



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 125 OF 2017

FORMERLY MKS HCCR NO. 18 OF 2016

REPUBLIC PROSECUTION

-VERSUS-

BONIFACE MUTUNGA ACCUSED

RULING

1. **Boniface Mutunga** the accused herein is charged with the murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are the accused on 6th day of April, 2016 at Kyanzuki village, Kitundu sub-location, Kitundu location, Kitundu division of Mbooni west district within Makueni county, murdered **Ndinda Mutua**.

2. To prove its case, the prosecution called four witnesses. From the evidence on record, there was no eye witness to this incident. Further, the postmortem report (EXB1) was produced under Section 77 Evidence Act by the consent of both the prosecuting and defence counsel. The witnesses Pw1 – Pw4 have all confirmed that indeed Ndinda Mutua is deceased. The postmortem report (EXB1) shows the cause of death as **“severe head and neck injuries due to inflicted by a sharp forceful object.”**

3. The next issue is whether there is evidence linking the accused to the murder i.e. the *actus reus*. I have considered the evidence on record plus the written submissions by the defence. **Pw1 Rozina Ngina Mutua** the mother of the deceased and the investigating officer **Pw4 C.I. Abraham Bor Borei** relied so much on information they say was given to them by one Francis Ndambuki Mbai who has been identified as Pw2.

4. The said Pw2 testified and said he had only seen the accused passing at her employer’s gate on 4th April 2016. On inquiry from **Pw3 Joseph Nzioki Ndeto** he was told the man he had seen was Mutunga who he identified as the accused. He swore that he never saw the accused again after that. He was categorical that he never saw the accused on the date of incident i.e. 6th April 2016.

5. In cross examination and re-examination, he denied telling the deceased’s mother (Pw1) that the killer of her daughter was the accused.

6. **Pw3 Joseph Nzioki Ndeto** testified that on 4th April 2016 at 6.45 a.m., while on his way to work he had met the accused which to him was nothing unusual. Thereafter he met Pw2 who asked him who the accused was and he told him who he was and it ended there. He denied any knowledge of anything in respect to the murder of the deceased, or the 6th April 2016.

7. The investigating officer **C.I Abraham Bor Borei** retrieved a panga (EXB 6), wet red t-shirt (EXB 5), hooded jacket (EXB 7) from the accused's house. He claimed that the t-shirt though washed still had blood stains. None of these items were subjected to any forensic analysis.

8. The deceased's mother (Pw1) suspected the accused to have fallen in love with the deceased who turned him down. She said she had even been warned. Beyond the suspicion there is nothing more placed before this court. Pw2 and Pw3 denied ever seeing the accused on 6th April 2016.

9. In the case of **Joan Chebichi Sawe –vs- Republic [2003] eKLR** the court of appeal stated this;

“Suspicion however strong cannot provide a basis for interlocking guilt which must be proved by evidence.”

10. I would say the same of the case before this court. Asking the accused to make his defence is tantamount to asking him to prove his innocence. Were the accused to be placed on his defence and he elected to remain silent, which is his right this court would not have sufficient evidence to convict him. My finding is that the prosecution has failed to establish a prima facie case against the accused to warrant this court placing him on his defence.

11. I therefore find the accused not guilty and acquit him under Section 306 (1) CPC.

12. Accused to be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

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

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H. I. Ong'udi

Judge