



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRC NO.35 OF 2017

FORMERLY MACHAKOS HCRC. NO. 3 OF 2015

REPUBLIC.....PROSECUTION

-VERSUS-

SAMMY MUSEMBI KIOKO.....RESPONDENT

RULING

1. **Sammy Musembi Kioko** the accused herein faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that the accused on the 26th December, 2014 at Shauri Moyo village, Makindu district within Makueni county murdered **Paul Muema Kioko**.
2. The prosecution presented a total of six (6) witnesses. The postmortem report (EXB1) was produced by consent of the parties. The accused and deceased were brothers. The deceased was in his 50^s and was older than the accused.
3. **Pw1 Anderson Makau Kithome** a senior assistant chief of Manyatta sub-location told the court that on 26th December 2014, he received a report of a person who had been killed. The body was lying in a hole about two feet deep and 5-6 feet in length, and had been covered with burnt grass and sand. He identified the body as belonging to Munene Richard the deceased. Police were called.
4. **Pw2 Omar Muthomi Kimwele** a village elder of Shauri Moyo village testified that he was at home on 26th December, 2014 when his grandchildren reported to him that they had seen a person burnt to death. He went to see **Rev. Musembi (Pw4)** who told him the accused had passed by and told him the deceased had died. He went to the scene and confirmed the report. People were already talking saying it is the accused who had killed the deceased. He was arrested and brought to the scene.
5. It was his evidence that whenever the two brothers were drunk they would fight over a particular land near their house. That the accused had wanted to sell this land, and the deceased was opposed to it.
6. In cross examination he said the accused and deceased appeared drunk on the evening of 25th December, 2015 and their house which is next to the road was wide open. It was the deceased's house but whenever the accused was around he would stay there.
7. **Pw3 Kamene Kioko** a sister to both accused and deceased received a report of the death on 26th December 2014 5:00 pm. She went home and confirmed and was also at the mortuary during the postmortem.
8. **Pw4 Abedinego Musembi** testified that on 26th December, 2014 he was at his construction site when the accused passed by and told him the deceased had died. He had a sisal rope in his hand. The witness gave him Kshs.40/= which included Kshs.20/= for the rope. He took the rope and while there some school children came running and told him Kyumbe had killed somebody. He did not know who that was. He went to the scene at 5:00 pm. He later learnt from the village elder that Kyumbe was the accused.
9. **Pw5 Domitila Mueni** is a niece to the accused and a daughter of the deceased. She received a call from her sister in-law who informed of her father's death on 26th December, 2014 at 4:45 pm. She went home and confirmed the report. She saw injuries on his head and right hand, and same had been burnt. The deceased used to live alone while accused used to visit and spend there. She witnessed the postmortem, after identifying the body. Besides the rumors, the witness did not know who killed the father.
10. **Pw6 No. 59531 corporal Bernard Mwasia** confirmed receiving a report while at Makindu police post on 26th December 2014 by a village elder **Omar Muthomi Kimwele (Pw2)**. Two officers went to the scene and the body was identified. He took over investigations on

28th December, 2014. The accused was brought to the scene with the murder weapon – a knife (EXB2), which had no blood stains. His investigations revealed that the accused who was a teacher had been suspended because of having a mental illness. He has a wife, sisters and a son who even recorded statements.

11. He produced the knife (EXB2) and sketch plans of the scene (EXB 3a and b). He stated that on the material day a nephew of the accused and deceased had given them money for Christmas drinking. They were therefore drunk.

12. Pw2, Pw3, Pw4 alluded to the fact that the accused was not mentally stable. The postmortem report (EXB1) showed the cause of death as cardiorespiratory arrest due to severe head injury and forth degree burns on the face due to assault.

13. Mr. Hassan for the accused filed written submissions. He generally submitted that the prosecution had failed to establish a prima facie case against the accused. He referred to the cases of:

i. Bhatt –vs- R (1957) E.A 332.

ii. R –vs- Morris Karani Alando (2012) eKLR.

14. Counsel submitted that the court had to establish whether the accused and deceased were together on the night of 25th December, 2014. That there was no evidence adduced to show they had been together on that day. He contends that the accused had another home elsewhere so it was important for the prosecution to prove where the deceased was on the material night.

