REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 37 OF 2011

DAVID WANJALA MATUBA.....ACCUSED

VERSUS

REPUBLIC .....PROSECUTION

RULING

The accused person **David Wanjala Matuba** was, vide the information dated 29th November 2011 charged with murder contrary to section 203 as read with s.204 of the Penal Code.

The particulars were that on 15th November 2011 at Kiandumba village, Mucharage sub-location Nyeri South District within Nyeri County he murdered **Kadogo Brukeria Mbavaswenichi.**

The accused person took plea on 23rd January 2012 before J.K Sergon J and pleaded not guilty to the charge.

By 4th July 2013, the case had not taken off because the state was having difficulties getting witnesses to testify.

On that date Abuodha J admitted the accused to bail. However, he never able to raise that bail and remained in custody to date.

Between then and 4th March 2016 when the matter took off before Mativo J the accused appeared before Wakiaga and Ngaah JJ.

Justice Mativo heard PW1 and PW2, before the matter landed in my docket on 21st February 2017. I heard PW3, 4 and 5.

The prosecution closed its case on 12th February 2019. The issue now is whether the prosecution has established a *prima facie case* to warrant the accused being put on the defence as per s.306 of the CPC which provides foe what should happen at the **Close of case for prosecution;** whether the accused will be put on his defence as provided for under subsection (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, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to act other than the accused person himself; and upon being informed thereof, the judge shall record the fact. or whether the court ought to enter a finding of not guilty as provided by subsection 1 thus;

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, record a finding of not guilty.

A prima facie case has been defined in the case of

RAMANLAL TRAMBAKLAL BHATT V R [1957] E.A. 332 at p. 334-

335 where it was said: -

"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, 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 credibility 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 is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard.

It may not be easy to define what is meant by a "prima facie case," but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

The case for the prosecution is that on the evening of 15th November 2011 the body of a woman was found lying in a pool of blood on the road side at Kiandumba Village in Mucharage sub location.

The Chief Chinga North West location PW1 John Kimani Kiragu was rang by some villagers who informed him about it. He proceeded to the scene, from where he rang the Police Corporal in charge of the Kariko Police Post. He also rang Chinga police station. He informed them of the incident.

Officers from both police stations came at the scene. The woman was confirmed dead. At the scene two women came forward and said they knew the killer. A search for the culprit commenced and the accused was arrested. On cross-examination he said of the 2 ladies, one was a sister to the deceased, the other was a colleague to the 2 as they all worked in a farm within his location. He said the person who had rang him was a matatu operator and that there was a large crowd of villagers at the scene.

PW4 No.45444 CPL Jackson Muindi was the in-charge Kariko Police Post. He confirmed receiving a call from the area chief PW1 at 8:00pm on 15th November 2011 and calling the OCS Chinga police station with whom he proceeded to the scene at Mucharage along Kiandumba road. He noted the body of a woman who had multiple cut wounds on the neck, knee of right leg, left shoulder, head. Scenes of crime personnel were called and they took photos, while he drew a sketch plan.

The Body was removed to Mukurweini Sub County Hospital mortuary. While at the scene they received information that the culprit had disappeared to Mumbuini near Chinga Girls'High School. They returned to the police station from where they went in search of the suspect.

It was full moon season. Where they went in search of the accused in Mumbuini there were three houses. Dogs in the home began to bark in the homestead. As they approached the home they noticed a person running away, they followed him, he entered a napier grass field- they surrounded the shamba and unleashed the police dog. They lay ambush and the accused appeared just where PW4 was laying ambush and he caught him, arrested him, handcuffed him, escorted him to his house.

According to PW4 when they got to accused's house they conducted a search and he found a panga which had blood stains and hair in a bag containing the accused's clothes. The accused's clothes were also wet and appeared to have stains which the PW4 thought were remnants of the accused's efforts to wash his clothes of blood stains. He made the accused change his clothes- took over the clothes accused was wearing together with the panga. Took accused to the police station where he charged him with the offence.

He sent the panga and accused's clothes –khaki trouser, maroon jumper, green jacket to the Government analyst together with blood samples of deceased, to confirm whether there was any link between the accused and the same.

He found during investigations that accused and deceased had a relationship, in his words that they "were dating".

