



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 26 OF 2012**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**MICHAEL MUTISO MUNYOKI.....ACCUSED**

**RULING**

**1. MICHAEL MUTISO MUNYOKI** 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 are that the accused on the 27<sup>th</sup> day of July 2012 at Mlolongo Township in Athi River District within Machakos, murdered Alex Musyoki hereinafter referred to as the deceased.

2. The accused pleaded not guilty to the charge. The prosecution called a total of nine (9) witnesses to prove the charge whose ingredients include 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 Stephen Kioko Kiio who testified that on 27.7.12 at around 11 am, he was at work at Ujamaa Mission Hospital when the deceased was brought by 3 persons and he was not breathing and his heart not beating; he concluded that the deceased was dead. He was informed that the deceased had been stabbed and he called the police.

5. Pw2 was Dominic Mbithi Thuru who testified that on 27.7.12 he received a call that someone had been stabbed at Mlolongo Pent House and thus he and Pw3 went to the police station and on being referred to the City Mortuary, he identified the deceased as his niece's son.

6. Pw3 was Justus Kioko who testified that on 3.8.12 he accompanied his uncle, Pw2 to the city mortuary where he found the body of the deceased.

7. Pw4, Anthony Kimani testified that on 27.7.2012 the accused and the deceased who were both drunk were fighting over a woman called Mwende and in the process of the fight, the accused used a knife to hurt the deceased and threw away the knife. The deceased died and the accused was taken to the police station. On cross-examination, he testified that the deceased and the accused shared a girlfriend and in addition the police recovered a knife that he could not tell had been used to harm the deceased.

8. Pw5 Chief Inspector Boniface Krop Lomuk, testified that on 27.7.2012 at 1300h he received a call from Pw6 that a young man had been stabbed in Mlolongo and died. He rushed to the Immaculate Hospital and saw the body of the deceased. He was then taken to the scene by Pw4 and Pw6 and he recovered a knife from the roof of a certain house and handed it over to the CID. On cross-examination, he testified that he could not tell if the knife he recovered was the one that was used to stab the deceased. He also testified that he was not the investigating officer in this case.

9. PW6, Robinson Kerosi Onchoki testified that on 27.7.12 at about 1130 hours he was walking when he met two men quarrelling and later he heard that they had stabbed each other so he went to the scene and found one of the men bleeding. He reported the matter to the police

post nearby and later learnt that the said man had died. He identified the other man who was in the brawl in court as one of the protagonists.

10. Pw7 was Caroline Njoki Wamae who testified that she has worked at the government chemist from 2011 to 2014 and testified that on 23.8.12 samples were submitted by Pw9 for examination and the said samples were blood samples from the accused and deceased, a knife and a coat. She testified that she examined the items and prepared a report and signed it on 3.4.14. In the said report she concluded that the blood on the knife matched the one on the coat.

11. Pw8 was Dr. Peter Muriuki who testified that he is a consultant pathologist who has practiced from 2005 at the Ministry of Health. He testified that on 3.8.12 a post-mortem was conducted on the deceased and noted that the body had a penetrating stab wound on the left chest and the heart had been perforated on the left ventricle and there was blood. An opinion was formed that the cause of death was hemorrhage due to chest injury due to a penetrating stab wound. He produced the post-mortem report.

12. Pw9 was Ahmed Haji, who testified that on 27.7.12, he was at CID Mlolongo when he received a report that there was an incident wherein he was instructed to accompany the OCS to the scene. He testified that by then the accused had been arrested by members of the public and handed over to the police, wherein he visited the scene that was known as Mlolongo Mulevi Street or Madharau Street and tendered the knife that he referred to as a murder weapon. On cross-examination, he testified that he was informed from the scene that the accused and the deceased differed over a certain woman and the incident occurred on the night of 26<sup>th</sup> and 27<sup>th</sup> July, 2012. With regard to the difference in names in the request for post mortem and the actual post mortem report, he testified that the initial names are the ones that were given by the members of the public whereas during the post mortem, he was given names by the family members of the deceased.

13. It is against this background that the learned Counsel for the state submitted that according to Pw4's evidence that is corroborated by Pw6's evidence, the accused and the deceased brawled over a woman and the accused harmed the deceased with a knife. He submitted that Pw8's evidence opined the cause of death as stab wound. With regard to malice aforethought, he submitted that the act of using a knife and causing a deep stab wound indicated malice and again the accused was positively identified by Pw6 who knew him. He relied on the case of **Ramanlal Trambaklal Bhatt v R (1957) EA 332** and submitted that a prima facie case was established.

14. 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.....”**

15. 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.”**

16. 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***.

17. 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.”**

18. 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.

19. 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 the state. 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.

20. In the instant, the testimony of each of the none (9) 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.

21. 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.

22. 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 30<sup>th</sup> day of April, 2019.**

**D.K. KEMEI**

**JUDGE**