15. He submits further that both men were drunk that day. That the rope and knife which were allegedly recovered had no connection with the head injury suffered by the deceased. That the deceased whose house is near a busy road could have been killed and burnt by another person.

16. He adds that the accused had no burnt marks and neither were any equipment or gadgets used to light a fire found on him. He argues that there was nothing to show that the accused used to stay with the deceased. He therefore submits that there is no evidence to warrant the accused being placed on his defence.

17. The prosecution relied on the evidence on record, and so made no submissions.

18. This court has from the evidence on record to make a determination on whether the prosecution has established a prima facie case against the accused to warrant his being placed on his defence. What then is a prima facie case? In the case of **Ramanlal Trambaklal Bhatt –vs- R (1957) E.A 332** the Court of Appeal laid down the standard of proof in determining whether the prosecution had established a prima facie case. It stated as follows: -

i. The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not 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.

ii. The question whether there is a case to answer cannot depend 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”

19. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 Penal Code defines murder as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

20. For a charge of murder to be established the following ingredients must be proved: -

i. Fact and cause of death.

ii. Actus reus – that the accused’s unlawful act or omission led to the deceased’s death.

iii. The said unlawful act or omission was committed with malice aforethought.

Issue no. (i) Fact and cause of death.

21. From the evidence of Pw1 – Pw6 there is no doubt that the deceased was found dead and his body was lying in a hole near his house. There was an injury on his head and some parts of his body were burnt. The post mortem revealed the cause of death as: -

“Cardiorespiratory arrest due to severe head injury and forth degree burns on the face due to assault.”

The post mortem report (EXB1) confirms what the witnesses said they saw.

Issue no. (ii) Actus reus – that the accused’s unlawful act or omission led to the deceased’s death.

22. It was the duty of the prosecution to link the accused person to the killing of the deceased. It is clear from the evidence that no one witnessed the deceased being killed or assaulted. The accused and deceased were brothers.

23. It is Pw2’s evidence that he had seen the accused and deceased on 25th December 2015 evening as they celebrated. He said they were drinking and the accused appeared drunk. He had not seen the accused during the day but he had seen the deceased with a neighbor eating some meat. None of the rest of the witnesses saw the accused or deceased on 25th December, 2015.

24. The accused is said to have a family in Kai. The investigating officer (Pw6) did not bother to find out whether the accused spent the night of 25th December, 2014 at the deceased’s house or at his family home in Kai. It was also not established whether the deceased was killed in the hole where the body was found, or in his house or somewhere else.

25. Pw6 says at page 29:

“It’s those who visited the scene and public who said the deceased was killed in the house. Both accused and deceased were drunkards.”

Besides what people allegedly told him he never investigated this aspect of the evidence.

26. Pw6 also told the court that Pw4 had seen the accused leaving the deceased’s house. This to him meant he had slept there that night. It is not clear which night he is claiming that the accused slept there. Pw4 in his evidence saw the accused on 26th December, 2014 between 4-5 pm as he passed by the construction site. He never said he had seen the accused leaving the deceased’s house.

27. The same investigating officer (Pw6) told the court that on the same day a nephew to the accused and deceased had given them money for Christmas drinking. This “nephew” was never called as a witness. In any event, the evidence is that both accused and deceased were drunk that day. The deceased’s house was never searched for the murder weapon if any.

28. Some of the witnesses tried to imply that the accused had a mental illness. The record shows that he was mentally assessed on 21st January, 2015 at Machakos level 5 hospital and a report filed on 26th January, 2015 before plea was taken. This was hardly a month after the incident.

29. The doctor found nothing unusual about him, found him able to follow proceedings, understanding the charges facing him and was able to advise counsel. The conclusion was that he was fit to plead. This put the issue of his mental status to rest.

30. The accused and deceased may have had their own small misunderstandings but that in itself is not sufficient to blame the accused for the deceased’s death. The evidence before this court is based on mere suspicion which however strong it maybe can never be the basis of a conviction. See **Joan Chebichii Sawe –vs- R (2003) eKLR**.

31. My finding is that the prosecution has failed to connect the accused with the death of the deceased to warrant me placing him on his defence. **He is hereby found not guilty and acquitted under section 306(1) Criminal Procedure Code.**

He shall be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 17th day of December 2019, in open court at Makueni.

.....

H. I. Ong’udi

Judge