



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NUMBER 54 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

DAVID NGUGI WANYOIKE.....ACCUSED

RULING ON CASE TO ANSWER

1. The accused person David Ngugi Wanyoike was charged with **Murder Contrary to section 203 as read with section 204 of the Penal Code**.
2. It was alleged that on 3rd December 2018 at Cheponde Village, Elburgon in Molo Sub-County within Nakuru County he murdered Teresia Wanjiku Muthoni.
3. The accused person pleaded not guilty and matter went into trial with the prosecution calling seven (7) witnesses.
4. **PW1, Grace Muthoni**, the deceased's mother testified that on 3rd December 2018 at around 4 am, she was woken by a neighbor and they rushed to the deceased house where they found her lying in bed with stab wounds on her neck and arm. She said they screamed and neighbors came and assisted in taking the deceased to Elburgon hospital where she was pronounced dead.
5. She confirmed that the police later visited the crime scene.
6. She knew the accused person as her son in law who had lived with the deceased for 17 years but had separated before deceased's death for about 1 year.
7. Under cross examination she testified that she did not witness the accused person kill the deceased but that there were differences between the deceased and the accused person. That the deceased had told her she had reported threats against her by the accused but she did not know where the deceased had made the reports. That the accused and the deceased had come to her to settle their disputes and they had gone before the chief severally. However asked about proof of such reports she had none.
8. **PW2**, the deceased daughter testified that on 2nd December, 2018 the deceased came back home at around 9pm and went straight to sleep. At around 3am she heard the deceased screaming. She called PW3 her brother and they went to check on their mother. As they entered her room they met a male person holding a phone torch leaving her mother's room. Each stated that they did not see the person well. They found her having cut wounds. They tried to speak to her but she was not talking. PW2 stated that it appeared as if the person had entered the house through a gap in the wooden boards of the walls of their mother's room.
9. **PW4, Naomi Wangare** testified that on 6th December 2018 at about 1.30 pm she went to Elburgon Hospital to witness the postmortem being conducted over the body of her deceased's sister.
10. **PW5, Gladys Oseko**, a Senior Medical Officer at Elburgon Hospital produced the report of the post mortem on the deceased which was conducted on 6th December 2018 at around 1.30 pm. She testified that the deceased had multiple stab wounds through the back; two through the shoulders, two through the upper arms, two through the lumbar region, one through the armpit. These resulted in several lacerations on the liver, stab in the kidney which led to the conclusion that the cause of death was multiple penetrating stab wounds and severe bleeding.
11. **PW7, Hannah Wamaitha Njuguna**, the deceased's neighbor testified that on the fateful day of 3rd December, 2018 at around 3pm she heard screams from the deceased house. She rushed there and found the deceased stabbed. However, she did not witness who killed her. She is the one who called the mother of the deceased to come from her house. She raised alarm and neighbours came and took the deceased from the house to the road side to look for assistance to take her to hospital. That is where the police found them, she accompanied the deceased to hospital.

12. **PW8, the Investigation Officer, No. 66325 CPL Charles Ntaiwa**, testified that on 3.12.2018 at 4:00am he was called by one boda rider from Chabonde and informed him that the a certain lady who was a neighbor had been stabbed and was bleeding profusely. He called two of his colleagues who accompanied him to the crime scene where they found some people on the road side with the deceased. Upon a cursory examination he saw she had numerous stab wounds on the neck and chest and was bleeding profusely. They took her to Elburgon Hospital and she died while undergoing treatment. He said that he went back to deceased's house and met her two children and neighbors. Upon interrogating one of the children he was informed that there was a man who had entered the deceased's room through a gap in the wooden wall and had run way through the children's room.

13. Members of public suspected the deceased's estranged husband, the accused. They went to his house but did not find him. His elder son who was in told them he did not know where his father had gone to. On searching the house, he said that it appeared to him that there had been a person there recently. They found a bottle of pesticide and some spit.

14. They went back to station. On 4th December, 2018 he received a call that accused person had been traced in Gilgil at a quarry in a bad state and had been taken to hospital where he was admitted. He was discharged on 5th December 2018 and taken to Elburgon Police station. The discharge summary indicated that he was suspected of having taken poison. He produced the discharge summary as **P. Exhibit 2**. When he spoke to him he appeared weak and confused and could not speak. He later produced the accused in court where he was charged.

On cross and re-examination he testified that the bottle of pesticide was recovered from within the homestead of the accused, but they did not connect it to this crime so they did not take it for forensic examination because it was forgotten in the police motor vehicle . That the two children at the scene were the children of both the accused and the deceased and the children knew him. None identified the intruder to be the accused person.

SUBMISSIONS

15. Mr. Maragia counsel for the accused made oral submissions on no case to answer. He submitted that there is no incriminating evidence against the accused person as no evidence was adduced to show that he was seen at the scene.

16. That no link was established between his alleged taking of poison in attempted suicide and the commission of the offence.

