



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL (MURDER) CASE NO. 11 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS KIRIMA M'IKUNYUA.....ACCUSED

RULING

1. **FRANCIS KIRIMA M'IKUNYUA** 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 16th day of February 2016 at Mto Mawe Area within Athi River Sub-County in Machakos County, murdered Peter Mwanga (hereinafter referred to as the deceased).

2. The accused pleaded not guilty to the charge. The prosecution called a total of ten (10) witnesses to prove the charge whose ingredients the following:

(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.

4. The evidence adduced by the prosecution witnesses can be summarized as follows: Pw1 was Donald Waitthaka Lua who testified that on 16.2.2016, he was at work at a field belonging to Portland Cement when he heard two gun shots but he didn't see who fired the shots. He ran towards Mto wa Mawe and heard 4 gunshots while in the company of PW.2 who was injured. He testified that on the following day he reported the incident to Athi River Police station and informed the police that the shooting incident was led by the accused.

5. Pw2 was Lawrence Wiiio Munywoki who testified that on 16.2.16 he was fixing beacons on the Portland Cement Land and at around 12 noon, the accused came and emerged from a vehicle and fired shots into the crowd of people that were gathered on the land. He testified that the first shot hit Pw3 on the ear and the chest and later the police came and arrested the accused. He reported the matter to Athi River Police Station. On cross-examination, he testified that Pw3 gave him the work of fixing beacons and that in addition another man called Peter was hit in the stomach.

6. Pw3 was Peter Meti Ndunda who testified that he was a squatter on land belonging to Portland Cement and on 16.2.2016, at 12 noon he received a report from Daniel Kitema, a member of Kinani Self-Help Group that the accused had chased them from the land and thus he went to the scene and learned that the accused had attacked a young man and carried him in his car. He testified that the accused came back and fired shots in the air demanding to know what Pw.3 was doing on the land, and then fired at Pw.2 and the shot grazed his ear and he fell down. He testified that the deceased who was next to him was hit and he fell down and he learnt that the deceased succumbed to injuries at Kenyatta National Hospital. He testified that he knew the accused. On cross-examination, he testified that he recorded a statement on the following day at Athi River Police Station and that on the material day he saw the accused emerge from a white car armed with a pistol. He also testified that there is a case in court where the accused seeks to evict Pw3 and others from the land but that he did not participate in the destruction of the accused's structure on the land.

7. **Pw4, Stephen Muema Muthusi** testified that he is a land dealer and on 16.2.16 the deceased informed him that there was land for sale in Athi River and being interested, he accompanied the deceased. He testified that he arrived on the land at around 11 am and met the deceased

and later a white car arrived and one of the occupants emerged one of whom had a pistol and another a panga and the one with a pistol fired a shot towards the deceased. The deceased indicated that he had been shot and he saw blood oozing from his waist and later the deceased was on the ground and then he was taken to Shalom Hospital and later referred to Kenyatta National Hospital. He testified that the accused was one of the attackers and was the one armed with a pistol. He recorded his statement at Athi River police station. On cross-examination, he testified that he has been charged in Makadara Court for forceful entry and trespass on a certain parcel of land.

8. Pw5 Titus Munywoki Kimanzi testified that he sells properties and on 16.2.16 he was at the land at Portland when the accused came and bundled a young man into his car and at 2 pm the accused came back and fired shots at the deceased who fell down. The deceased was taken to Shalom Hospital and transferred to Kenyatta National Hospital. On cross-examination, he testified that the deceased was shot on the waist.

9. PW6, CIP Peter Mwalali Kiema testified that he is the OCS of Athi River Police Station and on 16.2.16, at 2 pm he received a call from Peter Kioko that there were people pulling down structures and later he received a call from Pw7 that there were skirmishes on the Portland Cement Land and the accused arrived at the station in the presence of police officers. He proceeded to the scene where he saw a group of people who told him that the accused had killed the deceased. He secured the scene and recovered two empty cartridges near Mombasa Highway and 4 other cartridges and another one making a total of 7 cartridges and handed them over to Pw9 of the CID. He saw the accused being taken away by the police.

10. Pw.7 was Pc Bernard Lagat who testified that on 16.2.16 at 8 am he was on patrol within Portland Cement Factory Farm when he received a call that a wall was being damaged at the area and he rushed to the scene where he heard three gunshots. At the scene, a crowd was chanting against the accused and the crowd cooled down when they saw the accused being arrested.

11. Pw.8, CIP James Onyango testified that he is a firearms examiner for the last 7 years and testified that on 12.2.16 exhibits were received for examination and the said exhibits were a pistol, a magazine, 7 spent cartridges and 3 rounds of ammunition. The exhibits were received together with an exhibit memo. He testified that he examined the items and prepared a report dated 23.3.16, and clarified that the report had an error, namely that the date of receiving exhibits is indicated as 12.2.16 instead of 19.2.16. In the said report he concluded that 3 bullets were fired from the pistol that was presented to him but the other 4 were fired from another firearm that was not submitted to him.

12. **Pw.9 was Cpl Jackson Mbithi** who testified that on 16.2.2016 he was alerted of fighting along Mombasa Road and he rushed to the scene and was informed that the accused had shot somebody whereby he disarmed and placed him in custody. He received exhibits from the OCS that had been recovered from the scene and took possession of the same. On cross-examination, he testified that he submitted the firearm on 19.2.16 to the Ballistics Department and confirmed that the bullet that killed the deceased was not from the accused's firearm.

13. **Pw.10, Professor Emily Adhiambo Rogena** testified that she is a pathologist. She testified that on 27.4.16 a post-mortem report was signed by her with regard to a post mortem conducted on the deceased and noted that the body had a gun shot wound. An opinion was formed that the cause of death was hemoperitoneum due to a single penetrating abdominal gun injury. She produced the post-mortem report.

14. It is against this background that the accused's counsel relied on the case of **Ramanlal Trambaklal Bhatt v R (1957) EA 332** and submitted that a prima facie case was not established for the evidence is circumstantial and does not link the accused with the death of the deceased. Counsel also submitted that the circumstantial evidence cannot infer guilt of the accused for according to the evidence, the fatal shot did not come from his firearm. He further submitted that mens rea and actus rea have not been proved beyond reasonable doubt and cited the case of **R v Stanley Muthike Tiire (2018) eKLR**, and that the prosecution has not established that the accused's act caused the death of the deceased and therefore the accused should be acquitted under Section 210 for he has no case to answer.

15. Both learned counsels for the defence and prosecution filed written submissions which I have duly considered at length.

16. 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.....”

17. 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 call for 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.”

18. 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.***

19. 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.”

20. 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.

21. The legal principles to guide a trial court in making a determination on a prima facie case have clearly been stipulated in the Eastern African case of ***R.T. Bhatt v Republic (1957) EA 332*** that was cited by defence Counsel. 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.

22. In the instant, I appreciate the submissions of the counsel for the accused and find that the cited case of ***R v Michael Muriuki (2014) eKLR*** is not applicable, for it addresses the issue of conviction and not the weight of evidence against the accused so as to put him on his defence. The testimony of each of the ten (10) 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 evidence.

23. 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 answer. 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. It came out clearly in the evidence that the accused was seen firing shots from his pistol at the crowd of people from where the deceased was hit.

24. I find the accused person has a case to answer and 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 30th day of **April, 2019**.

D.K. KEMEI

JUDGE