



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 3 OF 2018

REPUBLIC..... PROSECUTOR

VERSUS

ANTONY WAMBUA WILLY.....ACCUSED

RULING

1. The Accused person, **ANTONY WAMBUA WILLY** was charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It is alleged that the on the 6th Day of December, 2017, at Etukani Village, Kibau Sub-location in Mwala Sub-county within Machakos County jointly with others not before court murdered **MATTHEW MUTUA KYALO**. The Accused person denied having committed the offence.

2. The accused person was represented by Mr Tamata whilst the State was represented by Mr Machogu.

3. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. 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 died;

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 ten (**10**) witnesses in support of its case. Pw1 was Thomas Mutua Mbuvi who testified that on 6.12.2017 he was at a bar when he saw the deceased leaving with a beer bottle which resulted in an altercation with the bar maid. He told the court that he heard a noise in the back of the bar and upon checking he saw the deceased lying on the ground being attacked by the accused and other persons and later heard that the deceased died while undergoing treatment.

5. Pw2 was Stephen Muthyani Kavivya who told the court that on the material day he was at a local bar when he heard noise and on inquiry he learnt that there was an altercation over non-payment of beer by the deceased. He told the court that there was a fight between the accused and the deceased and he saw the deceased falling down and who looked unconscious.

6. Pw3 was Peter Kaleli Mutisya who testified that on the material day he was informed that the deceased was in bad shape and he rushed him to Mwala Hospital.

7. Pw4 was Boniface Wambua Daudi who testified that on the material day he went to the scene and found the deceased lying down and who could not talk.

8. PW5 was APC George Wambua who testified that he received a report that a person had been attacked in a bar and that the person was later brought whilst unconscious and that he later found out the person injured was the deceased.

9. Pw6 was Joseph Musau Mulwa who testified that on 21.12.2017 he accompanied the father of the deceased to the mortuary where a post mortem was being carried out on the deceased.

10. Pw7 was Boniface Mutua Matata who testified that on 6.12.2017 after coming from the river to bathe he went to a local bar where he was told that the deceased was behind the bar after being attacked and when he went to check he found the deceased lying motionless. He told the

court that he learnt that the deceased later died.

11. Pw8 was Dr Waithera Githendu who testified of the post mortem examination carried out on the deceased on 21.12.17 who had died while undergoing treatment. The body had multiple chest injury and head injury as well as intracranial haemorrhage and she formed an opinion that the cause of death was increased pressure to the head due to head injury.

12. Pw9 was Pc Alfred Kiviyaso Rupia who testified that on 8.12.2017 he received a report that the deceased had been involved in a fight while drinking and after booking the incident he visited the scene and established that the fight was due to payment of deposit for a beer bottle and that the deceased was overpowered when fighting with the accused and others.

13. Pw10 was Mary Mbeke who testified that on 6.12.2017 she was at work at the scene and she served beer whereupon the deceased left with a beer bottle that she sought to find out if he had paid deposit for it. She testified that the deceased followed her to the counter and started hitting it on the counter when the accused informed him to leave and later the accused went to the back of the bar whereupon the deceased followed him but she did not know what happened. It was her testimony that she heard that the deceased was taken to hospital and the accused arrested.

14. Thereafter the prosecution closed its case and parties were directed to file submissions and only the state's submissions are on record. Learned counsel submitted that according to the evidence of Pw1 as corroborated by Pw2, the accused with others assaulted the deceased until he fell down unconscious and that there was malice in so doing hence he urged the court to find so in line with section 206(a) of the Penal Code. Counsel urged the court to find that a prima facie case was established against the accused.

15. 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 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 vs. 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.

16. 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...”

17. I have carefully evaluated the prosecution evidence. I find that, in the absence of any explanation to the contrary from the defence, the prosecution's evidence does establish the three (3) ingredients of the offence of murder. It is not in dispute that there was death and that the cause was established. On the question of the accused's participation, this court finds that, in the absence of any evidence to the contrary, the evidence of Pw1 to Pw3 does establish participation of the accused person. He was found at the scene of crime and was actually seen participating in assaulting the deceased. 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. The evidence of the barmaid and the two patrons left no doubt about the accused's participation in the crime. The evidence so far adduced is sufficient to sustain a conviction against the accused even if he elects to remain silent in defence.

18. For those reasons, I find that there is some evidence adduced against the accused person to establish a *prima facie* case against him which is sufficient to require him to be put on his own defence for the offence of murder contrary to sections 203 and 204 of the Penal Code.

19. In the result I find that the prosecution has made out a prima facie case against the accused to warrant him to make a defence. Consequently I find the accused has a case to answer and is now called upon to make a 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 30th day of January, 2020.

D. K. Kemei

Judge