



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.8 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOHNSON NZAU MUTUA.....1ST ACCUSED

JOHN KIAMBA MUTUA.....2ND ACCUSED

BENSON MWANZIA NYELE.....3RD ACCUSED

RULING

1. The accused persons, **JOHNSON NZAU MUTUA**, **JOHN KIAMBA MUTUA** and **BENSON MWANZIA NYELE** were on 13.3.2013 jointly charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It was alleged that on the night of 11th and 12th November, 2012, at Maiyuni Village, Mumbuni location in Machakos County they jointly murdered **AUSTIN KYALO KIAMBA**.

2. The 1st and 2nd accused persons were represented by Makundi Advocate whilst the 3rd accused was represented by Miss Mambiri and later by Mr Mbutia. The State was represented by Ms Rono, then Mr Machogu and later Mr Mwongera.

3. The Prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. Under section 203 as read with section 204 of the Penal Code the prosecution must prove the following ingredients beyond reasonable doubt:-

i. That the deceased is dead;

ii. That the death was caused unlawfully;

iii. That there was malice aforethought; and

iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

4. The Prosecution called a total of **twelve (12)** witnesses in support of its case. Pw1 was Rosalia Wayua Kiamba who testified that on 11.11.2012 she was startled to learn that her son had been killed by strangulation and added that she learnt that the incident happened at the trading centre. On cross examination, she denied witnessing the incident. She also stated that there was a land dispute between her family and that of Gerald Mutua Kiamba (Pw4) who is the father to 1st and 2nd accused.

5. **Pw2 Isaac Mulwa Munyao** testified that on the material day, the 3rd accused informed him that the deceased had been killed.

6. **Pw3 Robert Kyalo** testified that he heard Mulwa (Pw2) being informed by the 3rd accused that the deceased had been killed. On being cross examined, he stated that he did not witness the incident as he only learnt of it from the 3rd accused.

7. **Pw4 Gerald Mutua Kiamba** testified that he was informed that the deceased had been killed. He told the court that the 1st and 2nd accused were his sons while the deceased was his nephew.

8. **Pw5** was **Lawrence Wahome Muchoke** who on the 5.11.2015 sought to tender a confession from one of the accused persons but was stood down to another date as the document in question had not been supplied upon the defence counsels. He was later called to testify as Pw8.

9. On 29.6.2016, it is recorded that the court was on transfer and the matter was part heard before Justice T. Jaden. Learned Justice E. Ogola explained to the accused persons their rights under section 200 as read with section 201(2) of the Criminal Procedure Code and that the accused persons elected to have the matter proceed from where it had reached which request was duly granted.

10. On 28.3.2017, it is recorded that the court again was on transfer and the matter being part heard directions were taken under section 200 of the Criminal Procedure Code whereupon the accused persons elected to have the matter proceed from where it had reached.

11. **Pw6, Charles Ngele Kitema** testified that on 10.11.2012 he was called by the CID over the murder of the deceased. He testified that he went to the station and learnt that the accused persons were in custody and that Benson Mwanzia complained that he had been tortured in his private parts by an officer called Ngata so as to accept the charges. Pw6 told the court that he noted that Mwanzia had injuries all over his body. Pw6 was later declared a hostile witness and on cross examination by counsel for the prosecution he denied that Benson Mwanzia confessed to the murder of the deceased. He testified that the 3rd accused is his son who was charged with the offence for changing his mind on the confession and that he had lodged complaint over his son's injuries inflicted by the police.

12. **Pw7** was **Lucas Muindi** who testified that on 11.11.2012 he heard that the deceased had died and on visiting the scene he saw the deceased lying on the ground. On cross examination, he stated that he did not know the cause of the deceased's death and the persons responsible therefor.

13. **Pw8** was **CIP Lawrence Wahome Muchoki** who testified that on 8.3.2013, he was informed that a suspect intended to confess to a murder that occurred on 11.11.2012. He told the court that he was directed to record the confession and that the person who wanted to confess was Benson Mwanzia. He told the court that the said Benson indicated that he was confessing out of his own volition and hence the confession was recorded in Kiswahili. It was his testimony that the testimony was read back to him in the presence of his relatives and he signed it. The confession was tendered as an exhibit and marked 2A. On cross examination, he maintained that the confession from the 3rd accused was obtained procedurally since the same was made in the presence of his parents and uncle.

14. **Pw9 Geraldine Ndunge Mutua** testified that the 1st and 2nd accused are her brothers and that she did not know the 3rd accused. She testified that on 12.11.2012 she was informed that the deceased had died and that the accused persons had been accused of committing the offence. She maintained that she had been accompanied by the 2nd accused when they attended the funeral of their grandmother on 17.11.2012

15. **Pw10** was **Tony Makau Kiamba** who told court that he was informed on 12.12.2012 that the deceased had been found dead. He added that the 1st and 2nd accused were his cousins who were present during preparations for the burial of their grandmother and further vouched for his cousins' alibi.

16. **Pw11 Dr John Mutunga** who testified in respect of an autopsy that was carried out on the body of the deceased by Dr Fred Okinyi whose handwriting he was familiar with. He sought to tender the post mortem report on behalf of Dr Okinyi and the same was produced with no objection from the accused's counsels. The report revealed that the body of the deceased had contusion of the neck muscles and he formed the opinion that the cause of death was asphyxia due to manual strangulation. On cross examination he stated that the air into the deceased's lungs was cut off and that he cannot tell if the deceased hanged himself. The report was produced as Exh 3.