17. That there was no basis for the accused to be placed on his defence as there was no *prima facie* case against him.

18. Ms. Murunga prosecuting counsel submitted that their eight (8) witnesses had established a *prima facie* case against the accused person. That though there was no eye witness there was sufficient circumstantial evidence established by the investigation officer that the accused person was found to have taken a pesticide.

19. In a short rejoinder Mr. Maragia submitted that the prosecution had not laid any link between the offence and the accused person. That the accused was not found at the place where the bottle was found, and the investigating officer himself testified that the investigation did not link the accused to the poison bottle.

ANALYSIS AND DETERMINATION

20. The issue for determination is set out under **Section 306(1) & (2) of the Criminal Procedure Code**. The Section provides for what should happen at the close of the case for prosecution. It gives the two scenarios whether or not there is evidence that the accused did or did not commit the offence as charged to warrant the entry of a finding of not guilty, or the giving of his defence case.

The section states:

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact. (emphasis added)

21. The offence of **Murder** is defined by **Section 203 of the Penal Code** as follows;

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

To obtain a conviction the prosecution must prove that there is death of a person, caused by an unlawful act or omission of the accused person and the unlawful act or omission was actuated by malice aforethought. **Malice aforethought** is defined at **Section 206 of the Penal Code** thus:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

22. In **Republic vs. Abdi Ibrahim Owl [2013] eKLR** a *prima facie* case was defined as follows: -

“*Prima facie*” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “*Prima facie* case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”.

23. This was explained in **Ramanlal Trambaklal Bhatt vs R [1957] E.A 332 at 334 and 335**, where the court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether 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...It may not be easy to define what is meant by a “*prima facie* case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

24. In **Public Prosecution vs. Zainal Abidin B. Maidin & Another** court stated that:

“It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts..... It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.”

25. In **Republic vs. Prasad [1979] 2A CRIM R 45, King CJ** on a *prima facie* case held as follows:

“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it.”

26. In the case of **May vs O’sullivan (1955)92 CLR 654** the English court stated as follows;

“when at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law”

27. So, in which of the two scenarios presented by **Section 306 of the Criminal Procedure Code** does the accused herein fall?

28. The prosecution called seven (7) witnesses none of whom witnessed the killing of the deceased. The investigation officer told the court that the reason he went for the deceased’s estranged husband was because the members of the public suspected him. Thereafter it was upon him to conduct investigations to determine whether that suspicion was based on evidence that could support a conviction. The question is what evidence did he gather?

29. The deceased was stabbed numerous times by a person who entered her room through a gap in the wooden boards that made the walls of her room. The intruder was identified as male. Apart from just following the estranged husband the police did not bother to trace the movements of the deceased that day and night before she arrived home at 9:00pm. They did not search for the murder weapon, no neighbours were interrogated as to whether they had seen a strange man or even the suspect in the area that night.

30. The prosecution lay capital on an alleged bottle of poison found within the compound of the accused person. The investigation officer was categorical that his investigations did not link the alleged bottle of poison to the murder. His allegation that accused was suspected to have taken poison remains an allegation because even the discharge summary simply stated that he was suspected to have taken poison in a bid to commit suicide. There was no evidence to connect his alleged suicide attempt to the death of his estranged wife.

31. The numerous stab wounds are an indication that the killer may have been enraged with the deceased to the point of stabbing her to

ensure that she was dead. The prosecution did not even attempt to show that the accused had any reason except his estrangement, to want to cause the deceased harm. The evidence of the mother that there had been reports to the police on threats could have been proven by extracts from the OB of the police station, of the evidence of the chief. The Investigating Officer did not mention following up on any of these and it can only be assumed that none existed.

32. What this demonstrates is that the prosecution charged this accused person in a case where they had the weakest circumstantial evidence. The Court of Appeal in **Omar Mzungu Chimera vs Republic, Cr. Appeal No. 56 of 1998, at P. 5 through P. 6** stated that :

“It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilty is to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”

“.....circumstantial evidence in order to sustain a conviction (must be complete and incapable of) explanation on any other hypothesis than that of the guilt of the accused. Circumstantial evidence which falls short of the required standard on all material particulars cannot in law form a basis for a conviction.”

33. It is evident that the circumstances in this case upon which the court is expected to draw the accused person's guilt are not firmly and cogently established, do not unerringly point at the guilt of the accused, and do not even beckon the conclusion that within all human possibility the offence was committed by the accused.

34. In the circumstances upon consideration of the evidence, submissions by counsel *I find that there is no evidence that the accused committed the offence, and record a finding of not guilty.*

35. Consequently, the charge of **Murder c/s 203 as read with 204 of the Penal Code** against the accused person is dismissed. The accused is acquitted and shall be released forthwith, unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIA ZOOM THIS 23RD DAY OF JUNE 2021.

MUMBUA T MATHEKA J

CA Edna

Accused present

Ms. Murunga for state

Mr. Maragia for the accused person