



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.47 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

KILU NDUVA.....1ST ACCUSED

MULWA NZIOKA.....2ND ACCUSED

BENEDICT NZOMO.....3RD ACCUSED

MUTINDA NDUNGE.....4TH ACCUSED

JOHN MZOMO MUINDI.....5TH ACCUSED

BERNARD MWENDO MUSYOKA.....6TH ACCUSED

RULING

1. The Accused persons, **KILU NDUVA, MULWA NZIOKA, BENEDICT NZOMO, MUTINDA NDUNGE, JOHN MZOMO MUINDI** and **BERNARD MWENDO MUSYOKA** 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 29th Day of December 2014 at Kivae in Athi River Sub County within Machakos County, jointly murdered **JACKSON MAUNGU JOHN**. They all denied committing the offence.

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

3. The burden of proof was upon the prosecution in order to sustain a conviction by proving 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 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 **Victor Mbinda Muinde** who testified that on 31.12.2014 he received information that the deceased had been killed while working at a certain farm.

5. **Pw2** was **Daniel Muoki Morris** who testified that on 29.12.2014, he, Pw1 and the deceased went to a farm and in the process of surveying the same, he heard some noise coming from a crowd of people. He testified that the mob followed the deceased and beat him up with runigus, pangas and stones. He was able to identify the 1st, 2nd and 3rd accused persons as among the assailants.

6. **Pw3** was **David Ndolo Ngilai** who testified that he had been asked to survey Lukenya Land parcel number 2334/3. He told the court that he was informed that the deceased had been chased by squatters and beaten to death when he visited the site.

7. **Pw4** was **IP Dominic Mureithi** who testified that on 30.12.2014 he received a report from Victor Mbinda that someone had been attacked at Kivali area. He went to the area where he found the body of the deceased with multiple cut wounds.

8. **Pw5** was **IP Nobert Magoha** who testified that he received instructions to visit Kisima Park that was reported to be a murder scene. He told the court that he found the body of the deceased that had multiple cut wounds and organized for the same taken to Machakos Mortuary.

9. **Pw6** was **Vincent Nguyo John** who testified that the deceased was his brother and that he identified the body at Machakos Level 5 Hospital.

10. **Pw7** was **Alphonse Musembi** who testified that on 29.12.2014 he was scheduled to fence a plot of land at Kinanie Area and upon arrival a large group armed with pangas arrived and attacked him. He stated that the deceased whom he was with was unable to run hence he was descended upon by the crowd. He told the court that he identified the 1st accused as the one who gave orders to the crowd to kill; that he saw the 2nd accused with a panga while the 3rd accused had a huge stick whereas the 4th and 5th accused were armed with stones. He told the court that he witnessed the accused persons attacking the deceased.

11. **Pw8** was **Stephen Muli Wahome** who testified that on 29.12.2014 he went to do a fencing job on land at Kinanie and in the process of surveying the land, a group of people arrived and who were armed with pangas, bows, arrows and stones. He told the court that the group caught up with the deceased and attacked him; that he identified the 3rd accused and 4th accused attacking the deceased.

12. **Pw9** was **Dr Waithera Githendu** who testified of the post mortem examination carried out on the deceased on 7.1.2015. She testified that the body had multiple cut wounds on the scalp, shoulder, left knee, left leg and that the lower and upper limbs had fractures and so did the 8th rib and upper spine. She formed an opinion that the cause of death was multiple penetrating deep cut injuries and that the weapon was a sharp object that caused the fractures and further that a blunt force might have also caused the fracture of the 8th rib. The post mortem report was tendered and marked Exh 1.

13. **Pw10** was **CIP Lilian Otieno** who testified that on 26.3.2015 she was requested to conduct an identification parade on three suspects and after the exercise she signed the identification parade forms that were tendered as exhibit 2A, 2B, 2C, 2D and 2E.

14. **Pw11** was **IP Lydia Mutinda** who testified that on 16.1.2015 she was informed by the OCS that a murder case had been reported and that she was assigned investigation duties. She told the court that she recorded statements to the effect that the deceased had been overpowered and killed by a crowd when he had gone to fence a plot of land. She also told the court that she organized for an identification parade for some suspects out of which the 1st to 3rd accused persons were identified.

15. Thereafter, the prosecution closed its case and parties were directed to file written submissions. Learned counsel for the accused persons submitted that the prosecution failed to establish a prima facie case against the accused persons. It was submitted that the identification of the accused was in unfavourable circumstances and that the identification parade was not conducted in a proper manner. It was submitted that no mens rea was proven and the court was urged to acquit the accused persons. The state submitted that the accused persons were seen assaulting the deceased; that there was a dead body and that the part of the body inflicted with injuries was indicative of malice aforethought and it was thus 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 307 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 the **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’s evidence. I find that, in the absence of any explanation to the contrary from the defence, the prosecution evidence does establish two of the three (3) ingredients of the offence of murder. It is not in dispute that there was death and that the cause could be established. Dr Waithera Githendu (Pw9) who performed the autopsy formed the opinion that the cause of death was penetrating deep cut wound. On the question of the accused’s participation, this court finds that, in the absence of any evidence to the contrary, the evidence of Pw2, Pw7 and Pw8 does point towards the participation of the accused persons. Their testimonies placed the accused at the scene of the crime. 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. The court is yet to receive the evidence of the defence so as to establish whether the last ingredient was established by the prosecution.

19. For those reasons, I find that there is some evidence adduced against the accused persons to establish a *prima facie* case against them

which is sufficient to require them to be put on their defence. Consequently, I find each accused has a case to answer and now called upon to elect to make a 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 **26th** day of **October, 2020**.

D. K. Kemei

Judge