17. **Pw12, Jimmy Mutuku** testified that on 11.11.2012, he received information that the deceased had been killed. He added that the 1st and 2nd accused are his cousins whom he met during the preparation of the funeral of their grandmother

18. Thereafter the prosecution closed its case. Learned counsels filed submissions. Counsel for the prosecution submitted that as per the evidence of Pw2 and Pw10, the deceased was left with the 1st accused hence he was the last person seen with the deceased. It was submitted that the accused persons had malice aforethought and that they were properly identified as the ones who were amongst the mourners at the Kyalo Nzilu home. It was submitted that the cause of death was indicated in the post mortem report as per the testimony of Pw11. In placing reliance on the case of **Ramanlal Trambaklal Bhatt v R (1957) EA 332**, it was submitted that the accused ought to be placed on their defence.

19. It is trite law that prior to placing an accused person to his/her defence, the prosecution is required to have established a *prima facie* case against such accused person. It is now a well-established law that a *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence would convict the accused person, if no evidence or explanation was set up by the defence. See **Ramanlal .T. Bhatt v R [1957]E.A 332**, where the East African Court of Appeal held that a *prima facie* case could not be established by a mere *scintilla* of evidence or by any amount of worthless, discredited prosecution evidence.

20. Also, in the case of **State v Rajhnath Ramdhan, Amoy Chin Shue, Sunil Ramdhan and Rabindranath Dhanpaul. H.C.A No. S. 104/1997**, J.P. Moosali while quoting Lord Parker C.J. in **Sanjit Chaittal v The State (1985). 39. WLR. 925** stated that:

“A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence adduced by the Prosecution to prove an essential element in the alleged offence; b) when the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it...”

21. The prosecution case seems to rest on the confession of the 3rd accused that also seemed to mention the 1st and 2nd accused as

accomplices. Confessions are governed by the Constitution of Kenya 2010; the Evidence Act (Cap.80) and the Evidence (Out of Court Confessions) Rules, 2009. The relevant provisions of the Constitution are Articles 49 and especially article 49(4) as well as Article 50(2) of the Constitution. Sections 25 and 25A (1) of the Evidence Act state as follows:

“25. Confession defined

A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

25A. Confessions generally inadmissible-

(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.”

32. (1) Confession implicating co-accused

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession

22. The Evidence (Out of Court Confessions) Rules, 2009 specify the rights of an accused person who wishes to record a confession. Rule 4 provides that, among other things, the Recording Officer:

a. Shall ask and record the Accused Person’s preferred language of communication;

b. Shall provide the Accused Person with an interpreter free of charge where he does not speak Kiswahili or English;

c. Shall ensure that the Accused Person is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;

d. Shall ensure that the Accused Person is informed of his right to have legal representation of his own choice among others;

e. Shall ask the Accused Person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

23. The Supreme Court of Uganda in discussing the meaning of ‘accomplice’ in the case of **Nasolo v Uganda [2003] 1 EA 181 (SCU)** stated that;

“A court may find, on strength of the evidence before it at the trial, that a witness participated in the offence in one degree or another. Clearly, where a witness conspired to commit, or incited the commission of the offence under trial, he would be regarded as an accomplice. See Khetem v R [1956] EA 563; and Watete and others v Uganda (supra)”

24. I have considered the confession and found that it implicates all accused persons. The said confession was admitted into evidence as the defence did not object to its production which could have led to a trial within a trial being conducted. An attempt was made by counsel for the 1st and 2nd accused persons to have Pw8 recalled and examined in chief was rejected vide the ruling dated 10.7.2019 and they were advised to recall the witness for further cross examination if need be but they did not do so. Hence the said confession forms part of the evidence against the accused persons. As the confession placed them at the scene of crime then they must now be called upon to make a defence as the evidence raises a prima facie case against them.

25. Further to the said confession, I draw wisdom from the case of **Ibrahim v The King, [1914] A.C. 599 (P.C.), at p. 609** where it is stated;

“It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority”

26. It is my conviction that whether or not the confession was voluntary or not is a matter of mixed fact and law. As to whether the same was obtained procedurally in accordance with the requisite law and rules, a trial within a trial could have established the same but for the fact that the defence okayed the production of the confession as an exhibit. The defence did not seek for recall of Pw8 for further cross examination if need be despite being given the opportunity to do so. They now have to tackle the issue at the defence stage.

27. Having evaluated the prosecution evidence. I find that, in the absence of any explanation to the contrary from the defence, the prosecution evidence does establish the three (3) ingredients of the offence of murder. It is not in dispute that there was death as a result of strangulation. On the question of the accuseds’ participation, this court finds that, in the absence of any evidence to the contrary, the evidence does point to the participation of all accused pursuant to the confession by the 3rd accused which placed them at the scene of crime. In arriving at the above conclusions, I do recognize that at this stage, the standard of proof is not proof beyond reasonable doubt as required for a fully-fledged criminal trial. Rather, what is essential is such evidence which if taken literally or on the face of it would establish the

essential ingredients of the offence of murder, as well as the accused's participation therein. It is noted that the confession by the 3rd accused was not subjected to a trial within a trial as the defence did not object to its production. An attempt was later made by counsel for the 1st and 2nd accused persons to have Pw8 recalled and to be examined in chief was rejected by this court but gave the defence a chance to recall the witness for further cross examination but they did not do so.

28. I wish to associate myself with the decision of Justice J.B. Ojwang, as he then was, in the case of **R v Samuel Karanja Kiria CR. CASE NO.13 OF 2004 NAIROBI [2009] eKLR** had this to say on prima facie case: -

“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . .

From the confession and the evidence adduced, it is my finding that the accused persons require to make a defence to the allegations raised against them.

29. For those reasons, I find that the evidence adduced at this stage of the proceedings has established a prima facie case against all three accused persons to require them to be called upon to make a defence. Consequently, I find each accused has a case to answer and directed to elect to conduct their defence in accordance with the provisions of section 306(2) of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at Machakos this 16th day of February, 2021.

D. K. Kemei

Judge