



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 15 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

NDORO SIWEZI MUJUWA.....ACCUSED PERSON

RULING ON CASE TO ANSWER

1. The accused person, Nodoro Siwezi Mujuwa, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 16th March, 2017 at Davaya location in Kinango Sub-County, within Kwale County, murdered Mesalimu Mwero.

2. He pleaded not guilty to the charge and the case proceeded to hearing of the prosecution's case. The prosecution closed its case on 1st July, 2019. Neither the Prosecution Counsel nor the Counsel for the accused person opted to make any submissions at that stage of the hearing.

3. This court is called upon to make a ruling on whether the accused person has a case to answer or not.

4. PW1 was Dzame Mwero Tsiwezi of Dudu village. She was a co-wife to Mesalimu Mwero (deceased). She testified that she found the deceased lying dead in her garden. She could not tell if the accused person herein had been with the deceased. PW1 stated that the accused person had gone to graze the deceased's goats. She described the accused person as her grandson.

5. PW2 was Mwero Tsiwezi Mwero, a resident of Dudu village in Davaya location. He testified that about 8:00a.m., on 16th March, 2017 he went to Kinango but was called back home at 11:00a.m., as his son Mangale Mwero told him that his mother had been cut with a panga. He stated that when he reached home, he found her in the bush. She lay dead with a cut wound on her head.

6. He further stated that the deceased was his wife and that the accused person was his grandson. He stated that he did not find the accused person at the scene as he had been escorted to the Police Station by Mwero Dzombo (PW3) and Kombo Siwezi. PW2 explained that his son Mangale Mwero told him that the accused person was arrested as it was said that he was the one who had injured the deceased.

7. PW3, Mwero Dzombo Chondo of Dudu B village in Davaya location was on 16th March, 2017 going for a funeral with Ali Kombo Siwezi (PW4) when the latter received a phone call and was told that Mesalimu Mwero had been killed. He described her as his Aunt. They went home but before he could reach where the deceased's body lay, he was told to escort the accused person to Kinango Police Station. He and PW4 took the accused person to the said Police Station, where he was locked in. He stated that he did not know the reason as to why the accused person was locked in.

8. PW4, Ali Kombo Tsiwezi supported the evidence of PW3 that they were heading to a funeral on 16th March, 2017 when at 11:00a.m. he received a phone call which required him to go home immediately as Mesalimu Mwero had died. On reaching their village, he and PW3 at first went to their homes. As he was going to the deceased's home, he met PW3 who told him that they should take the accused person to Kinango Police Station. PW4 further stated that the accused person said that he wanted to be taken to the said Police Station but he did not disclose the reason behind his request.

9. PW5 was Dr. Hassan Ali Mukuche of Kinango Sub-County Hospital. He testified that he was registered as a Doctor in the year 2011 by the Kenya Medical Practitioners and Dentists Board. It was his evidence that on 16th March, 2017 at 7:00p.m., he carried out a post mortem on the body of an elderly lady called Mesalimu Mwero, after it was identified by Mwero Siwezi (PW2) and Bora Mwero (PW6). PW5 observed that she had a left temporo-parietal depressed skull fracture which was about 10 cm in diameter. She had left and right parietal penetrating traumatic brain injury. She also had a nasal laceration and a defensive injury on her left hand caused by a sharp object. On her right hand, she had fractures of the 3rd, 4th and 5th fingers.

