



**REPUBLIC OF KENYA**

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

Coram: D. K. Kemei – J

**CRIMINAL (MURDER) CASE NO.7 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPHINE MBATHA KIMONYI..... 1<sup>ST</sup> ACCUSED**

**MICHAEL MUOKI MUSYOKA.....2<sup>ND</sup> ACCUSED**

**RULING**

1. The accused persons, **JOSEPHINE MBATHA KIMONYI** and **MICHAEL MUOKI MUSYOKA** were jointly charged with the Offence of Murder contrary to section 203 as read with section and 204 of the Penal Code. It is alleged that the accused persons, on the 15<sup>th</sup> Day of February, 2018, at Uamani Village, Muvuti location within Machakos County murdered **KIMONYI MUMO**. They denied having committed the offence.

2. The accused persons were represented by Mr Nthiwa Advocate whilst the State was represented by Mr Machogu.

3. The prosecution was under a duty to prove all the ingredients of the offence of murder in order to sustain a conviction thereof. As per the elements provided for under section 203 as read with section 204 of the Penal Code, the prosecution must prove the following ingredients beyond reasonable doubt:

*i. That the deceased is dead;*

*ii. That the death was caused unlawfully;*

*iii. That there was malice aforethought; and*

*iv. That the accused persons directly or indirectly participated in the commission of the alleged offence.*

4. Regarding the standard of proof, the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. **See: Woolmington v DPP [1935] AC 462.** However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the accused, it should be resolved in the favour of the accused person. Therefore, the accused person must not be convicted because he has put a weak defence but rather that prosecution case strongly incriminates him and that there is no other reasonable hypothesis than the fact that the accused person committed the alleged crime.

5. The prosecution called a total of **seven (7)** witnesses in an attempt to prove its case. **Pw1 Rose Wanza Mumo** who testified that the deceased was her brother and that on 9.2.2018 she received a call that there was a fight at the home of the deceased. She recounted that the deceased had differed with his wife. She told the court that she went to the deceased's house and found the deceased lying on his bed, face upwards, a mosquito net tied round his neck and blood oozing from the ears and nose. She told the court that the deceased was rushed to Machakos Level 5 Hospital and who upon regaining consciousness claimed that he had been beaten by his wife and her worker who was the 2<sup>nd</sup> accused. She testified that the deceased later passed on. On cross examination, she testified that she did not know when the 1<sup>st</sup> accused left her matrimonial home. She denied having refused the 1<sup>st</sup> accused use of the family land but however admitted that the 1<sup>st</sup> accused had been prevented from selling any portion of the land.

6. **Pw2 James Maingi Mumo** testified that on 9.2.2018, he received a call from Pw1 that there was a fight at the deceased's home. He told the court that he went to Machakos Level 5 Hospital where he found the deceased unconscious with injuries on the head and that after three days he learnt that the deceased had died. He told the court that he was present when the post mortem was being conducted on the deceased. He informed the court that the deceased did not live peacefully with his wife. On cross examination he denied causing chaos at the hospital

and stated that he did not witness the fight at the deceased's home. He told the court that the deceased lodged reports with the area chief against the assault on him by the 1<sup>st</sup> accused who was his wife.

7. **James Mutuku Kisilu** testified as **Pw3** and who told court that on 8.2.2018 he was in the compound of the deceased and he heard him screaming. He told the court that he went to the scene where he found the 1<sup>st</sup> accused armed with a club and who was hitting the deceased who was then already on the ground. He told the court that the 2<sup>nd</sup> accused was also at the scene holding a torch. He stated that he learnt that on the following day, the deceased had not managed to wake up and he went to the deceased's home where he found the deceased on a bed with some head injury and swollen stomach. He testified that he escorted the deceased to Machakos General Hospital where he died on 15.2.2018. On cross examination, he reiterated that he saw the 1<sup>st</sup> accused assaulting the deceased.

8. **Lydia Kaveke Kisulu** testified as **Pw4** and who told the court that on 9.2.2018 she was informed that the deceased had not woken up and as a result she gained entry to the deceased's home via the roof where she found the deceased lying on a bed; he had head injuries but he was still breathing. She told the court that the deceased was rushed to hospital where he stayed for 6 days and on 16.2.18 she received a report that the deceased had died. She recounted how the 1<sup>st</sup> accused and the deceased used to fight a lot and that the 1<sup>st</sup> accused used to assault the deceased. On cross examination, she testified that she did not witness the accused persons assaulting the deceased. She stated that the 1<sup>st</sup> accused wanted to dispose of the family land.

