



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 194 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

KIOKO KITILI MWONGELA1ST ACCUSED

DAVID MUSEMBI NYAMAI2ND ACCUSED

RULING

1. The accused persons were charged with offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.
2. Particulars being that on the night of 30 & 31/07/2012 at Mumani Village, Ngai Sub-location, Kithungo Location in Mbooni West District within Makueni County jointly murdered Gerald Muoki Mutava.
3. The accused denied the offence by pleading not guilty and the matter went into trial.
4. The prosecution called 5 witnesses and closed its case.
5. The court is called to decide as to whether a *prima facie* case has been established to warrant accused persons being put on their defence.
6. The evidence in support of the prosecution case was that PW1 Jackson Ngila Maitha stated that on 31/07/2012 his brother; Peter Kyalo Maitha called him at around 7.00 p.m. and both went to Ngewa and took beer. The beer at Ngewa got finished so they went at Domary Bar where he took alcohol with his brother, David Musembi Nyamai, Kioko Kitili and Mutie Peter; his nephew. He stated that he was called by his nephew Mutie Peter and told him that Muoki had stolen his Kshs. 200/=.
7. PW1 stated that he found the 2nd accused in the bar and the 2nd accused never talked to the deceased. PW1 stated that the 2nd accused left Domary Bar earlier than him. PW1 left Domary Bar at around 10.00 p.m. alone and went home only to receive news that a person had been killed and thrown at Nyanzalani River. He never visited the scene.
8. PW2 Benson Mwanzia Mbevi stated that on 30/07/2012 he was at Kivutini Bar at around 7.30 p.m. alone. He stated that Muoki Mutava, the deceased quarreled with Mutie Peter outside Domary Bar for Mutie Peter claimed that Muoki Mutava had stolen Kshs. 150/= from him.
9. PW2 stated that he left the bar together with Mutuku at 9.30 p.m. and went home but left the 2nd accused in the bar and that Muoki Mutava, the deceased was not present when he left the bar. PW2 stated that Muoki Mutava left Domary Bar at around 8.30 p.m. together with Mutie Peter.
10. PW2 stated that the following morning he heard from Joyce Muli that Muoki Mutava had been beaten at Nyanzalani river. He visited the scene and found Muoki Mutava the deceased really beaten and thrown in the water. He stated that he saw Kioko Kitili and David Musembi Nyamai at the scene. He stated that he did not know the cause of death.
11. PW3 Mathias Katiku Mukithya was the Assistant Chief, Ngai Sub-location. PW3 stated that on 31/07/2017 he visited the scene of crime after receiving information that someone had been found killed and thrown in Nyanzalani River. PW3 stated that he knew the deceased; Muoki Mutava. PW3 stated that he collected information which would help trace suspects form Dobin Isaack Mbeke the owner of Domary Bar where the deceased was taking beer.
12. PW4 Stanford Mutua Mutava, stated that Muoki Mutava; the deceased was his brother. PW4 stated that on 31/07/2012 he visited the scene of crime after receiving the information of his brother's murder from one Eliza Mbindyo at Nyanzalani River. He visited the scene and

found Muoki Mutava; the deceased with several injuries on the face, a small blue torch and a big stone beside the river. He stated that he went and reported the murder at Mbooni Police Station. He stated that he cannot say who killed his brother; the deceased.

13. PW5 Japheth Mutua was the police officer investigating the crime.

14. PW5 stated that on 31/07/2012, he received a report of murder from Stanford Mutua. He visited the scene, found the deceased body with multiple injuries on the head, blood stains on a stone and two small torches one blue and another dark blue.

15. PW5 stated that at the scene he met one Bobin Isaack Mbeke the owner of Domary Bar who informed him that the deceased was taking beer at his bar and he was the last person to leave together with David Musembi, Kioki Kitili and Peter Mutie.

16. PW5 stated that there were three suspects but only two were arrested after investigations. He stated that they investigated the houses of the suspects and recovered one black trouser partly washed at the knees with river soil from the house of Kioko Kitili but never recovered anything from the house of the 2nd accused. A report from the government chemist did not incriminate the 2nd accused in any way.

17. The accused filed submissions via their Advocates on record.

18. After going through the evidence and submissions on record, I find the issue is whether a prima facie case has been established to warrant accused persons to be put on their defence.

ANALYSIS & DETERMINATION

19. The court in **Rep –Vs- Nicholas Onyango Nyolo (2014) eklr** held that;

There are three ingredients of the offence of murder which ought to be established, namely:-

a) Proof of the fact and the cause of death of the deceased.

b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence and

c) Proof that the said unlawful act or omission was committed with malice aforethought which constitutes the “mens rea” of the offence.

20. No single witness mentioned the accused persons nor witnessed any commission or omission by the accused persons which may have led to the deceased death. Actually the person who ought to have been charged with Mutie Peter who was quarrelling with the deceased over stolen money and who he left in company of.

21. No direct nor circumstantial evidence pointing to the commission of the crime by the accused persons, the prosecution failed to establish the main ingredient of “actus reus” against the accused persons herein in and as such issue of “mens rea” cannot arise in the circumstances.

22. Further the investigating officer has failed to testify and give evidence as to what led to the arrest and eventually charges against the accused persons.

23. He failed to call the witness who allegedly saw the deceased quarrelling with the accused persons as against the other prosecution witnesses who testified that the first accused never quarreled, confronted nor talked to the deceased. The investigating officer alleges that the owner of the bar saw them quarrel and leave together.

24. The prosecution did not avail a very critical witness who would corroborate the story of the investigating officer who allegedly saw the deceased quarrel and leave with the accused persons.

25. The investigating officer was casual in the mode he did investigations. While the person who had apparent motive to harm deceased was arrested and later freed, the accused persons were arrested as they passed near the scene of crime and were charged with murder even after witnesses testifying that the deceased never had any contact with the accused persons.

26. In **Bukenya & Others –Vs- Republic (1972) EA 549**, the court said at Page 551;

“While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of these witnesses, if called would have been tended to be adverse to the prosecution case.”

27. Since the bar owner who allegedly saw the deceased quarrel with accused persons did not testify in court and as such court is persuaded to make an inference that such evidence ought to be held in favour of the accused persons.

28. Further the exhibits produced did not tie nor link the 2 accused persons with the death of the deceased. The trouser collected at the accused home did not contain any blood stain as per the results of exhibit 6, the government chemist report and the blood samples were not a match. There was no link whatever linking the accused persons to the death of the deceased.

29. The post mortem report was produced by consent which shows that the cause of death as injuries to head and neck caused by blunt trauma. It did not point to the guilt of the accused persons nor link them to his murder.

30. A *prima facie* case has its legal proposition to mean that a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

31. The high court in Cr No. 44 of 2015, Republic -Vs- Joshua Koikai Sitaya, at Kajiado expounded more on what a prima facie case was and even quoted **Mozley and Whitleys Law Dictionary 5th Edition** which stated

“A litigating party is said to have a prima facie case when the evidence in his favour is sufficient strong for his opponent to be called to answer. A prima facie case, then, is one which established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.”

32. The lack of any evidence adduced by the prosecution witnesses to link the accused persons to the death of the deceased cannot just be wished away and like in every criminal case, there arises doubt which should be resolved in favour of the accused persons.

33. Therefore the court makes the following orders;

(i) No *prima facie* case has been established to warrant putting accused persons to their defence.

(ii) The accused persons are therefore acquitted and released forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 28TH DAY OF MAY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE