



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR NO. 171 OF 2017

FORMERLY MACHAKOS HCCR NO. 85 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

DUNCAN MAKAU KIOKO.....ACCUSED

RULING

1. **Duncan Makau Kioko alias Mangii a.k.a. Mariko** the accused herein is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on the 10th day of November, 2015 at Kwa Mutisya market in Tulimani Sub-location, Mbooni Location within Makueni County, murdered **Rosalia Mwikalo Mumo**. The deceased was the accused's wife.

2. The prosecution called five (5) witnesses to establish its case. In totality there is no eye witness who testified. The evidence is therefore circumstantial.

3. **PW2 Angeline K. Mutuku** runs a boutique at Mutisya market. She was a neighbour to the deceased and the accused at their shop. On 10th November 2015 at 5.00 p.m., the deceased came to her (PW2's) boutique for a chat and they parted ways with the deceased going to their shop while PW2 went to her mother's for vegetables.

When she returned to her boutique she heard the deceased and accused talking in their shop which was locked from inside. The deceased was asking the accused for money. She left her shop at 6.00 p.m. and the couple was still there. She learnt of the deceased's death the next day at 9.00 a.m. when she came to open her shop. She identified the accused as the deceased's husband.

4. In cross examination, she said the couple's shop was a barber shop and it had been open on the material day. She did not hear any struggles from the couple's shop though she could not remember if they were still talking when she left. The deceased was alright when she came to her shop on the material day.

5. **PW3 Dr. Jane Gachagua** produced with the defence's consent, the postmortem report by Dr. Patrick Mutinda. The report outlines the findings as follows:-

- Foul smell from abdomen.
- Blood oozing from mouth and nostrils.
- Bruises on left side of Jaws and neck.
- Broken neck.
- Bleeding tissues in the vagina.
- Foetus parts in the vagina.
- Foetus was 16 weeks and was removed.

- Congested lungs.
- Broken trachea.
- Dilated vessels of the heart.
- Skull fractured/depressed.
- Displaced spinal cord.

The cause of death was found to be cardiopulmonary arrest due to strangulation, lack of flow of air to the brain and head injury. The report was produced as EXB1.

6. In cross examination she said there was no sign of a rope hanging around the neck or bruising around the neck to confirm hanging.
7. **PW4 No. 232056 Assistant Superintendent of police Geoffrey Chania** a document examiner of 12 years' experience examined the questioned document (EXB 2) against the accused's known writing (EXB3) and his specimen writing (EXB4). He found all the three (EXB2, 3 & 4) to have been authored by the same hand whose hand was the accused person's. He further found that the writing in EXB2 differed from the specimen writing (EXB5) of Jackson Katiku, whom the prosecution considered as its key witness.
8. He explained all that he considered before arriving at his conclusion.
9. In cross examination, he said alcohol can affect one's writing, but the characteristics remain. He added that he only considered the writings he had been given.
10. **PW5 No. 88455 P.C. Kennedy Otieno** of DCI Mito Andei who investigated this case, testified that upon receipt of the report of the murder he went to the scene with the O.C.S and other officers. The scene was at Sonia barbershop which they photographed. The room was partitioned, and the counter had a wire mesh with a small door which was locked, with a padlock. They broke the padlock (EXB7) and gained entry. Inside was the deceased's body which lay on the floor with a written note (EXB2) on top of it. EXB2 was written in Kiswahili language. They learnt that the deceased was married to the accused person.
11. Information they gathered led them to arrest one Jackson Kioko Katiku who was in the crowd they found at the scene. He gave them information to the effect that he had been with the accused that evening and when they came to the shop that night before the accused disappeared. That the man slept on a bench/form and he was the one who alerted the public about the female body. He later interrogated PW2 who explained to them about the previous day's happenings. The accused was arrested on 12th November 2015.
12. The witness produced the padlock (EXB7), counter book (EXB3), specimen signatures (EXB 4&5), questioned document (EXB2), photos taken at the scene EXB8(i) – xiv) and certificate (EXB9).
13. **PW1 Boniface Mutinda Mutiso** runs a bar known as "Katheu bar".