9. **Winfred Muendo** testified as **Pw5** and who told the court that on 8.2.2018, the deceased had a meal at her place and at the time he was outside the compound with the 1<sup>st</sup> accused. She testified that the deceased went to see the 2<sup>nd</sup> accused whom he accused of having an affair with his wife who is the 1<sup>st</sup> accused. She told the court that the 2<sup>nd</sup> accused came and claimed that the deceased had assaulted him and that he had gone to report to the police station but however at 2.00 am, the 2<sup>nd</sup> accused reported that the deceased could not be found. She told the court that she went to the home of the deceased and gained entry through the roof where the deceased was given porridge and was assisted to sit outside. She told the court that the deceased did not look like he had any problems. She testified that the deceased was taken to Machakos Level 5 Hospital where he was admitted for about a week before he died. On cross examination, she testified that the 1<sup>st</sup> accused and the deceased were in good terms. She testified that the deceased did not inform her that he had been assaulted by the accused. She told the court that the 1<sup>st</sup> accused used to take porridge and fruits to the deceased when he was in hospital and she used to visit him every day. She told the court that there was a land dispute; that the deceased did not implicate the 1<sup>st</sup> accused neither did she see any blood in the house of the deceased. She testified on re-examination that the relatives of the deceased wanted her to move out of the family land.

10. **Dr Waithera Githendu** testified as **Pw6**. She testified in respect of an autopsy that was carried out on the deceased which revealed that the deceased had skin injuries on the arm and the leg as well as soft tissue injuries; there was contusion on the scalp; he had internal bleeding to the brain causing increased pressure. He formed the opinion that the cause of death was internal brain injury due to blunt force trauma and that the injuries were caused by an external force. The post mortem report was tendered as an exhibit. On cross examination, she testified that the injuries could not have been caused by a fall.

11. **Pius Ngila** testified as **Pw7**. He told the court that he was assigned to investigate the instant case and he noted from the OB that the deceased had been assaulted. He told court that he received information that the deceased had been admitted to hospital and died while undergoing treatment. He told the court that it was alleged that the 1<sup>st</sup> accused assaulted the deceased and who was arrested; that he went to the scene where the deceased's bedroom had vomit and blood. He told the court that the deceased's houseboy who was alleged to have been involved had disappeared to Kimutwa but was however apprehended by members of the public; he told the court that investigations implicated the accused persons. On cross examination, he testified that it was not true that the deceased fell off the hospital bed. He admitted that the accused persons had lodged a report that they had been attacked and chased by the deceased but that the report was not genuine.

12. Thereafter, prosecution closed its case. Counsels filed submissions. Learned counsel for the accused persons submitted that the prosecution evidence is doubtful and contradictory and placed reliance on the case of **Kavoo Kimonyi v R (2018) eKLR** and prayed that the court finds that the prosecution case was not proven and the accused be acquitted.

13. The state in response submitted that the accused persons were involved in the death of the deceased as per the evidence of Pw3; that there was malice proven vide the use of a club and that the accused were identified by Pw3. It was submitted that as per the evidence of Pw6, the cause of death was established. The court was urged to place the accused on their defence as per section 307 of the Criminal Procedure Code.

14. The issue for determination is whether a prima facie case has been established to warrant the accused persons to be put on their defence.

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 v 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. On the other hand, Lord Parker, C.J. in **Practice Note [1962] 1 All ER 448**, held that a submission of no case to answer may be properly

upheld when there has been no evidence to prove an essential element in the alleged offence and also when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could convict on it.

18. 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 as a result of injury caused by an external force. On the question of the accused's participation, this court finds that, in the absence of any evidence to the contrary, the evidence of PW3 could indicate participation of the accused persons as he witnessed the 1<sup>st</sup> accused assaulting the deceased while the 2<sup>nd</sup> accused stood by. 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 accuseds' participation therein.

19. For those reasons, I find that there is some evidence adduced against the accused persons to establish a *prima facie* case against them and sufficient to put them on their own defence for the offence of murder contrary to sections 203 and 204 of the Penal Code. From the evidence adduced the accused persons were squarely placed at the scene of crime thereby warranting them to make a defence.

20. In the result, it is my finding that a prima facie case has been made by the prosecution against both accused to require them to make a defence. I find that they have a case to answer and now called upon to elect to make their defence in line with the provisions of section 306(2) of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at Machakos this 16<sup>th</sup> day of **September, 2020**.

**D. K. Kemei**

**Judge**