10. PW5 formed the opinion that the cause of death was traumatic brain injury or penetrating head injury with intra-cranial haemorrhage. He filled the post-mortem report which he produced as p. exhibit 1.
11. PW6, Bora Mwero Tsiwezi testified that on 16th March, 2107 his wife Nzalambi Gandi called him and told him that his mother had been killed. He rushed to Davaya and found his mother's body. He also found his father at the scene who told him that he did not know what had happened. He noted that his mother had a cut on the left side of her head, at the back of her head and on her mouth. He observed that some of her teeth had come out. He saw some injuries on the left side of her hand and on her fingers on the right hand. PW6 further testified that he took the deceased's body to Kinango Hospital Mortuary. He did not know the person who committed the offence.
12. PW8 was Benjamin Chimbonja Bendago, a retired Assistant Chief of Kifyonzo sub-location in Davaya location, in Kinango Sub-County. It was his evidence that on 16th March, 2017 at 11:00a.m., he received a call from Juma Chiwaya Matano who informed him that in Dudu B village a woman had been slashed to death with a panga. PW8 was told that the woman was the wife of Mwero Siwezi and that she had been killed by her grandson Ngoro Siwezi Mujuwa (the accused person). PW8 reported to Kinango Police Station about the death. He then proceeded to the scene with Police Officers who collected the deceased's body and took it to Kinango Hospital Mortuary. PW8 inquired about the whereabouts of the accused person and he was told that he had been escorted to the Police Station to record a statement. PW8 stated that he knew the accused person herein as a resident of Dudu B village and that the deceased was his grandmother. PW8 further stated that it was alleged that the deceased was killed on allegations of witchcraft.
13. The Investigating Officer testified as PW7. He was No. 23604, Inspector Robert Mwiti, attached to Diani Police Station. His evidence was that in the year 2017, he was attached to Kinango Police Station as the Deputy OCS. On 16th March, 2017 at about 11:45 a.m., he received a call from the Assistant Chief Kifyonzo Sub-location in Dudu B village, by the name of Benjamin Bendago (PW8), who informed him that there was a murder that had occurred in his area. He booked the report in the Occurrence Book (OB) and proceeded to the scene.
14. On reaching the scene in the company of other Police Officers, he was directed to the body of the deceased which lay in a pool of blood. On examination he saw cuts on the head, nose and the ear of the deceased.
15. PW7's evidence was to the effect that the information he got from those who were present was that at 6:00 a.m., the deceased and the accused person, who was a grandson to the deceased, were grazing goats in their farm when the two disagreed and quarreled. It was claimed that the accused had alleged that the deceased was practicing witchcraft and had bewitched the accused person's brother who died in the year 2016. It was further alleged that the deceased told the accused person that her intention in the year 2016 was to bewitch him and not his brother. It was further alleged that was when the accused person attacked and killed the deceased with a panga.
16. PW7 further stated that at the time they visited the scene of crime, the accused person had been escorted to Kinango Police Station. They removed the deceased's body and took it to Kinango Sub-district Hospital Mortuary. It was his evidence that on 19th March, 2016, he escorted the accused person back to the scene where he showed PW7 where he had hidden a panga, about 50 meters away from where the deceased's body lay at the time they collected it from the scene. He stated that the accused person removed a panga from a thicket. PW7 produced the panga as p. exhibit 2.
17. On 1st July, 2019, PW7 was recalled by the prosecution and to produce photographs that he took at the scene of crime on 16th March, 2017. He produced the photographs as p. exhibit 3(a), 3(b) and 3(c). He also produced an exhibit memo as p. exhibit 4, in which he requested the scenes of crime personnel to enlarge the photographs he had taken and to issue a certificate of the enlargement process. PW7 produced the certificate of the photographic prints as p. exhibit 5. He explained that he personally took the photographs of the scene of crime as there was no Scenes of Crime Officer at CID Diani at that time.

ANALYSIS AND DETERMINATION

18. An offence of murder under Section 203 of the Penal Code presupposes that an accused person had malice aforethought at the time of the commission of the offence. Malice aforethought under Section 206 of the Penal Code is established by evidence proving any one or more of the following circumstances-

"(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape of any person who has committed or attempted to commit a felony."

