



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL CASE NO. 6 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

WONA KING'OO.....1ST ACCUSED

KYALO KING'OO.....2ND ACCUSED

RULING

Introduction:

1. The accused persons have been charged 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.
2. The particulars are that on the night of 7th and 8th February 2017 at Mutuluni village, Kilome Location within Makueni County, the accused persons murdered Francis Mutuku Waita.
3. The accused persons pleaded not guilty and the prosecution called seven (7) witnesses in support of its case.

Prosecution's Case:

4. **PW1** was **Douglas Mutiso Kaua** the assistant chief of Kilome. He testified that on 15/02/2017 at 6.30am, he received a call from Kyenze Kyengo and was informed about the deceased's death. He proceeded to the scene and found the deceased near the house of Mwongela Lazarus. There was blood on the road and he saw a small torch. The deceased had been dragged to the roadside. There were many local people at the scene. The deceased had been cut on the throat and the shoes were apart. He called the chief, OCS, OCPD, DAPC and local MP Regina Ndambuki who arrived at the scene and addressed the people. The deceased was facing upward. Before 2pm, PW1 heard that the two accused persons had been arrested. He then followed stains of blood to the 2nd accused's place from the road. The police took samples of blood and left. 2 weeks before the death of the deceased, PW1 had been told by the deceased's relative that the deceased had complained about having been beaten and injured.

5. On cross-examination, he confirmed that the incident was on 15/02/2017 but the statement talked of 08/02/2017. That his caller said that the deceased had been attacked but did not mention any of the two accused persons. He also said that as the assistant chief, he had not received any complaint against the accused persons even from the deceased.

6. **PW2** was **Michael Keleli Ndambuki**, a retired teacher. He testified that the deceased was his cousin and that on 08/02/2017; he received a report that a student had seen a dead body on the road. He proceeded to the scene at 8.00am and found a crowd. There was blood on the road and the deceased had a cut on the throat. His hands had been tied with a rope. That prior to the death, he had previously been attacked by unknown people and suspected the 2nd accused as they had previously quarreled.

7. On cross-examination, he said that he got the report on 14th and went to the scene on 15th. That it appeared as if he had been tied on the hands but was not tied. That there was a dragging trail and the blood stains were from the deceased to the 2nd accused's shop. That the distance from the scene to the 2nd accused's shop was about ½ km. That there was blood at the backside of the 2nd accused's shop. That the deceased had fought with the 2nd accused's wife.

8. **PW3** was **Margaret Mutuku**, the deceased's wife. She testified that on 15/02/2017, she was at her sister's place when she received the news about her husband's death. She went home and found her sister-in-law there. She went to the mortuary and saw bruises on the

deceased's hands and a piercing on the throat. That in 2016, the 2nd accused and deceased had a problem and the 2nd accused had taken the deceased to the police. That the 2nd accused told PW3 to inform her husband to never cross his path otherwise he would do something.

9. On cross-examination, she said that she went to the mortuary on the burial date. That there were differences between the deceased and 2nd accused because the 2nd accused would tell her. That the deceased had said that he would seek forgiveness from the 2nd accused. That in 2016, the deceased had been attacked by unknown people. That the deceased was a drunkard and could insult.

10. **PW4** was **AMK**, a student at [particulars withheld]. She testified that on 08/02/2017 at 5.00am while on her way to school, she saw a man by the roadside and tried calling him. He did not answer. She then saw blood near the person and decided to go back home and inform her parents. They all went back to the scene together with a neighbor who they had woken up. They realized that the man was dead and was known to them. They screamed and many people arrived. She did not see anything at the scene save for the body.

11. On cross-examination, she said that she recorded her statement on 26/02/2017 in the company of her father and that she knew the deceased as *fundi*.

12. **PW5** was **Juliana Ndunge**, the neighbour who was woken up by PW4 and her parents. She testified that she was woken up at 6.00am on 08/02/2017 and they proceeded to the scene where they saw the body of fundi facing upward. They screamed and people from the neighborhood gathered. Others who arrived were AP officers, Assistant chief, MCA, OCS, DC and the area MP. She saw a blood trail near the market but not at somebody's house.

13. **PW6** was **Dr.Makau Alex**, a general practitioner at Makueni Hospital. He produced a postmortem report (*Exh 1*) on behalf of Dr. Loiposha who, he explained, was away for further studies. He testified that on general observation, the body was in stripped coat with socks, torn sealed greenish trouser, blue t-shirt, bluish pant, brownish pant and brownish leather shoes. On appearance, there were visible injuries on the neck and the oesophagus was open.

14. The cause of death was severe neck injuries secondary to a sharp object probably a knife. The report was signed by Dr. Loiposha and stamped. PW6 further testified that during training, they do two years of pathology. On cross-examination, he said that the neck was not disconnected from the body.

