



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL (MURDER) CASE NO. 35 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

1. JOSEPH MAMBO MUTISO)

2. TITUS MUTUA KAUMBULU).....ACCUSED

RULING

1. **JOSEPH MAMBO MUTISO** and **TITUS MUTUA KAUMBULU** hereinafter referred as the accused persons were jointly 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 28th day of September, 2012 at Kathama Location in Mwala District within Machakos County, jointly with others not before court, murdered Laban Kimeu Ndungu (hereinafter referred to as the deceased).

2. The accused persons pleaded not guilty to the charge. They were represented at the trial by Mr. Mwangangi while the prosecution was conducted by Mrs Abuga. The prosecution called a total of five (5) witnesses to prove the ingredients of the offence constituting the following:

(1) *The death of the deceased.*

(2) *The death of the deceased was unlawful.*

(3) *That in causing death there was malice afore-thought 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 persons have a case to answer. The evidence adduced by the prosecution witnesses can be summarized as follows: Pw1 was **DAVID KIOKO MUTUNE** who testified that on 30/09/2012 at 12.00 midnight he got information that Laban Kimeu had passed on. He knew the deceased as his neighbor and went to the police station and found that Joseph Mambo had been arrested. He testified that he is a Community Policing Agent and that the OCS instructed him to look for the other suspect. He and his four colleagues went in search of Titus Mutua. John Nzuki and Muthini found the suspect and the OCS instructed him to take him to the A.P. Post and on 1.10.2012 they went to Mbiuni Police Post to record a statement. On cross examination, he testified that the 2nd accused was arrested by his colleague.

4. **PW.2** was **JOHN NZUKI WAMBUA** who testified that he was a community Policing agent and that on 30/09/2012, he got a document from David Kioko that had the name of Titus Mutua and another. He testified that he searched for Titus and found him at Mambo's home taking a meal. When Titus spotted him, he abandoned his food that he was eating from the kitchen and took off, however he chased him and found him hiding within a certain farm 20 metres away.

5. **PW.3** was **NELSON MUTUKU KIMEU** who testified that on 29/09/2012 at 7.30 p.m. Mambo Joseph asked him to go to his home as he had found one Laban Kimeu near his homestead. He testified that he went there and found the deceased Kimeu Ndungu near his homestead. The deceased seemed to have been beaten but he was still alive but however he was not able to stand or bend. He was seated and had injuries. He testified that the deceased was bleeding from his face and head. He was also unable to talk. He inquired from the crowd around and Joseph told him that the deceased had been found with someone's wife. He then carried the deceased on a motor cycle and notified APs from Kathama Camp who ordered him to take the deceased to hospital. He took him to Mbiuni police station then to hospital. However the hospital was closed and he took the deceased to Grace's dispensary where first aid was administered on him. However on 30th September 2012 he heard that the deceased had died. On cross examination by Mr Mwangangi, he testified that the first accused asked him to go to the scene where he found about six (6) people. One of them was Mambo's father, the mother and wife of Mutiso Kitavi and on arrival

he was told by Joseph that Laban Kimeu had been found at the home of Mutiso Kitavi by the two (2) accuseds in the act of sex with the wife of Mutiso Kitavi. He testified that he did not see the accused assaulting the deceased and he also found the lady who was said to have been caught in the act with the deceased.

6. **PW.4** was **GRACE WANJIKU MASIRA** who testified that she is a nurse by profession and has been operating the Jamii Health Clinic for the last 20 years. She testified that on 29th September, 2012 she was at her clinic when an elderly man Kimeu Ndungu was brought by Simon Musyoka and Nelson Mutuku. The deceased could not walk properly. She examined him and found him to be wet. He was bleeding from the mouth & ears, the nose had blood stains. He complained of severe chest pains. She testified that she prepared treatment notes to assist the Doctor in the next station. She noted the condition and her observation on the treatment card and referred the deceased to Kangundo Hospital. The treatment card dated 29/09/2012 OPD 3027/12 was produced in evidence and marked as exhibit1. On cross examination, she testified that the injuries must have been occasioned during the night and not on that date. Also that the deceased complained of the rectum being painful.

