



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Hon. D. K. Kemei)

CRIMINAL (MURDER) CASE NO.14 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

MAGDALINE WAYUA MUTIE.....ACCUSED

RULING

1. The accused herein **MAGDALINE WAYUA MUTIE** was charged with the offence of murder contrary to sections **203** as read with section **204** of the Penal Code. It is alleged on the night of 16th and 17th March, 2017 at Matuu Township, Matuu Location, Yatta Sub County within Machakos County she murdered **LEONARD MUTUNGI KAINDI**.

2. The accused is represented by Mr. Tamata whilst the prosecution was initially represented by Mr. Machogu and currently by Mr. Mwongera.

3. The prosecution in order to sustain a conviction must prove all the ingredients of the offence herein. The elements of the offence as provided for under section 203 as read with section 204 of the Penal Code are:

i. That the deceased is dead;

ii. That the death was caused unlawfully;

iii. That there was malice aforethought; and

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

4. The prosecution called a total of **ten (10)** witnesses in support of its case. **Pw1** was **David Kaindi Mutungi** who witnessed the post mortem that was conducted on the body of the deceased. He testified that the deceased was the husband to the accused whereas the deceased was his son. He testified that on 17th March, 2017 at 4.30 am he received a call from his son (the deceased) and on trying to inquire what the issue was he did not speak. He called the deceased's wife (the accused) who responded that the deceased had left the house shortly. He stated that he sensed something was wrong and he alerted a relative to go and check on the deceased. He later proceeded to Matuu Township where he learnt that his son had been killed. He testified that on viewing his son's body he saw it had a deep incision at the chest, injury at the elbow and a bruise at the chin.

5. **Pw2** was **Dr. Muli Simeon Kioko** who testified in respect of an autopsy that had been carried out on the deceased who formed the opinion that the cause of death was due to cardiopulmonary arrest as a result of massive hemorrhage due to multiple stab wounds over the chest. He noted that the body had injuries inflicted by a sharp object. He also noted that the deceased had some old injuries on the chest but which according to him did not contribute to the death. He produced the post mortem report as Exhibit 1.

6. **Pw3** was **Simon Muthoka Muumbwa** who testified that on 17th March, 2017 at 8.00 am, he received a call from Pw1 informing him that his son had been stabbed to death by the accused. He further testified that the deceased wanted him to proceed to the scene and confirm the circumstances leading to the death.

7. **Pw4** was **Sgt. Angelo Njui** who testified that in the company of OCS Chief Inspector Okodoi, Corporal Noor, PC Kamau, and PC Yegon they visited the scene of crime where he saw the body of the deceased with blood stains all over and on following the bloodstains (trail)

which led them to the house of the accused. He stated that they conducted a search of the house and recovered a knife with traces of blood and also collected some water with bloodstains on the verandah of the house which were later handed over to the Government for DNA analysis. He stated that he also organized for photographs to be taken at the scene and he identified the knife, an empty bottle of Moonwalker whisky, photographs, exhibit memo form and Govt analyst report. On cross-examination, he stated that the body was discovered 30 metres away from accused's house.

8. **Pw5** was **Gideon Muumbwa Muthoka** who testified that on 16th March, 2017 at 9.30 pm, he went to Wasafiri bar to enjoy himself and met the deceased in the company of the accused drinking alcohol. He left them at the bar and went to Impression bar where they would later join him. They all left Impression bar together and the couple proceeded to their home while he went to his place. On cross-examination, he confirmed that the accused and the deceased were in good terms and jovial prior to the incident.

9. **Pw6** was **Annastacia Kanini Nzoka** was the care taker of a plot where the accused had rented a house. She testified that on 17th March, 2017 as she went about her endeavors she learnt that somebody had been killed the previous night. She went back to her house only to find a large crowd of people and police officers assembled in the plot. She identified the body of the deceased and led the police officers to the house of the accused where a knife was recovered. On cross-examination, she confirmed that she had never heard of any squabbles between the accused and the deceased and further confirmed that she did not witness the incident.

