



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCR NO. 80 OF 2017**

**FORMERLY MACHAKOS HCCR. NO. 89 OF 2015**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**BONIFACE MUTUA MUSYOKA.....ACCUSED**

**RULING**

1. **Boniface Mutua Musyoka** faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the 9<sup>th</sup> day of December 2015 at Makanisani village, Mavivi sub-location, Mukaa sub-county within Makueni county murdered **John Kituku Musyoka**.
2. The prosecution case is premised on the evidence of eight (8) witnesses. The matter is before me to determine whether the prosecution has made out a prima facie case to make this court place the accused on his defence.
3. There is no dispute that there is none who testified to having witnessed the deceased's killing. What is before this court is therefore circumstantial evidence. It is also not disputed that the deceased was a brother to the accused's mother. So he was a maternal uncle to the accused.
4. The cause of death was found by Dr. Waithera whose report was produced by Dr. Lugogo (Pw8) to be asphyxia due to hanging (EXB2).
5. A summary of the prosecution case is that the accused is a nephew to the deceased. They used to quarrel and fight a lot. On 18/12/2015 night the deceased came home complaining of the accused stealing from him. Earlier in the day he had rung his brother (Pw1) to inform him of his disagreement with the accused. He further told him the accused had threatened to kill him.
6. The next day the deceased went to work leaving his phone behind and he never returned home that night. There is evidence from Pw3 **Morris Wambua** that he had seen the accused and deceased fighting on a corridor at a market place.
7. Pw4 **William Muange Nzioki** who had been with the deceased in the evening said as they parted ways the deceased left together with one Ngaathe who never testified. The next day he was found dead with a scarf (EXB1) around his neck. He was kneeling while the scarf was tied to a tree branch.
8. Pw8 **Dr. Lugogo** produced the postmortem report. The accused was the prime suspect because of the fight they had had the previous night.
9. Mr. Hassan for the accused filed written submissions after the close of the prosecution case. He submits that the prosecution has not made out a prima facie case to warrant the accused's placement on his defence. He has cited the cases of **R –vs- Morris Karani Alando (2012) Eklr; Bhatt –vs- R (1957) E.A 332 and R –vs- Martin Oluoch Okwako and 2 Others 2015 eKLR** to explain when a prima facie case is found to have been made.
10. Counsel submits that none of the prosecution witnesses linked the death of the deceased to the accused person. Further that the evidence adduced was that of a disagreement between the accused and deceased on the material night and that the deceased left in the company of another person who was never called to testify. In addition, the deceased's body was found near the house of the person he had left with. He submits that the accused was seen drinking in a bar way past the time the deceased had left with the other person and the accused was drunk.
11. Counsel contends that the much talked about scarf did not have any special marking and it resembled a lot of such scarfs sold in the market place, and no DNA test was done to link the accused with the scarf. On the post mortem he argues that there was no injury that caused the deceased's death. He therefore prays for the accused's acquittal under section 306(1) Criminal Procedure Code.

12. The prosecution relied on the evidence on record.

13. I have duly considered the evidence on record plus the submissions by the defence counsel on no case to answer. A few definitions of what a prima facie case is will suffice.

14. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own to enable a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the Court of Appeal case of **Ramandal Bhatt –vs- R (1957)** E.A 332.

15. In the case of **R –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, 8<sup>th</sup> 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”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, 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 is 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.”*

16. At this stage what the court needs to ask itself is whether this court directing its mind well on the evidence available would convict if the accused chose not to give any evidence. See **R –vs- Martin Oluoch Okwako and 2 Others (supra), Ronald Nyaga Kiura –vs- R (2018) eKLR**. There is no dispute that the accused was a nephew to the deceased who was his mother’s brother.

17. The cause of death as given by the evidence in the post mortem report (EXB2) is that the deceased died of asphyxia secondary to hanging and not any injury caused through the fight. There is no single witness who testified as having witnessed this. The evidence on record is therefore purely circumstantial, since there is no direct evidence linking the accused to the offence. Circumstantial evidence has been defined in the case of **Sawe –vs- R (2003) KLR 364** as follows:

*(1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.*

*(2) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.*

*(3) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.*

18. Having all the above definitions and principles in mind, I now wish to analyse the evidence adduced. It was the evidence of Pw5 and Pw6 that the deceased had come home on 8<sup>th</sup> December 2015 in a very bad mood. He told his wife (Pw5) that he did not know why the accused who was his nephew was stealing from him. He was calmed down and he slept.

19. According to Pw5, the deceased went to work the next day but left his phone behind. At no point did she say the deceased came home for the phone. On the other hand, Pw6 said he met the deceased at the market at 5:30 pm and he gave him his phone to go and charge it for him. He obliged and that was the last time he saw his father alive.