According to PW2, John Mbuthia Waititu, on 15th November 2011, about 11:00pm, he was in his house when he heard his dogs barking. He opened the door and saw someone carrying a metallic box and a panga. He saw it was someone he knew as a business friend by the name Daudi. He was referring to him as "brother to my father". He testified that the accused requested him to keep his things for him, he took in the metallic box. The accused said he was going for more of his things. He left and came back 15 minutes later with a sack, a thermos flask and a radio. He asked him where he was coming from? Why his clothes were wet but the accused only asked for a place to sleep. He noticed the bloodstained panga. He asked about it and accused told him he had cut his hand. He told accused to wash his clothes. Accused said he would sleep on a sack on the floor. He gave him the sack. Accused had a red rain coat, green over coat, red sweater, socks that were wet and a trouser.

After about 1 ½ hours later (say around half past midnight) the dogs began to bark again. That is when the accused woke up and went to the door. PW2 followed him, there was light from torches outside. Accused opened the door and ran out. PW2 heard people shouting, there he is. That accused was trapped by barbed wire as he tried to run and hid in napier grass. He was arrested by the police. PW2 asked the police why they were arresting him. They told him that accused had killed someone. He heard the accused being asked about the panga. The accused told the police he had left there. He PW2 however, told the police that the accused had left the panga in his, PW2's house.

On cross-examination the PW2 said accused only asked for a sleep that he never asked him why.

Unable to avail other witnesses the state sought to admit their statements in evidence. This was vehemently objected to by the defence and upon hearing the parties, I determined that it would be prejudicial to the accused person as this being a criminal case, and with everything being contested, it would be prejudicial to the accused as he would not have the chance to cross examine the said witnesses. That delayed the cross-examination of PW4 until the determination of that issue where in a ruling dated 8th July 2018. I refused the application.

On cross-examination the Investigating officer could not find anywhere in his statement where had had recorded that he had taken down the statements of those witnesses.

With regard to the samples taken to the government analyst, the Exhibit Memo was put to the investigating officer and he confirmed that the blood sample of the accused person was never presented to the government analyst. He also confirmed that none of the deceased's clothes were taken to the government chemist for analysis. He said they never visited the accused's house but only his place of business.

That in the house where they found the panga there was only one person. Asked whether he conducted search he said the owner of that house showed them the accused person's things and it was upon checking the accused's things that they found the panga and at that point he was satisfied that it was the panga that the accused had used to kill the deceased. He said that the accused was positively identified by the sister of the deceased as the assailant.

PW5 Dr. Musyoki Francis consultant Physician Mukurweini Hospital produced the post mortem report on behalf of Dr. Njuki who had conducted the postmortem. He testified that he never worked with Dr. Njuki but had learnt that Dr. Njuki had left public service.

There was no objection to his production of the postmortem report.

Reading from the report he testified that the deceased's clothes were blood stained, she had a deep cut on throat, left shoulder, right knee- the cut on the throat had severed both trachea and esophagus, the carotid artery. Cause of death was excessive bleeding due to severance of the carotid artery and asphyxia due to severed trachea. The report was dated 17th November 2011.

The prosecution closed its case.

Neither the defence/ the prosecutor made any submissions.

The only issue for determination is whether the prosecution has established a *prima facie case* to warrant accused being placed on the defence.

To establish a prima facie case the prosecution was expected to establish the ingredients for the offence of murder as defined at s. 203 penal Code;

> ***Any person*** *who of* ***malice aforethought causes death of another person*** *by an* ***unlawful act*** *or* ***omission*** *is guilty of murder.*

The fact of death

This was established by the doctor who produced the postmortem report, the evidence of PW1 and PW4 who saw the body of the deceased at the scene of crime.

Unlawful act or omission of **the accused person**.

To arrive at the answer we have to ask these question; what connects the accused to the deceased and her unfortunate death?

i) It was alleged by the investigating officer that the accused had a 'dating' relationship with the deceased, however that was not established by any evidence . No one even from the factory where the accused worked or PW2 who alleged he knew the accused as a business friend and 'my father's brother' placed any connection between him and the deceased.

ii) It was alleged that he was identified by some people again these people did not testify.

iii) It was also not stated for what these alleged witnesses identified him.

iv) No one said they saw accused cut the deceased. No one testified that the witnesses who could not be traced said they had seen the accused kill the deceased.

v) The circumstantial evidence of the panga. This was first raised by PW2. It was his testimony that accused went to his house seeking a place to sleep while carrying a metal box and a blood stained panga which he gave PW2 to keep as he went for his other items. The police on the other hand said through PW4 that they went to the house of the accused searched it and found the panga among his clothes in a bag contradicting PW2's that it was he who gave the panga to the police. This is the alleged murder weapon. The manner of its recovery also create doubts, in that it is not clear how/and where the police found it, whether it was given to the them by the PW2 or did they find it in a bag of clothes belonging to the accused person? Whether it was inside the PW2's house /or inside the accused's own house?

vi) The accused's alleged blood stained clothes. It was alleged that accused washed his blood stained clothes to wash off the blood.

