



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 66 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MAINGI KIOKO.....ACCUSED

RULING ON A CASE TO ANSWER

1. The accused **Maingi Kioko** is charged with two counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that the accused on 25th October, 2014 at Misakwani sub-location, Mumbuni Location in Machakos District within Machakos County murdered **Wilberforce Kioko Mumo** and **Peter Wambua Mumo**.

2. A plea of not guilty was entered. The prosecution called a total of eight (8) witnesses. No submissions were tendered on a case to answer.

3. This court's concern at this stage of the proceedings is whether or not a prima facie case has been made out by the prosecution. The court in **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335**, discussed what constitutes a prima facie case as follows:

“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 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.”

4. It emerged from the prosecution evidence that **Gaudencia Mbithe Mumo (PW1)** prepared her younger children, **Wilberforce Kioko Mumo** and **Peter Wambua Mumo** for tuition on 25th October, 2014 at around 7.00 am and she left for town. Her elder daughter **Bernice Mutete (PW2)** was left home with the children. When PW1 returned home at around 7.00 pm she did not find the two younger children (deceased). Upon inquiry, PW2 informed her that the deceased had gone missing since 1.00 pm. She together with her husband and neighbour lodged a search for the deceased. The accused who is her brother-in-law was questioned as to why he was asleep while everyone was involved in the search and he responded that the deceased were old enough and would be back home when they were ready. The search did not yield anything and the issue was reported to the police. PW1 stated that she suspected that the accused had a hand in the issue for the reason that he had earlier on threatened to rape PW2. She called PW2 and instructed her to search the accused's house. By this time, the accused had joined the search team. PW2 searched the accused's house and found the clothes that had been worn by the deceased on the material day being; Wilberforce's pink T-Shirt and grey trouser and Peter's black trouser, light green T-Shirt and a flowered sweater. The accused overheard that the clothes had been found at his house and tried to flee but was held and interrogated by the police. The accused was said to have explained that he saw the children collecting firewood but that he did not inform PW1 because they were not in talking terms. On 26th October, 2014, Bernice raised alarm that the deceased's bodies had been found about 10 meters from the accused's house. The deceased were found naked. PW1 stated that Wilberforce had his hand on his chest and had blood oozing from his mouth and anal area and that Peter had scars on his head and scratches on his neck. She stated that the accused's house was not locked at the time he had been arrested but that no one could have entered the said house. She further stated that they have a dispute over land.

5. PW2 recounted that at around 12.00 noon on the material day, her in law by the name Christine requested her to take for her water in the farm. She took the water and on returning she found the door open and the radio put on with loud volume. she also found the deceased missing. She inquired from the accused who informed her that she should not bother since he saw them collecting firewood. The accused asked her to go to his house but she refused. The accused left and later returned asking for a knife. He entered the house and took the knife and went away. All this time, the deceased were still missing. Later on when PW1 returned she informed her and a search was lodged. She narrated that PW1 instructed her to search the accused's house and on searching she found the deceased's earlier mentioned clothes under the bed. On 26th October, 2014 while standing nearby the house, she saw the deceased naked bodies near the accused's house in a farm. She stated that the relationship between her family and the accused was not very good.

6. **Angeline Mbithe Mulwa (PW3)** recounted that while on her way from the market on the material day, she met the accused wearing a light grey T-Shirt with blood spots. She greeted him but he did not respond. Later that day at about 7.00 pm she received a call from PW2 asking her whether she had seen the deceased but she responded in the negative. PW3 and her husband Joseph Wambua later joined in on the search to no avail. On 26th October, 2014 when the search continued, PW3 stated that the deceased bodies were found behind the accused's house. On cross examination, she stated that the scene where the bodies were found was open and that they must have been brought there at night.

7. **James Ngui Kombo (PW4)** was on 26th October, 2014 alerted by PW1 that the deceased had gone missing. He then instructed the village elder to assist them in the search. At around 6.00 am he heard screams and rushed in that direction where he found the deceased lying dead and naked. He then informed the police. He stated that the bodies were found lying at a farm nearby.

8. **Mumo Kioko (PW5)** arrived home from work and learnt from PW1 who is her wife that the deceased had gone missing. He suggested that they search for them which they did to no avail. The search continued on 26th October, 2014 when the deceased naked bodies were found dumped about 10 meters from his house. He stated that the deceased clothes had been found in the accused's house and that the accused who is his younger brother was fond of harassing PW1 whenever he was drunk. He further confirmed having attended the post-mortem.

9. **Pius Ngila (PW6)** together with his colleagues Cpl. Shiundu and PC Ngethi were instructed by the OCS Machakos Police Station to proceed to the scene where the bodies of the deceased had been reported to have been found. They found the assistant chief James Kombo at the accused's compound. There they also found the deceased naked bodies. He stated that the deceased appeared to have been strangled. They recovered clothes belonging to the children and a driving licence and identity card belonging to the accused. The items recovered were produced as follows; Pink T- Shirt (P. Exh.1), Trouser (P. Exh. 2), Green T- shirt (P. Exh.3), Black trouser (P. Exh. 4), Brown belt (P. Exh. 5), Sweater (P. Exh.6) Driving license (P. Exh. 7) and ID Card number 22349159 in the names of Maingi Kioko Kinama (P. Exh. 8). He stated that a scene of crime officer took photographs of the bodies, the house and compound and the bodies were taken to Machakos Hospital Mortuary.

10. Cpl James Olago (PW7) stated that he is a gazetted scene of crime officer and recounted that he processed some photographs of the deceased persons on 26th October, 2014. That he had been contacted by OCS CIP Nyagah. He then accompanied the OCS and PC Ngila to the scene where the bodies were and he took twelve (12) coloured photographs. He produced the photographs and certificates as P. Exhibit 9 and 10 respectively.

11. Dr. Felix Akonde Oyombe (PW8) and who stated that he was familiar with Dr. Waithera's handwriting and signature. He produced the post-mortem reports as P. Exhibit 10 (a) and (b). He stated that an inference of strangulation was made for both Wilberforce and Peter. The cause of death was asphyxia secondary to strangulation for both victims.

12. I have duly considered the said evidence and without delving into the merits of this case at this stage, I am satisfied that the prosecution has made out a prima facie case against the accused person requiring him to make a defence. Hence I find the accused has a case to answer and he is now called upon 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 28th day of **March, 2019.**

D. K. KEMEI

JUDGE