20. Pw1 **Kyeva Musyoka** a brother to the deceased testified that on 9<sup>th</sup> December, 2015 1:00 pm the deceased had called him and informed him of his collision with the accused who had promised to kill him. Pw1 did not take this seriously since the deceased and accused had always disagreed, fought and threatened each other with killing. This had gone on for years but never had they injured one another.

21. Pw2 **Philip Kimilu Manthi** was in Mayor’s bar working on 9<sup>th</sup> December, 2015 8:00 pm when the deceased came and ordered for alcohol which he was given and he started drinking it. While still drinking his stuff the accused arrived and a quarrel ensued between them. Pw2 removed them from the bar and he never saw them again. The deceased was doing his first drink while the accused took nothing. It’s not known where they went to but they were spotted by Pw3 **Morris Wambua** as they fought on the corridor. Pw3 ignored them but informed Pw4 about the fight and left for home.

22. Pw4 had been with the deceased at Mavivia market that evening at 5:30 pm, and were later joined by one Ngaathe. Together they took some alcohol. Thereafter the deceased left followed by Ngaathe, while Pw4 was the last to leave. On his way to buy credit he met Pw3 who informed him of the fight between the deceased and accused. After buying credit he went to where he was told they were fighting. He found the accused who was looking for his phone which was later brought by Mutungi Kitili (*watchman*) and Mumo Mukilya (*barmaid*).

23. Both the watchman and bar girl were not called to testify. It is not known how they came to possess the accused's phone and how they traced him upto where he was. Pw4 was categorical that he only met the accused and never saw the deceased. He does not mention ever talking to the accused before leaving for home.

24. According to Pw4, the deceased had left Mavivia market together with Ngathe but that was before he went to Mayor's pub where Pw2 worked. Pw2 never saw Ngaathe and he said the deceased went to his bar alone. It was however important to know how and where the deceased and Ngaathe had parted. It has been stated by Pw4 that where the deceased's body was found is near Ngaathe's home and he is one of those who had been with him during his last moments. His evidence would have assisted the court in arriving at its decision.

25. Pw5 and Pw6 went to Mayor's bar that night but did not find the deceased there. It is there they were when Pw6 was informed by Kiniu that the deceased and accused had fought. They went to the next bar where they found the accused who was rude when they inquired from him about the deceased. Pw5 also said as they walked on the corridor she saw the deceased's cap there. It's not clear if she took it and she did, it was never produced as an exhibit.

26. After failing to trace the deceased Pw5 and Pw6 went home and did not report anywhere. The next morning, they found the deceased kneeling with a scarf around his neck and tied to a tree near some path.

27. It is noted that there was a fight between the accused and deceased as stated. Pw3 did not do anything but reported to Pw4, who went to the scene of the fight and only met the accused who was receiving his phone from a watchman and the barmaid. He did not ask the accused anything nor make any inquiries on the deceased's whereabouts. No report was made anywhere about the incident.

28. **Mutungu Kitili** and **Mumo Mukilya** appear not to have been questioned or recorded any statement about the fight or what they witnessed. Ngaathe who had been with the deceased was also not called as a witness to say what he knew. A lot has been said about the black and white cloth (EXB1) found on the deceased's neck. It is believed to belong to the accused and used to strangle the deceased. This piece of cloth (EXB1) is a common feature in our shops, market and motorbikes. The prosecution did not point out anything unique on the said EXB1 to specifically connect it with the accused.

29. Finally did the deceased die as a result of any injuries he may have suffered as a result of the fight? Those who may have witnessed the fight never testified save for Pw3 whose evidence did not make mention of any injuries. Further the only marks noted on the deceased's neck after removal of the scarf led to the finding that he had died of asphyxia secondary to strangling. Did the accused strangle the deceased? There is no evidence before this court that can lead to that conclusion.

30. From the evidence given by Pw1, Pw5 and Pw6 would there be a possibility of the deceased having committed suicide as a result of the frustrations caused to him by the accused who was his sister's son? That could be a possibility.

31. After evaluating the evidence on record, I find that if the Investigating officer had carried out thorough investigations and interrogated crucial witnesses at Mavivia market, Mayor's bar and Kisiyo's bar the truth of the deceased's killing would have been revealed.

32. I find this case to be founded on mere suspicion without going into deep investigations. Suspicion however strong can never be the basis of a conviction. See **Sawe –Vs- Republic 2003 KLR 364** where the Court of Appeal held:

***“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”***

The evidence before this court cannot found a conviction in the event that the accused were to elect to remain silent in his defence.

33. For my part, I find him not guilty and acquit him under section 306 (1) Criminal Procedure Code. He shall be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 26<sup>th</sup> day of February 2020, in open court at Makueni.**

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**Hon. H. I. Ong'udi**

**Judge**