



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 77 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**1. BONIFACE MBURU GATUGUTA**

**2. TERESIA MUKULU CHOVE.....ACCUSED**

**RULING ON A CASE TO ANSWER**

1. The accused persons are faced with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The accused persons pleaded not guilty to the charge and were put to trial. The prosecution called a total of four (4) witnesses. The particulars were that the accused persons on 19<sup>th</sup> September, 2015 at Kisima village, Matungulu sub-county within Machakos County, jointly murdered Michael Wambua Ndunda. The 1<sup>st</sup> accused later died in the course of trial and which left the 2<sup>nd</sup> accused to continue with the trial.

2. Julius Lemaiyan Lechurwa (PW1) testified that he was on 19<sup>th</sup> September, 2015 at the plot where the 2<sup>nd</sup> accused person lived. He was in company of Anastacia Wanja, Mbithe and Monica. As they were chewing *miraa*, Mukulu stated she could hear some voice although PW1 stated that he did not hear the same. That Mukulu said she heard a sound of something being hit. They then proceeded to the place where Mukulu alleged to have heard a voice. Mukulu is the one who directed them to the house. She lit her mobile phone torch and they saw blood on the ground. They followed the trail of blood to an incomplete house. There they found Michael bleeding from his left leg. He stated that he went together with a man by the name Baite to Michael's brother. Baite was said to have joined them after they had reached Michael's house after being awoken from the plot where they had been chewing *miraa*. Mukulu called Baite who works at the quarry. He and Baite went to Michael's brother by the name Kimanzi so that he could take him to hospital. Kimanzi went to the scene with his wife who goes by the name Monica. Monica called Michael's other brother and a pastor who took Michael to hospital. He stated that he was informed on 20<sup>th</sup> September, 2015 that Michael passed on.

3. Nancy Mbithi Muli (PW2) on 19<sup>th</sup> September, 2015 at 9.00 pm was called by Mukulu and informed that there was noise at Michael's place. She stated that she was in company of Mukulu, Wanja and Julius and Mukulu asked them to go and find out what was going on at Michael's. They found blood and 3 stones. That Mukulu illuminated the scene using her mobile phone torch light. They followed the trail of blood to where Michael was lying in an incomplete brick house. Michael was said to have been found in a bad state bleeding from his left leg. That Michael's sister in law who is the wife to his brother by the name Kimanzi called a pastor who took Michael to hospital. PW2 learnt of Michael's death on 20<sup>th</sup> September, 2015.

4. Anastacia Wanja (PW3) recounted that she was on 19<sup>th</sup> September, 2015 at around 9.00 pm at her house when PW2 requested her to visit her house. She went to PW1's and later the accused asked them to go to her house to relax and chew *miraa*. The 1<sup>st</sup> accused later alerted them of noise emanating from nearby and they rushed to the source of the noise. On arrival, they learnt that the place belonged to Michael. Illuminating from the accused torch they saw blood dripping from a window. They went back to the 1<sup>st</sup> accused's house. The 1<sup>st</sup> accused then woke up several people to go and see blood and they followed the trail of blood. They were led to Michael's house. There, they found the deceased whose left leg had a cut wound. He was said to be alive at the time. She stated that she was in company of PW2, Kimani and the 1<sup>st</sup> accused. They removed Michael from the house. The deceased's brother was called for. He went to the scene with his wife Monica and Michael was taken to hospital. PW3 and PW2 spent the night at Michael's house and the next day received information that he had passed on. PW3 stated that Michael was the 2<sup>nd</sup> accused's boyfriend but that she did not know the 1<sup>st</sup> accused person.