15. **PW7** was **CIP Nephath Marubu** attached at DCI headquarters and previously the DCIO Mukaa. He testified that on 15/02/2017, he was in the office when he received a call from the OCS Kilome who informed him that there was a murder at Mutituni village. He proceeded to the scene with two other officers and found the body on the roadside. The murder weapon appeared sharp and photographs had been taken. They found over 200 people and it was around 8.30am. There were blood stains which ended 20 meters to the 1st accused's premises.

16. People suspected two business people in the area. The two suspects were called and their houses searched but there was no recovery. The body was taken to Kilungu Hospital mortuary and post-mortem conducted.

17. On cross examination, he said that the blood stains started 200 meters from the body and ran for 70 meters then stopped 20 meters from the 1st accused's premises. The murder weapon was not recovered and there was no DNA analysis of the blood. There was no eye witness. He denied having arrested out of pressure.

18. It is against the above evidence that this Court is expected to determine whether the prosecution has established a *prima facie* case to require the accused persons to be put on their defence. The basis is in section 306 (1) and (2) of the Criminal Procedure Code which provides that;

“when the evidence of the prosecution case is concluded the court shall consider the evidence and any arguments made by either the defence or prosecution case to determine whether a case against the accused has been made on the allegations/or charge. If the court finds that there is no evidence that the accused has committed the offence the court shall record a finding of not guilty and order for a discharge or acquittal.”

19. On what constitutes a *prima facie* case, I draw guidance from the case of ***R.T. Bhatt –vs- Republic [1957] EA 332 – 335*** where the East African Court of Appeal stated 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 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, 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.”

20. I will proceed to analyze the evidence on record against the ingredients of murder to wit;

- a) That the death of the deceased occurred.
- b) That the death was caused by an unlawful act committed by the accused (*actus reus*).

c) That the accused had malice aforethought (*mens rea*).

Proof of Death:

21. PW 1, 2, 4, 5 and 7 testified that they saw the deceased's body at the scene of the incident. PW3 saw the body at the mortuary on the day of the burial and there was also medical evidence from PW7 who produced the post mortem report. Accordingly, this ingredient has been proved.

Proof that the death was caused by an unlawful act committed by the accused:

22. The evidence on record is purely circumstantial. There was no eye witness and the murder weapon was not recovered. In *Joan Chebichii Sawa v Republic [2003] eKLR* the Court of Appeal stated that;

“before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution. These principles articulate the position in law that the question as to the cause of death may either be answered by way of medical or circumstantial evidence.”

23. The main piece of evidence which the prosecution seems to be relying on is the blood trail. PW1 said that the blood trail led to the 2nd accused's place. PW2 said that it led to the 2nd accused's shop and that there was blood at the backside of the said shop. PW5 said that she saw the blood trail near the market but not at somebody's house. PW7 said that the blood trail ended 20 meters to the 1st accused's house. It was crucial for the evidence of all these witnesses to be consistent. PW7, the officer who searched the accused persons premises should have been able to spot the blood trail at the backside of 2nd accused's shop which PW2 had talked about. He should also have been able to confirm whether there was any blood trail leading to the 2nd accused house as per the evidence of PW1 and PW2.

24. Interestingly, PW5 who was also at the scene said that the blood trail was not at somebody's house. Then there was the issue of the big crowd which had gathered around the deceased and in my view, there is a possibility that the scene had already been tampered with hence making it difficult to identify a blood trail.

25. Then there was the evidence of PW3, the deceased's wife who said that there were differences between the deceased and 2nd accused and that the 2nd accused had even threatened the deceased. She also said that in 2016, the deceased had been attacked by unknown people. On the other hand, the assistant chief PW1, said that he had never received a complaint about the accused persons even from the deceased.

26. First, I can't even tell with certainty that the deceased was attacked in 2016. Was the incident reported? Was he treated for any injuries sustained and if yes, where were the treatment records? Secondly, the fact the attackers were unknown removes the accused persons from the equation and thirdly, I would expect the assistant chief to be aware of any differences that might have existed between the deceased and any of the accused persons. Further, it was PW1's evidence that prior to the deceased's death, there was a series of killings in the area and arrests had been made but none of the accused persons had been connected with the killings.

27. With this kind of information, it was imperative for the prosecution to adduce concrete evidence linking the accused persons with the death of the deceased. I also noted that there was inconsistency with regard to the date of the offence. The information stated that the offence was committed on the night of 7th and 8th February 2017. Some witnesses talked about 08/02/2017 and others talked about 15/02/2017. The post mortem report indicates that the body was found on 14/02/2017 at 0700 hrs. In a nutshell, the prosecution's evidence is weak and there is nothing to show that the death was caused by unlawful acts of the accused persons. The circumstances relied on cannot be said to be so accurate that the only inference to be drawn is the guilt of the accused persons. If the accused persons are placed on their defence and decide to remain silent, which is well within their rights, the evidence on record cannot sustain the charge. Thus the court makes the following orders.

Conclusion:

i. The accused persons are therefore acquitted under section 306 (1) of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

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C. KARIUKI

JUDGE