

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL MURDER CASE NO. 19 OF 2014

REPUBLIC APPLICANT

V E R S U S

MARY WAWIRA MITARO.....1ST ACCUSED

CECILY WAKUTHII MITARO2ND ACCUSED

DAVID KARIUKI MITARO3RD ACCUSED

RULING

1. The accused Cecily Wakuthii Mitaro and David Kariuki Mitaro together with Mary Wawira Mitaro now deceased were jointly charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code** in that on 23/8/2014 at Saberia village, Mutithi Location in Kirinyaga County jointly with others not before the court, murdered Michael Mitaro Njinju. Unfortunately, the 1st accused Mary Wawira Mitaro died during the pendency of this trial and the case against her was marked as abated.

2. The accused persons denied the charge and the prosecution called a total of Eleven witness in an effort to prove the charge against the accused. This is a ruling as to whether the 2nd and 3rd accused have a case to answer.

3. The brief facts of the case are that the 1st accused was the wife of the deceased while 2nd & 3rd accused are his children. On 23/8/2014 the deceased was seen going to his house after leaving the house of his girlfriend, Lydia Wanjiru Mundia (PW-2). The deceased was last spotted by PW-1- Denis Wachira Mitaro, Charles Mbogo Mwangi (PW-3-), Edward Irungu Munene and PW-7- Erick Gichuki Francis as he went home and entered his house.

4. According to PW-1- Denis Wachira Mitaro who is a grandson of the deceased, he heard the deceased and his wife quarrelling when he entered the house that fateful night. The following day the deceased was missing and was not traced until 25/8/14 when his body was found in a sack dumped in a carnal which was full of water. The body was retrieved and relatives of the deceased identified him.

5. The body was taken to Kibugi Funeral Home where a postmortem was done by Dr. Ndirangu Karomo (PW-10). He concluded that the cause of death was severe head injury inflicted by a sharp object. The Doctor also noted severe injuries in the lower and upper lips. The postmortem form was produced as **Exhibit -1-**. The accused's who were in the house when the deceased was last seen entering the house never to be seen a life again were arrested and charged. This is a ruling as to whether the accused have a case to answer. **Section 306(1) of the Criminal Procedure Code** provides:-

“(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”

6. The issue for determination is whether there is sufficient evidence to prove that the accused committed the offence. The test of prima facie case was laid out in the case of **Ramanlal Trambaklal Bhatt –v- R(1957) E.A 332** where the court stated that a prima facie case is 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. At this stage the court is required to make a determination as to whether a prima facie case has been established by the prosecution. This determination is supposed to be made by considering the evidence tendered by the prosecution and the law.

7. The only evidence which tended to implicate the 2nd and 3rd accused was tendered by PW-11- Cpl Christopher Orok who testified that Denis (PW-1-) told him that David and Cecily were in the house on that material night. However, when Denis (PW-1-) testified, he did not mention the 2nd and 3rd accused as the people who were in the house of the deceased on that material night. The testimony of PW-11- was therefore not confirmed by Denis. There is no prove that the 2nd & 3rd accused were in the house on that material night. The propensity of the evidence was that the deceased was last spotted on the night of 23/8/2014 while entering his house. It is confirmed by PW-1- that the 1st accused was in the house that night and was heard quarrelling with the deceased. As the evidence stands, there is nothing to prove the charge against the 2nd & 3rd accused. They are charged with murder which places a burden on the prosecution to prove both ‘**mensrea**’ and ‘**actus reus**’ in order to sustain a conviction for murder. **Section 203 & 204 of the Penal Code** provides:-

203. “Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Any person convicted of murder shall be sentenced to death.”

8. No evidence was tendered to prove that the two accused before me had planned and executed the murder of the deceased. The charge of murder cannot be sustained based on the evidence tendered before me. Probably had 1st accused lived she could have been in a position to tell us what happened after the quarrel with her husband on that material night. This is now wishful thinking as dead bodies tell no tales. What I am trying to say is that the evidence on record is insufficient and has not established a prima facie case to warrant the 2nd and 3rd accused to be put on their defence. They are therefore entitled to an acquittal. I therefore acquit the 2nd & 3rd accused under **Section 306(1) of the Criminal Procedure Code.**

Dated at Kerugoya this 12th day of March 2020.

L. W. GITARI

JUDGE