5. Isaiah Ochieng' (PW4) recounted that he was at Joska Police Patrol Base when members of the public took Michael who was said to have been assaulted on the leg using a sharp object. He was escorted to Mama Lucy Hospital. Later on, the area assistant chief Mr. Kilonzo reported that Michael had passed on. He visited the scene and commenced investigations and received another report on 22<sup>nd</sup> September, 2015 from the assistant chief that there was chaos as there was a suspect. The said suspect was rescued and taken to the police post. The 1<sup>st</sup> accused was also taken to the police. The 1<sup>st</sup> accused was said to have died. Michael's body was taken to Kenyatta National Hospital where post-mortem was conducted. Relatives by the name Mathew Ndunda and Titus Mutua were said to have identified the body. The post-mortem report was produced as P. Exhibit 1.

6. It was the defence submission that the accused herein was at no point said to have murdered the deceased by the prosecution witnesses or any evidence to point to her as having a connection with the murder and that a prima facie case had not in the circumstances been made against her. In support thereof he cited **Republic v. Kamiro Chege High Court Criminal Case No. 3 of 2005.**, **Ramnalal Trambaklal Bhatt v. R [E.A. 332]**, **Philip Muiruri v. R., Criminal Appeal No. 76 of 2012**, **Simoni Musoke v. R [1958] E. A. 715**, **Burunyi & another v. Uganda [1969] E.A. 123**, **Republic v. Kipkering Arap Kosgei [1949] 16 E.A.C.A 135** and **Sawe v. Republic [2003] 2 KLR 357**.

7. The court in the case of **Bhatt v. Republic [1957] 1 EA 332** highlighted the guiding principles in determining whether or not an accused has a case to answer. It was held as follows in the said case:

***“That the question whether there is a case to answer cannot depend 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 such evidence that a reasonable tribunal properly directing its mind to the law and evidence would convict if no other evidence is adduced in rebuttal.”***

8. I have carefully evaluated the entire evidence and find that the same does not raise a prima facie case to warrant the accused herein to make a defence. To start with it transpired from the evidence that the deceased had been a boyfriend to the accused herein and further that the accused who died in the course of the trial namely Boniface Mburu Gatuguta had also been suspected to be a boy friend of the accused herein. The accused was in the company of PW.1, PW.2 and PW.3 at her house busy chewing miraa (khat) when one Mukulu heard some noise and on going to check they found the deceased already injured. None of the witnesses implicated the accused herein in the murder of the deceased. The accused appears to have been only implicated on the ground that the 1<sup>st</sup> accused Boniface Mburu Gatuguta who has since died had been her boyfriend and which might have created a love triangle since the deceased was also dating the accused herein. It is highly likely that the 1<sup>st</sup> accused who has since died attacked the deceased so as to eliminate competition as they were both dating the accused herein. The 1<sup>st</sup> accused was later lynched by members of public following those suspicions. The investigating officer stated that six suspects were initially arrested but later released some of them as prosecution witness. It seems to me that the accused herein was charged for having been a lover of the 1<sup>st</sup> accused as well as the deceased which could have raised some suspicion that she might have colluded with the 1<sup>st</sup> accused to eliminate the deceased. However, suspicion alone is not sufficient to sustain a conviction. In any case the key prosecution witnesses confirmed that they were in company of the accused herein when the incident happened and that they did not witness her attacking the deceased. It is therefore quite doubtful that the accused herein was behind the murder of the deceased. She should be given the benefit of any such doubt as there was no direct evidence linking her to the incident. The Court of Appeal in the case of **Sawe =Vs= Republic [2003] 2 KLR 357** held as follows regarding the aspect of suspicion:-

***“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis that of his guilt..... Suspicion however strong cannot provide a basis for inferring guilt which must be provided by evidence.”***

Being guided by the above authority, I find that if the accused was to elect to remain silent in defence, the evidence on record is not sufficient enough to sustain a conviction against the accused.

9. In the result, I find the prosecution has not established a prima facie case against the accused to warrant her to be put on her defence. Consequently, I find she has no case to answer and is acquitted of the charge of murder under Section 306(1) of the Criminal Procedure Code. She is to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 28<sup>th</sup> day of **March, 2019**.

**D. K. KEMEI**

**JUDGE**