



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL (MURDER) CASE NO.46 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES NDAMBUKI NTHIWA.....ACCUSED

RULING

1. The accused herein **CHARLES NDAMBUKI NTHIWA** 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 on the 22nd September, 2013 at Kinyaata Sub-location, Kinyaata Location in Yatta District within Machakos County he murdered **MUTUA MWANZIA**.

2. The accused person was represented by Mr Kyalo Advocate 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 directly or indirectly participated in the commission of the alleged offence.

4. The Prosecution called a total of seven (7) witnesses in an attempt to prove its case. **Pw1 was Peter Mwanzia Kibati** who testified that on 22.9.2013 the accused came to his house and demanded for the deceased and he took him away as he suspected that the deceased had broken into his shop. He testified that after 30 minutes he went to the accused's shop and found the deceased lying down and seriously injured and was also bleeding profusely. He testified that the deceased died while at Muaani Hospital in Matuu. On cross examination, he told court that he did not witness the deceased being assaulted.

5. **Pw2 was Anthony Kyalo Mwanzia** who testified that on 22.9.2013 the accused came demanding for the deceased on suspicion that he had broken into the accused's shop. He told the court that the accused and the deceased accompanied each other to the accused's shop and that later he visited the shop and found that the deceased was lying on the ground, badly injured and tied with ropes. He testified that he escorted the deceased to hospital and that the deceased later died.

6. **Pw3 was Stephen Kioko Ngunzi** who testified that on 22.9.2013 he was informed that the deceased had fallen down outside a shop. He told the court that he rushed to the scene and found the deceased lying down while bleeding profusely; that at the scene the accused informed him that the deceased had stolen from his shop. He testified that he learnt that the deceased had died.

7. **Pw4 was Dr Gloria Sisenda** who testified of the post mortem examination carried out on the deceased on 26.9.2013. There was laceration on the scalp, a fracture of the temporal skull bone and that there was bleeding in the skull; she formed the opinion that the cause of death was intra cranial haemorrhage due to head injury and that the weapon was probably a sharp object. The post mortem report was tendered in court.

8. **Pw5 was Cpl Stephen Chepkwony** who testified that on 22.9.2013 he received a report that a person had been assaulted. He testified that he went to the scene and saw the deceased lying on the floor and was bleeding as well as unconscious and soaked in blood.

9. Pw6 was **Joseph Masyula Kivai** who testified that on 26.9.2013 he accompanied his father for the post mortem that was conducted on the deceased by the doctor.

10. Pw7 was **Pc Peter Yegon** who testified that on 22.9.2013 he received instructions to visit a scene where an assault was said to have occurred. He testified that he visited the scene and collected a stone, piece of stick. He also visited the hospital where the deceased was undergoing treatment and confirmed that the deceased later died. He testified that the accused was charged. On cross examination, he told the court that he was the investigating officer and that he did not have an inventory of the exhibits.

11. Thereafter, prosecution closed its case and parties were directed to file submissions. Learned counsel for the defence submitted that even though the accused was a suspect, there was no direct evidence connecting the accused with the offence. Learned counsel in placing reliance on the case of **R v Pius Kikungu John (2019) eKLR** submitted that it was circumstantial evidence that was used to charge the accused. Learned counsel submitted that the prosecution failed establish a prima facie case against the accused and urged the court to acquit him under section 306(1) of the Criminal Procedure Code.

12. In reply, counsel for the state submitted that the accused was responsible for the injuries on the deceased; that the accused had desire to harm the deceased on suspicion of having stolen from his kiosk. It was submitted that the accused was identified by Pw1 and Pw2 who witnessed the accused leave with the deceased and that the cause of death was established by the post mortem report. The court was urged to place the accused on his defence under section 307 of the Criminal Procedure Code.

13. Having considered the evidence on record and the respective submissions of counsel, the singular issue for determination is whether the accused should be placed on his defence.

14. It is trite law that prior to placing an accused person to 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.

15. 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...”

16. 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 could be 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 Pw.1 and Pw2 does establish that the accused had an opportunity to meet the deceased and as such it would be necessary for him to explain what occurred after that meeting. It was the accused who picked up the deceased claiming that the deceased had broken into his shop and stolen and minutes later the deceased was found seriously injured outside the accused’s shop. 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 circumstances surrounding the demise of the deceased clearly placed the accused squarely at the scene of the crime warranting him to make a defence.

17. In the result it is my finding that a prima facie case has been made against the accused to require him to be called upon to make a defence. Consequently I find the accused has a case to answer and is now called upon to make his defence in accordance with the provisions of Section 306(2) of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at **Machakos** this 22nd day of **July, 2020**.

D. K. Kemei

Judge