This fact was not proved for no blood stains were found on the clothes he was wearing. Secondly, the clothes in the bag where the blood stained panga was allegedly found were not checked for blood stains or the deceased's DNA. It appears to me that if his intention was to conceal having committed the offence, the easiest thing would have been for him to clean the panga especially after the PW2 had drawn his attention to the blood on it.

vii) Allegation of fleeing from scene of crime. PW2's testimony was not corroborated by the investigating officer – that accused person fled from where he had committed the offence and came to seek refuge in the house of the PW2. there was no mention of accused's metal box containing his wares, no mention of the sack containing his property, no mention of any radio/thermos found in PW2's house or wherever it is the police say they recovered the panga from, r searched accused's house. No inventory was made of the alleged recoveries by the police –**see John Mutura Muraya Vs.Republic Court of Appeal (Nyeri) CR.Appeal No.384 of 2009 (UR)**. Neither was there evidence that the items alleged to belong to the accused were actually recovered from him.

PW2 from the little evidence that is on record, ought to have been a person of interest. How would he allow a person who comes in at night, armed with a blood stained panga, having blood stained clothes apparently fleeing and who had his own house, to just come in and sleep why and ? without any explanation? I found that to be suspicious.

His story resonates with the observations of the Judges in Kiilu **& another Vs.Republic (2005) KLR 17** at 175 where the Court of Appeal (Tunoi, Waki, Onyango Otieno JJA) held;

> **"The witness whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".**

vii. Forensic evidence and placing the accused at the scene. Even the efforts to place the accused at the scene of the murder through forensic evidence failed. First, no blood sample was taken from the accused person. Secondly the clothes allegedly to have been taken from the accused had no blood stains. Thirdly the blood on the panga, matched the blood from the deceased. Fourth, the deceased's clothes were not taken for forensic examination to make check whether any DNA from the accused was on them. Fifth, PW2, in evidence aimed at connecting the accused to the panga, alleged that the accused told him he had cut his hand, there was no evidence that accused had any injury on him at the time of arrest or that any of his clothes had his own blood stains. Sixth the panga was alleged to have hair on it but no DNA test was done on that hair to confirm whom it belonged to. And to cap it all the Investigating officer, told the court that upon alleged recovery of the panga he was certain that that was the murder weapon, even before the forensic examination.

Hence, no eye witness placed accused at the scene, neither did the forensic evidence. Hence on the issue as to whether death was caused by the act/or omission of the accused person the prosecution failed to establish that.

Prosecution appears to rely on hearsay- as there is no circumstantial evidence produced before this court to attach the accused to the offence.

Finally on issue of malice aforethought

The ingredients are set out at s. 206 of the Penal Code viz;

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any

person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

No single evidence of intent was led by the prosecution to answer the question: why would the accused have wanted to kill the deceased? Apart from the allegation that he was 'dating' the deceased, which was not established the prosecution did not even attempt to lay a foundation from malice aforethought on the part of the accused- none at all.

Clearly the prosecution has not hit the mark set by Bhatt vs. Republic as to the value of evidence that amount to a prima facie case.

Having taken into consideration the caution set in **Republic -Vs- Wachira (1975) EA 262** that an accused person should only be acquitted at this stage only if: -

> ***"There is no evidence of a material ingredient or if the prosecution has been so discredited and the evidence of their witnesses so***

incredible and untrustworthy that no reasonable tribunal properly directing itself could safely convict"

I find that the prosecution has not laid the legal basis required by s. 306(2) to warrant the person accused being put on the defence for the offence of Murder c/s 203 as read with 204 of the Penal Code.

In the circumstances I enter a finding of not guilty according to section 306 (1) of the Criminal Procedure Code.

The accused person is to be set at liberty unless otherwise legally held.

Dated, signed and delivered in open court at Nyeri this 28th March 2019.

Mumbua T. Matheka

Judge

In the presence of: -

Court Assistant: Juliet

Mr. Magoma for the state

Ms. Mwai for accused

Mumbua T. Matheka

Judge

28/3/19