He testified that on 10th November 2015 around 5.00 p.m., he was at work. At 10.00 p.m., the accused went to his bar and ordered for alcohol. He was with his friend Katiku, and he sold them the alcohol. They ordered for another round. The accused later left. He did not say anything about Katiku. When through, he closed the bar and left. He learnt of the deceased's death the next day.
14. The above is the prosecution case and this court has to determine whether the prosecution has established a *prima facie* case against the accused, for him to be placed on his defence. The scene of incident was at Mutisya's market. PW2's boutique neighbored the couple's barber shop on one side. PW5 did not state whether there was another neighbour on the other side of the said shop. The injuries suffered by the deceased were very serious ones. She could not have missed to scream to attract the attention of the people at the market.
15. Surprisingly besides PW2 there is no one from the Mutisya market who testified. The evidence of PW2 was to the effect that she left the place at 6.00 p.m. and she did not hear any fracas from the couple besides the deceased asking for money with the two having locked themselves in the shop. Being a couple, there would be no reason for one to check to see why they had locked themselves inside.
16. There is no witness who has testified on what was happening between the accused and deceased from the time PW2 left them in their shop and the time the accused and his friend Jackson Kioko Katiku landed at PW1's bar. PW1 did not notice anything strange on the accused or his friend at that time.
17. PW5 told the court a lot of things that he had allegedly been told by Jackson Kioko Katiku and that was the basis of the charge against the accused. Unfortunately, despite the several opportunities given to the prosecution to avail the said witness, the same was never done. The accused was first arraigned in court on 3rd November 2015 while plea was taken on 8th February 2016.
18. This court issued summons twice for the attendance of Jackson Katiku to testify but he still did not show up. The man is said to be a teacher in one of the schools within Kitui County. So he is not a lay person and knows the reasons for conducting himself in such a manner. Most likely he had lied to the police or he was compromised. In short, the said witness had not attended court to testify as at 14th December 2020, five (5) years since the accused's first arraignment in court.

19. It is also noted that the accused has been in remand custody all through. My finding is that all that PW5 was allegedly told by the said Jackson Kioko Katiku amounts to hearsay evidence and cannot be relied on by this court as there is no other evidence in support of the same.

20. There is a note (EXB 2) which was found on the deceased's body. The document examiner found the note to have been written by the accused person. The note was written in Kiswahili language as follows;

“Rafiki wa Mwikali asikali alisema nikiendelea kuishi na Mwikali ata niuawa dio sababu akuna aja ya kushidana na asikali. Twagamimei woto alisema at ni shut!!! ?????????????????? andi woke masaku an iba vizuri kinaleta waka cha enda Machakos lezi MTH alikuja akamambia ata niwuza Tupatane mbele kweli.”

21. The information in the note (EXB 2) is as extracted above. In it the author is talking of threats from a police officer. The rest cannot be comprehended. Besides determining the author there is nothing else this court has been told to be the connection between the note and the deceased's death. It is not for this court to look for that evidence.

22. PW5 did not investigate on the contents of the note, and who placed it there. He did not even attempt to trace the movements of the accused from 6.00 p.m. on 10th November 2015 when PW2 left him and the deceased in their shop. At what point did the accused and the famous “Jackson Katiku” link up before landing at PW1's bar? Where were they prior to going to the bar? What role did Jackson Katiku play in the whole saga?

23. With all these questions lingering in the court's mind can it be said with certainty that the accused has been placed at the scene of the murder?

In the case of **Ramulal Trambaklal Bhatt –Vs- Republic [1957] E.A. 332** the court stated the following of a *prima facie* case;

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one, “which on full consideration might possibly be thought sufficient to sustain a conviction.” this is perilously near suggesting that the court would not be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its incredibility or weight, sufficient to put the accused on his defence.” A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.....it may not be easy to define what is meant by a “prima facie case”, but at least it must mean one of which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

24. The Bhatt case (supra) above sets out the parameters within which the evidence by the prosecution must be examined in considering whether or not an accused person should be placed on his/her defence. In the present case there was no direct evidence placed before this court.

The circumstantial evidence presented is so weak and is based on high suspicion. In **Sawe –Vs- Republic [2003] KLR 364** the court of Appeal held thus;

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

25. The note (EXB 2) is not a confession and besides being presented to the court as an exhibit, there was no explanation given on it. Were the accused to be placed on his defence and he elects to remain silent (which is his right) the evidence before this court is not sufficient to sustain a conviction.

26. The end result is that the prosecution has failed to establish a *prima facie* case against the accused person for this court to place him on his defence.

27. For my part, I find him **not guilty and acquit him under Section 306(1) of the Criminal Procedure Code. He shall be released unless otherwise lawfully held under a separate warrant.**

Delivered, signed & dated in open court this 18th day of December 2020, at Makueni.

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H. I. ONG'UDI

JUDGE