19. In order for this court to put the accused person on his defence, it has to be satisfied that there is some evidence that directly connects him to the commission of the offence of murder as per the threshold set out in Section 206 of the Penal Code or even the lesser charge of manslaughter. If there is no direct evidence, this court would then fall back to circumstantial evidence or a combination of both direct and circumstantial evidence, to find out if a *prima facie* case has been established against the accused person to put him on his defence.

20. A *prima facie* case is one that meets the test laid out in **R.T. Bhatt vs Republic** [1957] EA 332- 335 where the court held thus:-

“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 enough to define what is meant by a prima facie case, 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.”

21. In the instant case, PW1, PW2, PW3, PW4, PW6 and PW8 did not see the accused person assaulting the deceased. They found the deceased lying dead at the scene of crime.

22. Although PW7, the Investigating Officer, in his evidence in court said that he was informed by members of the public that it was the accused person who had slashed the deceased with a panga, he failed to avail the said eye witnesses to this court to testify on whether indeed the accused person quarreled with the deceased after he alleged that she had bewitched his late brother. PW7 gave evidence to the effect that the accused person led him to the place where he had hidden the murder weapon and retrieved the panga which was produced as an exhibit.

23. In the case of **Ahamad Abalfathi Mohamed & Another vs Republic** [2018] eKLR, the Court of Appeal held that information given by an accused person leading to discovery of evidence is not admissible if given outside of a confession, after the repeal of Section 31 of the Evidence Act. An appeal against the said decision was filed in the Supreme Court by the Director of Public Prosecutions. The Supreme Court of Kenya in **Petition 39 of 2018 Republic vs Ahmad Mohammed Abolfathi Mohamed & another** [2019] eKLR, when addressing the issue of information from an accused person leading to discovery of evidence held that such information amounts to an admission and is admissible but in order for the court to convict, it would need corroboration from other evidence. The Court stated thus:-

"Assuming for a moment that the 1st respondent indeed led the Police to the recovery of the RDX explosive, is that information admissible? In other words, despite the repeal of Section 31 of the Evidence Act, is information leading to discovery of material evidence generally admissible? We think it is. We agree with the appellant that it is a matter of general public importance that the Police are given the freedom to carry out investigations with a view of detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews, Police are entitled to confront suspects with any report they may have received about the suspect's commission or involvement in the commission of a crime and demand an explanation. In response, a suspect may offer an explanation. If it happens that the explanation the suspect gives is an admission of a material, ideally the Police are required to invoke the provisions of Section 25A of the Evidence Act. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in evidence but, unlike a confession, it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in Section 25A(1) of the Evidence Act, are admissible...."

24. In this case, an attempt had been made to produce a statement under inquiry that was recorded by PW7 but the same was objected to, by the defence Counsel. This court held that it was recorded by a Police Officer who was of the rank of an Inspector and he was therefore not authorized by the law to record the said statement. The objection by the defence Counsel was therefore sustained. Save for the admission leading to discovery of a panga which was allegedly used to kill the deceased, there was paucity of other independent evidence on record to corroborate the said admission. The Investigating Officer's failure to bring eyewitnesses who gave him information that the accused person is the one who killed the deceased weakened the prosecution's case.

25. It is unfortunate that an innocent life was lost but the Investigating Officer failed to carry out his investigation duties with diligence to nail the person who killed the deceased. It is my finding that in the absence of other evidence, save for the recovery of the panga, the prosecution has failed to establish a *prima facie* case to enable this court to put the accused person on his defence.

26. I therefore find the accused person not guilty of the offence of murder contrary to Section 203 as read with 204 of the Penal Code. He is hereby acquitted under the provisions of Section 306(1) of the Criminal Procedure Code. The accused person shall be set at liberty forthwith unless he is otherwise lawfully held.

DELIVERED, DATED and SIGNED at MOMBASA on this 1st day of August, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mushelle for the accused person

Ms Mbaeh, Prosecution Counsel, for the Director of Public Prosecutions

Accused person - present

Mr. Mohamed Mohamud - Court Assistant