



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCR NO. 114 OF 2017**

**FORMERLY MACHAKOS HCCR NO. 76 OF 2015**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**SAMUEL NGUNGA KIILU.....ACCUSED**

**RULING**

1. **Samuel Ngunga Kiilu** the accused herein 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 18<sup>th</sup> August 2015 at Lambati village, Mukaa sub-Location, within Makueni county murdered **David Kyuma**.

2. The accused denied the charge and the prosecution set out to prove its case by calling seven (7) witnesses. This court is now called upon to determine whether there is sufficient evidence to warrant the accused being placed on his defence under Section 306(2) Criminal Procedure Code or not.

3. M/s Anne Thiongo for the accused person did a summary of the evidence adduced. She submitted that the prosecution had not discharged its duty of establishing a *prima facie* case to warrant the accused being placed on his defence.

4. A summary of the prosecution case is that on 18<sup>th</sup> August 2016 at 4.30 p.m. the deceased (David Kyuma) came to the home of PW5 (**ENK**) who was a student and used to sell alcohol when her mother (PW3) was away. On this day the deceased came to their home to buy alcohol and was in the company of Mutiso and Muema and bought five (5) litres of alcohol and carried it in a five litre jerrican. At 8.00 p.m. the accused who she calls "Sammy" returned the 5 litre jerrican which was empty.

5. The next day the deceased's dead body was found at the end of PW3's shamba. The administration through PW2 **Jonathan Nzomo** became involved. The body was taken to the mortuary after a report had been made at the Salama police station. Names of the suspects were floated and PW2 arrested Muia Muindi, Kasa Munee and Sammy Kiilu (the accused).

6. The body was identified by the deceased's son (PW1). A post mortem was conducted and the cause of death was found to be "asphyxia secondary to hanging." There was blood oozing from the deceased's ears and nostrils. PW7 **I. P. Robina Mbaluka** testified on behalf of the investigating officer saying there had been a brawl between the accused and deceased over Kshs.200/= for sale of sand.

7. In her submissions M/s Thiongo referred the court to many decided cases on the issue of determination of a *prima facie* case. Some of which are;

- Republic –Vs- Galbraith 1981 WLR 1039.
- Republic –vs- Andrew Omwenga [2009] eKLR.
- Republic –vs- Alex Mwanzia Mutangili 2017 eKLR.
- Republic –vs- Silas Magongo Onzere alias Fredrick Namena (2017) eKLR.
- Republic –vs- Andrew Musaina Kihungwa.

· Republic –vs- Stanely Muthiki Ture (2018) eKLR.

8. The deceased's death is not in dispute. He was found lying dead on PW5's shamba on the morning of 19<sup>th</sup> August 2016. The post mortem report EXB 2 has confirmed the death to have been caused by asphyxia, secondary to strangling.

9. The next issue for determination is whether the accused person has been shown to be connected with the death of the deceased. In other words has a *prima facie* case been established by the prosecution to make this court to confidently place the accused on his defence?

10. What constitutes a *prima facie* case was defined in the case of **R.T. Bhatt –Vs- Republic (1957) E.A 332 – 334 & 335** when it 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 case, 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.”***

11. Proof of a *prima facie* case in a criminal case is on the prosecution. Section 107 (1) Evidence Act provides;

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

12. From the evidence on record there was no eye witness to what happened to the deceased person and how he met his death. The only evidence connecting him is his returning the 5 litre jerrican that the deceased used to buy alcohol from PW5. The evidence of PW5 is that when the deceased came to buy alcohol he was with two young men namely;

(i) Mutiso.

(ii) Muema.

These two persons were not called as prosecution witnesses and neither were they charged. Where are they?

13. Evidence was adduced by PW2 to the effect that he arrested two suspects namely;

(i) Kasa Mune.

(ii) Muia Muindi.

Again these two fellows were never charged even after being arrested and neither were they presented as witnesses for the prosecution. Why were they arrested in the first place and how were they released?

14. PW7 **I.P. Robina Mbaluka** who testified on behalf of the investigating officer said the accused was arrested because he had had a brawl with the deceased over payment of Kshs.200/= from sale of sand. One Mutiso was allegedly present during the fight. As I have indicated above, Mutiso is neither an accused or witness here. No evidence was presented before this court to confirm that the accused and deceased had a brawl and that the accused strangled him.

15. From the evidence of PW3, it's clear that the accused is their neighbour. He brought them the jerrican and that's the offence he seems to have committed. Nobody asked him where he had got the jerrican. This jerrican was taken to Salama police station. The said jerrican which is the main link between the accused and this offence was never identified by its owners (PW3 & PW5) and it was never produced as an exhibit. The court therefore assumes there was never any such jerrican in the first place. Do I need to say more than this?

16. There was nothing recovered at the scene which could have linked the accused to this offence. A *prima facie* is established when the evidence on record is sufficient to found a conviction in the event of the accused electing to remain silent in his defence.

17. My finding is that the prosecution selectively charged the accused and also selectively chose which witnesses should testify. The result is that the evidence before this court is not sufficient to establish a *prima facie* case against the accused.

18. On my part I find him not guilty and acquit him under Section 306(1) of the Criminal Procedure Code.

Orders accordingly.

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

**H. I. Ong'udi**

**Judge**