7. **PW.5** was **SIMON KIOKO MULI**. He testified that he is a retired general Practitioner currently stationed at Matuu. He testified that on the 11th October, 2012 he carried out a post mortem examination on Laban Kimeu Ndungu at Matuu Nursing Home Mortuary. The body was identified by Nahason Mutuku, Ezekiel Mutuku in the presence of PC. Nyamalu. The deceased was an African Male aged 70 years old. The body was well preserved by refrigeration and he observed that the deceased had peripheral psychosis, the chest at the left side had hematoma formation, multiple facial bruise wounds and upon dissection, his findings were that on the left side of the chest he had fracture of ribs 5, 6, 7, 8, the right side of the chest rib 6 & 7 frontal aspect were fractured. In addition, in the Chest cavity Haemothorax (bleeding) was present. In the Digestive system there were anal lacerations, the Rectum was ruptured. In the Abdomen, the right kidney had lacerations within the abnormal cavity– haeperitoneous (bleeding). The Spinal cord was normal. He formed the opinion that the deceased passed on due to bleeding within the chest, abdomen as a result of the blunt injuries. He filled the post mortem report which was produced and marked as Exhibit. On cross examination, he testified that the instrument/weapon that was used was blunt and that he conducted the post mortem on 10th October, 2012 and not the 11th October, 2012.

8. It is against this background that the accused's counsel submitted that a prima facie case was not established and therefore the accused persons should be set at liberty.

9. The state has not filed submissions.

10. 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.....”

11. 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 all 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.”

12. 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*.

13. 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.”

14. 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 persons have a case to answer or can be put on their defence as provided for under section 306 (2) of the Criminal Procedure Code.

15. 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*. 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.

16. In the instant, I appreciate the submissions of the counsel by the accused and find that the testimony of each of the five (5) witnesses

called by the prosecution as evaluated against the charge of murder facing the accused persons together with the evidence placed before me, has not met the test of a prima facie case. This means that the prosecution has not satisfied the court the need to warrant the accused persons 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. The evidence so far tendered should be sufficient to sustain a conviction against the accused persons were they to elect to remain silent in defence. Looking at the entire evidence I find the same has not met the threshold of a prima facie case to warrant both accused persons to be called upon to make a defence. There are several reasons to support such a finding. Firstly all the witnesses did not witness the accused persons attacking the deceased. Indeed the first two witnesses were community policing agents and were only alerted after the incident and proceeded to apprehend the accused persons after being mentioned by members of public. Secondly none of the members of public who are alleged to have witnessed the incident were called to testify. Thirdly it transpired that the deceased had been found in flagrant delicto having sex with the wife of one Mutiso Kitavi who incidentally was not called to testify and shed light on the alleged incident. Fourthly the investigating officer was not called to testify. His evidence was crucial as he would have given his findings on the two incidences as well as go further to state what action had been taken by the cuckolded husband of the lady who is alleged to have engaged in an illicit sex with the deceased and also to record statements from key witnesses. The witnesses who were brought forward apparently did not witness the alleged incident. Finally it came out clearly that the deceased was attacked by members of public upon being caught red handed having sex with the wife of one of the villagers and ordinarily the cuckolded husband might have been among the assailants but was neither charged nor called as a witness. Under those circumstances I find that the case was poorly investigated and as such the evidence herein would not sustain a conviction against both accused persons if they elect to remain silent in defence. The accused persons appear to have been suspected over the incident. However suspicion alone in the absence of concrete evidence is not sufficient to sustain a conviction.

17. The upshot of the foregoing observations is that no prima facie case has been made out against both accused persons herein. I find each of the accused persons not guilty of the charge of murder and are hereby acquitted of the charge under section 306(1) of the Criminal Procedure Code. They are set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at **Machakos** this 27th day of **June, 2019**.

DK KEMEI

JUDGE