



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 59 OF 2014

REPUBLIC.....PROSECUTOR

-VERSUS-

MORRISON MUTIKA LEIZAR.....ACCUSED

RULING

Background

1. **MORRISON MUTIKA LEIZAR** hereinafter referred as the accused is charged before this court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the charge brought against the accused provide as follows: that the accused on the 9TH day of September 2014 at Mlolongo Township in Athi River District within Machakos Township, murdered David King'oo Nzioki hereinafter referred to as the deceased.

2. The accused pleaded not guilty to the charge. He was represented at the trial by Mr. Sang advocate and the prosecution was conducted by Ms Rono, a Prosecution Counsel. The prosecution called a total of seven (7) witnesses in support of its case in a bid to establish the essential ingredients of the offence namely:

- (1) The death of the deceased.**
- (2) The death of the deceased was unlawful.**
- (3) That in causing death there was malice aforethought on the part of the accused.**
- (4) That the accused was positively identified as the one who caused or participated in the killing of the deceased.**

3. At the close of the prosecution case the court directed parties to file submissions on whether or not the accused has a case to answer.

Prosecution Evidence

The evidence adduced by the prosecution witnesses can be summarized as follows:

4. Pw1 was Samson Mutune who testified that on 9.9.14 at around 3 pm, he went to resolve a merry go round dispute and asked the accused to accompany him, wherein the accused sought to leave and the deceased stood in his way but however the accused managed to escape.

5. Pw2 was Phoebe Mutemi Musau who testified that on 9/9/2014 at around 3 pm she had a problem with a merry go round, and she went to attend to her tea when a scuffle ensued and she found a group of people round the accused who had an injury on his head and his head was bleeding and the deceased was on the ground.

6. Pw3 was Shadrack Muoki Muli who testified that he was present at Pw2's kiosk and after the deceased blocked the accused's exit from the kiosk, the accused forced his way out and the deceased was hit by the door frame.

7. Pw4, Cpl Emily Chepkemoi, testified how she was summoned on 20.9.14 to arrest a murder suspect. She learnt that the victim succumbed to injuries in Hospital. That she went to a place called Katangaita to arrest the suspect and escorted him to Mlolongo police station.

8. PW5, Ezekiel Juma a police officer testified of how he received a report on 9.9.14 via phone that one of the village elders had been injured and he was instructed to investigate the matter. After establishing that the victim had been rushed to Kenyatta National Hospital, he went to the said hospital and found the deceased in a coma, wherein the deceased later died on 20.9.14. He testified that he received instructions to arrest the accused who was a Tanzanian Citizen in the possession of an emergency travel document. He testified that he did not recover any murder weapon.

9. Pw6 was Boniface Gitahi Maigua a retired police officer who testified that on 9.9.14 at 5 pm, he received a report from the accused that he was being attacked with stones. He testified that he issued the accused with a P3 form.

10. Pw7 was Dr Andrew Kanyi, who testified that he is a consultant pathologist who has practiced for the past 22 years. He stated that a post-mortem was conducted on the deceased and he noted that the body had deep lacerations on the right side of the forehead, there was extensive bleeding into the brain and there was raised pressure on the brain. An opinion was formed that the cause of death was severe head injury due to blunt force trauma. He produced the post-mortem report.

Submissions

11. It is against this background that learned counsel for the defence contested the post-mortem report for an examination that was done on 25.9.14 and yet the deceased died on 20.9.14. Learned counsel on the cause of death contested the fact that no murder weapon was recovered and yet Pw1 alleged that the accused used a stone to attack the deceased. With regard to malice aforethought, counsel further submitted that from the evidence, it is apparent that the accused intended to escape without causing harm and there was a contention about a list of names therefore it has not been established that there was a previous quarrel between the deceased and the accused and as such motive has not been established. Learned Counsel relying on the evidence by the prosecution urged this court to find that accused has demonstrated that he has no case to answer.

12. The state submitted that according to Pw1, he received a call that the accused had refused with merry-go round contributions and they held a meeting whereby the accused wrote names on a piece of paper and the deceased demanded to know why the accused wrote down the names and as a result a scuffle ensued and the accused picked a stone and hit the deceased on his head until he fell down. He submitted that Pw3 saw the accused hit the deceased with a stone on the forehead, thus Pw1, Pw2 and Pw3 saw the accused pick up a stone and hit the deceased until he fell down.

Analysis

13. The Criminal Procedure Code section 306 (1) provides as follows:

“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit recording a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.....”

14. The question on the prima facie case has been extensively considered by the courts and other legal texts by scholars. The *Oxford Companion of Law at pg 907* gives the definition as:

“A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive.”

15. In making a finding on a prima facie case one should bear in mind the cardinal principle, on the burden of proof that it is the duty of the prosecution to establish the guilt of the accused for the offence charged beyond reasonable doubt, as was stated in *Woolmington v DPP [1935] EA 462 at 481.*

16. Section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya provides that:

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.”

17. In criminal trials that burden of proof is always on the prosecution. A trial court is therefore enjoined by law to determine whether at the conclusion of the prosecution case there exists a case discharging that burden of proof. I have considered the prosecution evidence and all these issues as canvassed by the submissions on record. The issue to be determined is whether the accused has a case to answer or can be put on his defence as provided for under section 306 (2) of the Criminal Procedure Code.

18. The legal principles to guide a trial court in making a determination on a prima facie case have clearly been stipulated in both the persuasive authorities and in the Eastern African case of *R.T. Bhatt v Republic (1957) EA 332.* The legal principles which run through the cases cited revolves around sufficiency of evidence capable of establishing the ingredients of the offence the accused is charged with. Secondly, a mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence. Thirdly it is evidence adduced by the prosecution such that a reasonable tribunal properly directing its mind would convict the accused in absence of any explanation when called upon to answer or put on his defence.

19. In the instant case, the testimony of each of the seven (7) witnesses called by the prosecution has been evaluated against the charge of murder facing the accused. The standard of proof required at this stage is not that of beyond reasonable doubt as the court has not had the advantage of the defence case.

20. From the evidence placed before me, I am satisfied that the test of a prima facie case has been met by the prosecution to warrant the accused person to be called upon to make a defence. The test to be applied here is as elucidated under section 306 of the Criminal Procedure Code and buttressed by the legal principles in the cited authorities. Further it has transpired from the evidence that there was an encounter between accused and deceased over a dispute on some merry go round contributions and accused recording down names of the members and that the scuffle led to deceased sustaining injuries from which he later succumbed. Accused was placed at the scene of crime.

Determination

21. I find that the accused has a case to answer. The accused person is hereby called upon to make a defence as per the steps outlined under section 306(2) as read together with section 307 of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at Machakos this 29th day of **January, 2019**.

D.K. KEMEI

JUDGE