



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL (MURDER) CASE NO.45 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY KYALO NDAKA.....1ST ACCUSED

MICHAEL KITHEKA MUTUA.....2ND ACCUSED

RULING

1. The Accused persons, **ANTHONY KYALO NDAKA** and **MICHAEL KITHEKA MUTUA** were jointly charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code Act, Cap 63. It is alleged that on the 18th Day of May, 2015 they murdered **ONESMUS KISUNA MUNUVE**. The accused persons denied having committed the offence.

2. The accused persons were represented by Mr Mwihi and Mr J.N Kimeu respectively 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 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 **ten (10)** witnesses in an attempt to prove its case. Pw1 was Michael Kimanthi Wambua who testified that the deceased informed him that Kyalo had attacked him.

5. **Pw2 was Anastasia Kathini Munuve** who testified that she received a report that the deceased had been attacked by the accused persons and that she went to the bar where the deceased informed her about the attack.

6. **Pw3 was Kitonyi Mwanzui** who testified that the deceased told him that he was attacked by both accused persons. He participated in identifying the body of the deceased during the post mortem.

7. **Pw4 was Zipporah Ndinda** who testified that she saw the deceased being pushed to the ground by the accused persons and she saw them kick him.

8. **Pw5 was Pc Mohammed Isoka** who testified that on 19.5.2015 that he received a report that the deceased had been assaulted the previous day by a son of Nduku and a one Kyalo.

9. **Pw6 was Josephat Kyalo** who testified that on 18.5.2015 there was a fight at Mombasa Raha bar between the deceased and Kyalo Ndaka and that later he saw Kyalo stepping on the deceased's stomach.

10. **Pw7 was Dr Silvester Maingi** who testified of the post mortem examination carried out on the deceased on 26.5.2015. The body had external abrasions and that the skull was fractured and there was internal bleeding on the brain. There was blood emanating from the intestines and he formed an opinion that the cause of death was excessive blood loss, head injury due to blunt trauma.

11. **Pw8** was **Cpl Albanus Muia** who testified that on 19.5.2015 he received a report that the deceased was spotted lying down and he went to the scene and established that the deceased had been assaulted.

12. **Pw9** was **Cpl David Sang** who testified that he was in the team that went to the scene of the crime and that he was in the team that arrested the accused when their whereabouts were reported to the police.

13. **Pw10** was **Annah Nduku Mutua** who testified that on 18.5.2015 she was at Mombasa Raha bar and she saw the deceased and the 1st accused person fighting and that the following day she heard that the 1st accused had overpowered the deceased.

14. Thereafter prosecution closed its case and parties were directed to make oral submissions. Learned counsel for the accused persons submitted that there are inconsistencies in the prosecution evidence and that no prima facie case had been made and further that the prosecution case is based on suspicion and hence urged the court to find that no prima facie case was established against the accused persons. The state submitted that the accused were seen assaulting the deceased; that there was a dead body and the part of the body inflicted was indicative of malice aforethought and thus submitted that a prima facie case had been made against the accused persons.

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 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 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 evidence does establish the three (3) ingredients of the offence of murder. It is not in dispute that there was death and the cause was established. The pathologist who conducted the autopsy formed the opinion that the cause of death was excessive blood loss, head injury due to blunt trauma. 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, 2, 3, 4, 6 and 10 does establish participation of the accused persons. 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. Most of the customers at Mombasa Raha bar and its environs came forward to confirm seeing the accused persons assaulting the deceased on the material date. Hence if the accused persons were to elect to remain silent in defence the evidence so far tendered at this stage will be sufficient to sustain a conviction against them.

18. For those reasons, I find that a prima facie case has been made out against both accused persons to require them to make a defence. I find that each accused has a case to answer and are now called upon to tender their defence in line with section 306 of the Criminal Procedure Code.

Orders accordingly.

Dated and delivered at Machakos this 30th day of January, 2020.

D. K. Kemei

Judge