REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 173 OF 2017

(FORMERLY MACHAKOS HCCR NO. 50 OF 2014)

REPUBLIC.....PROSECUTION

-VERSUS-

JACKSON WAMBUA MATIVO.....ACCUSED

RULING

1. The accused **Jackson Wambua Mativo** stands charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars were that on the **6th day of August, 2014** at Mwambani village in Makueni district within Makueni county murdered **Kyalo Matheka**.

2. The accused entered a plea of not guilty and the trial commenced before Justice Kariuki Charles on 12th November, 2018. Four (4) witnesses were heard by him. I took over the matter and heard two witnesses before the prosecution closed its case.

3. A summary of the prosecution case is that the witnesses (Pw1 – Pw4) and the deceased met at December bar on 6/8/2014 evening for a drink. Each arrived on his own. Pw1 **Benson Maweu** a brother to the deceased testified that as they drunk, the accused who was on a different table claimed that he had lost his phone. He was sitting alone and he said that it was the deceased who had taken the phone. After a while the phone was found in the accused's gumboot.

4. The finding of the phone resolved the problem and there was no other up to the time of closure of the bar when him, Pw2 and others left. The accused and deceased were left at the gate of the bar. This was confirmed by Pw2. Pw3 was only informed of the death on **7/8/2014**.

5. Pw4 **Rachel Mueni** is a barmaid at Mwambani bar but formerly worked at December bar. She confirmed that on **6/8/2014** the accused and deceased were among the customers at December bar. The deceased was taking Kane extra while the accused took Gebel. At one point the accused claimed that he had lost his phone. The same was found in his gumboot.

6. This witness testified that as they continued drinking the accused and deceased started mixing the Kane and Gebel drinks which they took. At 10:30 pm she informed them they were closing the bar. The deceased bought one Kane while the accused bought two bottles. She closed and left them outside the bar. The next morning at 6:00 am she heard screams and went to the scene where she found the deceased's body near the road where there is a water tank.

7. In cross examination she said the accused and deceased were taking Kane extra, and this is a spirit which intoxicates very fast. According to Pw4 both the accused and deceased were drunk but the deceased was very drunk. She said from the bar gate to the scene is about 50 metres. She never heard any commotion or screams that night.

8. Pw5 **Ruth Wangari** a government analyst produced the analyst's report on behalf of her colleague **Lucy Warukira Wachira.** She testified that a stone with human blood stains, a suspect's trouser, tee-shirt and a sample of the deceased's blood were taken to them for analysis. The analysis was done and the result was as follows: -

- **A partial male DNA was generated from the stains on the stone which could not be resolved.**
- **This meant the result could not offer a perfect match.**
- **The DNA from the blood on the stone and the DNA of the deceased's blood were different**
- **The tee-shirt and trouser of the suspect had no blood stains on them.**

9. Pw6 **Corporal Isaac Galgalo** is the investigating officer. He testified of having visited the scene and photos (EXB 1a-d) taken by the scenes of crime officer. He produced the certificate by the scenes of crime officer (EXB1 e) and the stone (EXB3). He confirmed that the accused was arrested on 8th August 2014 and the tee-shirt (EXB4) and trouser (EXB5) he wore were removed for purposes of taking them to the government chemist for analysis since they had blood stains.

10. He insisted that EXB 4 and 5 were blood stained. The accused was then sent to Emali police station for purposes of recording a confession. In cross examination he said he was aware that the homes of the accused and deceased were a distance apart though he did not know the routes they took.

11. **Mrs. Nyaata** for the accused filed written submissions arguing that there wasn't sufficient evidence to make this court place the accused on his defence. It was her submission that the fact and cause of death of the deceased was not proved as no postmortem report was produced as an exhibit. Secondly, there was no eye witness. The stone which is alleged to be the murder weapon was not proved to be so. The prosecution relied on the evidence adduced.

12. This is so far the evidence that was adduced by the prosecution at the close of its case. The court must now analyse the said evidence with a view to determining whether the prosecution has established a prima facie case sufficient to warrant calling upon the accused to defend himself.

13. In the case of **RAMANLAL T. BHATT –VS- R 1957 E**. The Court of Appeal stated the following on a definition of a prima facie case.

> ***"It may not be easy to determine what is meant by "a prima facie "case but at the very 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".**

14. On the fact of death Pw1 – Pw4 and Pw6 spoke to it. The photos (EXB 1a – d) indeed confirm that **Kyalo Matheka** died. The photos also show injuries on the head. There is evidence to the effect, that the deceased's body was taken to a mortuary and a post mortem was conducted on the body. Pw3 who is a brother to the deceased witnessed the post mortem on the body. It means there is a report lying somewhere unproduced. In the cases of **Ndungu v R (1985) KLR 487; and Chengo Nickson Kalama v R (201**5) eKLR both Court of Appeal cases the court held that save for exceptional cases the cause of death must be established through the production of medical evidence. The same has not been done in this case.

15. On the evidence adduced it's clear that Pw1, Pw2, deceased and accused had been drinking at the bar. They only left after the closure of the bar. The level of intoxication of Pw1 and Pw2 is however unknown. Pw4 who was serving them with drinks was categorical that the accused was drunk while the deceased was very drunk. She also confirmed that they had been consuming spirits which they were at one-point mixing. The effect of this is disastrous.

16. It is true that the accused and deceased while in that state of drunkenness were left at the gate of the bar. Pw1 who is a brother of the deceased also left him behind even though he knew his brother was too drunk. Pw1 testified that the accused could not trace his phone until it was found in his gumboot. He too must have been too drunk.

17. The deceased's body was recovered at the water tank the next morning. There is no witness who came out to say he or she had heard any commotion or screams that night. Whatever was said to be the murder weapon (stone EXB 3) was taken for an analysis at the government chemist. The result did not support the prosecution case (EXB 2b). The accused's tee-shirt and trouser (EXB 4 and 5) which Pw6 claimed had blood stains were found by the examining body not to have any blood stains (EXB 2b).

18. It is clear that the evidence before this court is purely circumstantial. In the case of **R v Taylor Weaver and Donavan (1928)21 Cr. App. R. 20** the court held: -

> ***"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence that say, it is circumstantial".***

19. From the evidence adduced a number of things are not clear, namely: -

- **It is not clear what time of the night this incident took place.**
- **It has not been shown that at the time of incident the accused and deceased were still together.**
- **There is no mention of anything found at the scene or on the accused that would link him to the murder.**

20. Finally does the evidence placed before this court point to the accused as the only person who could have killed the deceased? With all the issues raised in this ruling it would be unsafe to answer this question in the affirmative. The accused is highly suspected. Suspicion however strong it is without tangible evidence cannot sustain a conviction. **See Sawe –vs- R 2003 KLR.**

21. After evaluating all the evidence herein, I find that the same is too weak to require the accused to defend himself. If the accused was placed on his defence and he elected to remain silent the evidence on record is not strong enough to sustain a conviction. On my part I find the accused not guilty and acquit him under Section 306(1) of the Criminal Procedure Code. He shall be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly

DELIVERED, SIGNED & DATED THIS 24TH DAY OF JULY 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE