair VP and Bacon JA), as one in which a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation was offered by the defence.

6. The principal elements of the offence of murder are four, and are defined in section 203 of the Penal Code. They are the fact of death, the cause of the death, the role of the accused person in the cause of the death and the fact that the death is caused by the accused with malice aforethought.

7. From the material before me there is *prima facie* proof that the deceased died. Her lifeless remains were seen by PW1 and PW2. PW1 viewed the body at the scene, where she had met her death. PW2 was the pathologist who performed the post mortem on her remains. PW1, PW2 and PW3 were the only witnesses who testified. They were not present when the events that led up to the death of the deceased happened. PW1 and PW3 narrated what they were told by other individuals about what transpired, but those individuals did not testify. No eyewitness account was given of what transpired, and no evidence was adduced as to the role the accused might have played in the causation of the death of the deceased. There is, therefore, no material before me that would suggest that the accused was linked to death of the deceased in any way. None of the witnesses presented in court were present when the assault happened. None of them saw the accused assault the deceased. None of them saw the two, the accused and the deceased, going into the house where the body was found, and being together at the house disputing or fighting, or something related. There is just no evidence at all on what transpired. There is neither direct nor circumstantial evidence.

8. The standard of proof in criminal cases is beyond reasonable doubt. The prosecution was required to establish, beyond any shadow of a doubt, that the death of the deceased herein arose directly from an act or omission on the part of the accused. It would only be after that is established that the accused can be called upon to give an account. As the prosecution has not established any connection between the accused and the death of the deceased, I do not have before me material upon which I can convict the accused were he not to offer any explanation. It is not for the accused person to seal gaps in the prosecution case, but for the prosecution to prove their case beyond reasonable doubt. I am not satisfied that a *prima facie* has been made out herein, to warrant the accused being put on his defence. That is not to say that the accused person was not responsible for the death, but rather that sufficient evidence has not been adduced in court to establish his involvement.

9. I accordingly find the accused, Jona Ashioya Nduso, not guilty of the murder of Millicent Achieng Otieno, contrary to section 203 of the Penal Code, and I hereby acquit him under section 306(1) of the Criminal Procedure Code, Cap 175, Laws of Kenya. He shall be set free unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25th .DAY OF FEBRUARY 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Khayumbi, Advocate, for the accused person.

Mr. Mwangi, instructed by the Director of Public Prosecutions, for the Republic.