



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.11 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH TAKWA KYALO.....1ST ACCUSED

SAMUEL MUTHINI MUASA.....2ND ACCUSED

RULING

1. The Accused persons, **JOSEPH TAKWA KYALO** and **SAMUEL MUTHINI MUASA** were jointly 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 16th Day of April, 2018 at Kikunuani Market, Lita Sub location Kathiani Sub County within Machakos County, jointly with another not before court, they murdered **PAUL MUTUKU KIIO**. They denied the charges and a trial commenced.

2. The accused persons were represented by learned counsel Mr Langalanga whilst the State was represented by Mr Machogu.

3. The burden of proof lay upon the prosecution to discharge in order to sustain a conviction which entailed proving all the ingredients of the offence herein. 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 persons directly or indirectly participated in the commission of the alleged offence.

4. The Prosecution called a total of eleven (**11**) witnesses in support of its case. **Pw1** was **Kakungu Muteti** who was a former night guard at Kikunuani market and who testified that on 16.4.2018 he was informed by his colleague that someone was lying down within the market and had been attacked. He rushed to the scene and saw the body but could not recognize it then but later learnt that the deceased was one Mutuku Kiiro who had been his neighbour.

5. **Pw2** was **Muli Mutisya** a night guard at Kikunuani market who testified that on 16.4.2018 he found a person lying outside Club Digital and alerted the village elder. He told the court that he later learnt that the deceased was someone he had known as his neighbour.

6. **Pw3** was **Philip Musyoki Kiiro** who testified that he was the deceased's elder brother and that on 17.4.2018 he received a report that the deceased had been attacked and killed at Digital bar.

7. **Pw4** was **Samuel Muindi Makani** who testified that he witnessed the 1st accused on the material day throwing out the deceased and accusing him of being a traitor. He told the court that he witnessed the 1st and 2nd accused manhandle the deceased by kicking and hitting him.

8. **Pw5** was **Raphael Munyao** who testified that on 20.4.2018 he was amongst the persons who identified the body of the deceased when the post mortem examination was conducted.

9. **Pw6** was **Joseph Mutua Mutuku** who testified that on 16.4.2018 he was at Digital bar and he witnessed the 1st accused slapping the deceased and hitting him on the head with bottles. He told the court that the 2nd accused joined the 1st accused in attacking the deceased by using a stick.

10. **Pw7** was **Francis Kituku Mutua** who testified that on 16.4.2018 he saw the 1st accused confronting the deceased over an issue concerning a pistol that had been allegedly used to threaten the 1st accused's father. He told the court that he saw the 1st accused assaulting the deceased with kicks and blows and that empty bottles were smashed on the head of the deceased by the 1st accused. He testified that the 2nd accused joined the 1st accused and stepped on the deceased.

11. **Pw8** was **APC Bismark Kalundu** who testified that on 14.4.2018 he received information that someone had been attacked at a bar and he rushed to the scene. He told the court that Takwa Kyalo came to the police station to report that the deceased had attempted to rob him and when he arrived at Digital bar he established that the alleged attacker was actually a victim of assault. He told the court that he established that Takwa and his colleagues had assaulted the deceased.

12. **Pw9** was **Dr Waithera Githendu** who testified of the post mortem examination carried out on the deceased on 20.4.2018. The body had superficial injuries on the neck and head and internally the anterior chest wall had bleeding and hematoma in the sternum. There was internal bleeding in the brain due to increased pressure. Her opinion was that the cause of death was head injury, secondary to blunt trauma. The post mortem report was tendered and marked Exh 3.

13. **Pw10** was **Joel Nzuki Sammy** who testified that on 16.4.2018 a brawl ensued at Digital bar where he was and that the 1st accused approached the deceased and asked him as to why he had threatened his father with a gun. He testified that he saw the 1st accused slapping the deceased and hitting him on the head with beer bottles. He testified that the Mutinda Ndolo joined in attacking the deceased using his bare hands and that the deceased fell down and later the 2nd accused joined and stepped on the deceased's head. On cross examination, he testified that the 1st accused did more of the attack while the 2nd accused stepped on the deceased.

14. **PW11** was **Pc Simon Warui** who testified that on 17.4.2018 he was at the Kathiani Police station where he received a call that a person had been attacked. He told the court that he went to Digital bar and was informed that the victim had been rushed to Machakos and later learnt that the deceased had died while undergoing treatment. He testified that Takwa Joseph was implicated.

15. Thereafter, prosecution closed its case and parties were directed to file written submissions. Learned counsel for the accused persons took issue with the failure to tender as exhibits the bottles that were used to hit the deceased and submitted that the prosecution failed to prove their case beyond reasonable doubt to warrant placing the accused persons on their defence. The state submitted that the accused persons were seen assaulting the deceased; that there was a dead body and the part of the body inflicted was indicative of malice aforethought hence submitted that a prima facie case had been made against the accused persons. The court was urged to place the accused persons on their defence under section 306(2) of the Criminal Procedure Code.

16. 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 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.

17. 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...”

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 earlier identified hereinabove. It is not in dispute that there was death and that the cause could be established. The pathologist (Pw9) established the cause of death as head injury secondary to blunt trauma. On the question of the accuseds' participation, this court finds that, in the absence of any evidence to the contrary, the evidence of Pw4, Pw6, Pw7, and Pw10 does establish participation of the accused person. The said witnesses confirmed seeing them attacking the deceased while they were all at the 1st accused's Digital Bar. 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 which is sufficient to require them to be put on their defence for the offence. The evidence of the key prosecution witnesses placed both accused at the scene of crime thereby requiring the accused persons to give an explanation regarding the death of the deceased herein. The evidence thus presented has established a prima facie case against both accused persons.

20. In the result. It is my finding that both accused have a case to answer and are now called upon to elect to make their defence in

accordance with section 306 (2) of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at Machakos this 27th day of October, 2020.

D. K. Kemei

Judge