10. **Pw7** was **PC Nuru Issa** who testified that on 17th March, 2017 he proceeded to the scene of crime and found a dead body lying in a pool of blood. He followed the blood stains trail that led him to the house of the accused. He testified that there was blood inside and outside the premises and it looked like the accused had attempted to clean the house in haste.

11. **Pw8** was **PC Michael Kamau** who testified that on 17th March, 2017 he proceeded to the scene of crime and found a dead body lying in a pool of blood. He followed the blood stains trail that led him to the house of the accused. He testified that there was blood inside and outside the premises and it looked like the accused had attempted to clean the house in haste.

12. **Pw9** was **Margaret Wahu Maina** an analyst at the government chemist who testified that the DNA profile from blood sample collected from the knife matched that which was generated from the blood sample of the deceased.

13. **Pw10** was **PC Peter Kipyegon** who testified that on 17th March, 2017 around 7.00 am he was alerted by the OCS of a murder that occurred within Matuu Township. In the company of his two colleagues he proceeded to the scene of the crime where he collected blood samples and the kitchen knife which were forwarded to the government laboratory for analysis. He produced the kitchen knife and an empty bottle as exhibits. On cross-examination, he stated that he visited a bar where both accused and deceased had taken alcohol and established that the two did not at all quarrel. He also stated that the accused did not run away upon seeing them.

14. Thereafter, prosecution closed its case and parties were directed to file submissions. Learned counsels filed submissions. Defence counsel submitted that there is no case to answer as the accused had not been identified and further submitted that the reliance by the prosecution on the doctrine of "last seen with the deceased" was not conclusive. He relied on the case of **Republic V. E K K (2018) eKLR**. It was submitted that the ingredients of murder especially mens rea was not proved hence there is no need to put the accused person on her defence.

15. Learned counsel for the prosecution in response submitted that as per the evidence of **Pw2**, **Pw5** and **Pw9**, the deceased had been left with the accused and hence she was the last person seen with the deceased. It was submitted that the accused person had malice aforethought and that she was properly identified as the one who was with the deceased as they left the Impression bar together. It was submitted that the cause of death was indicated in the post mortem report as per the testimony of Pw2. In placing reliance on the case of **Ramanlal Trambaklal Bhatt v R (1957) EA 332** the court was urged to place the accused on her defence under section 306(2) of the Criminal Procedure Code.

16. It is trite law that prior to placing an accused person on his/her defence, the prosecution is required to have established a *prima facie* case against such accused person. It is now a well-established principle of 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 to the contrary. *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.

17. 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..."

18. I have carefully 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 massive haemorrhage due to multiple stab wounds. On the question of the accused's participation, this court finds that, in the absence of any evidence to the contrary, the evidence of **Pw7**, **Pw8** and **Pw10** does point to participation of the accused person. 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. **Pw7** and **Pw8** who are the investigating officers who reported to the scene of crime testified that on arrival at the accused's house they found blood inside and outside the premises and it looked like the accused had attempted to clean the house in haste. They also confirmed that the blood trail led from where the body lay all the way to accused's

house. It is therefore clear that the accused was placed at the scene of the crime and hence the need for her to offer an explanation regarding the death of the deceased. Further, it transpired from the evidence of Pw5 that he was in company of the deceased and accused as they left Impression bar and who parted ways and left the accused in company of the deceased as they headed to their place of residence. The circumstances are such that it is only the accused who should offer an explanation as to how the deceased met his death. Again, the conduct of the accused in trying to clean the blood stains from the house and verandah squarely placed her at the scene of crime warranting her to make a defence.

19. For those reasons, I find that there is some evidence adduced against the accused person to establish a prima facie case against him and sufficient to put her on her own defence for the offence of murder contrary to sections 203 as read with section 204 of the Penal Code. Consequently, I find that the accused has a case to answer and is now called upon to make her defence in line with the provisions of section 306(2) of the Criminal Procedure Code.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021.

D. K. KEMEI

JUDGE