



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KERICHO

HCCR NO.24 OF 2012

REPUBLIC.....PROSECUTOR

VS

ELIZABETH MUHUNJA.....1ST ACCUSED

DENNIS MORURI.....2ND ACCUSED

RULING

1. The accused, Elizabeth Muhunja and Dennis Moruri are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 30th day of April 2012 at Majengo Estate in Kericho County within the Rift Valley, they jointly murdered Tony Rubea Lubanga.
2. The prosecution called 7 witnesses and produced exhibits in support of its case. At the close of the prosecution case, Learned Counsel for the State, Ms. Keli, and Mr. Sang for the defence made submissions on whether or not the prosecution had established a prima facie case that would warrant placing the accused on their defence.
3. Ms. Keli submitted that through the 7 prosecution witnesses, the state had established a prima facie case against the accused for the murder of the deceased. The deceased was found hanging from the roof of his house while standing on a stool. This, according to the prosecution, shows that he did not hang himself but had been murdered. The investigation by the police led to the accused as the persons who had committed the offence.
4. The 1st accused was the wife of the deceased, with whom the deceased had marital problems, while the 2nd accused was an employee of the deceased and the 1st accused. The 1st and 2nd accused were, according to the prosecution, having a love affair that was so pronounced that the 2nd accused would be seen sleeping in the house of the 1st accused despite it being a well-known fact that the deceased and 1st accused were in a relationship.
5. The evidence of PW1, Dennis Gichana Marage, was that he had been with the deceased 3 days before his death. He had seen the 1st accused hitting the deceased, and that as he escorted the deceased to his house, he had seen the two accused persons hiding in a dark corner eavesdropping on the conversation between him and the deceased. The deceased was found dead two days later.
6. The evidence of PW2, Carolyn Kagesi, the 1st accused's cousin, was that she had been informed that the deceased and the 1st accused had been having issues to the extent of the 1st accused injuring the deceased and clearly stating that she would kill him, and 2 weeks later he met his death. PW's evidence was that the deceased and 1st accused were having marital problems. She also testified that the deceased had told him that the 1st accused would finish him, a day before the deceased met his death.
7. The evidence of PW4, Charles Wanyonyi, according to the state, confirmed the open affair between the accused persons. He also confirmed the unstable relationship between the 1st accused and the deceased and identified the body of the deceased to the doctor who performed the post mortem.
8. The medical evidence adduced by the state, according to Ms. Keli, supported the prosecution case that the two accused persons had murdered the deceased. The evidence, which was produced by PW8, Dr. Raymond Churyai showed that the deceased died due to manual strangulation. This was evident from the way the sheet around the deceased's neck was tied, in a horizontal manner, and the lacerations on the neck and head of the deceased. Photographs of the deceased also confirmed the prosecution case that the deceased had been strangled.
9. Ms. Keli's submission was that this was a case based purely on circumstantial evidence. It was her submission that from the circumstantial

evidence, the inference of guilty pointed to the accused as the persons who had committed the offence. This was in light of the fact that the 1st accused had been having several disagreements with the deceased; she had been violent against the deceased several times, and had even threatened to kill him. This, coupled with the fact that the two accused persons were having an affair and were seen eavesdropping on the deceased's conversation with PW1 was, in the prosecution's view, demonstration of the fact that they were planning to kill him.

10. In response, Mr. Sang for the accused submitted that the prosecution had failed to establish a prima facie case against the accused. None of the witnesses had testified that they saw the two accused persons at the scene of crime. PW1 to PW6 all dwelt on the relationship between the deceased and the 1st accused person. None of them testified to seeing the murder being perpetrated.

11. Counsel further submitted that the prosecution had failed to produce the bed sheet and the stool that were allegedly at the scene of crime. According to Mr. Sang, the non-production of these items must be construed adversely against the prosecution.

12. Learned Counsel also took issue with the post mortem report, noting that the doctor had confessed to not having specialized training in the field of pathology. Counsel relied on the decision in **R. vs. Billow Abdi Dulle Nairobi High Court Criminal Case No.57 of 2004** to submit that there was a need for specific elements of every charge to be stated to enable the accused defend himself. His submission was that suspicion, however strong, cannot provide a basis for inferring guilt. He urged the court to find that the case is based on circumstantial evidence and suspicion with no iota of evidence against the accused, and to acquit the accused persons in line with section 306 (1) of the CPC.

13. I have considered the prosecution evidence and the submissions of Learned Counsel on whether or not the accused have a case to answer. I note that the case against the accused is purely circumstantial, no-one having testified to having seen them commit the offence with which they are charged. However, as has been held in various cases, circumstantial evidence can sometimes be the best evidence see for instance **Neema Mwandoro Ndurya vs R (2008) eKLR**.

14. At this stage, all I am required to do is to inquire whether or not the prosecution has established a prima facie case against the accused. As for what amounts to a prima facie case, see **Ramanlal Trambaklal Bhatt vs R [1957] E.A 332 at 334 and 335** relied on by the state, in which the court stated:

“It may not be easy 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.”

15. Similarly, in **R vs Jagjiwan M. Patel and Others (1) T.L.R. (R) 85** the court stated that:

“.....all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

16. In this case, the circumstantial evidence adduced against the accused raises a prima facie case that warrants their being placed on their defence. The 1st and 2nd accused were lovers, even though the 1st accused was also in a relationship with the deceased and, according to PW1, was his wife. The 1st accused had been seen to assault the deceased, and had been heard to threaten to kill him. The night before he was found dead, the 1st and 2nd accused had been seen listening to a conversation between the deceased and PW1. The evidence of the medical doctor discounts the suicide theory, as do the photos of the crime scene which show the deceased standing on a stool.

17. Having taken into consideration the evidence before the court, I am satisfied that the prosecution has made out a prima facie case to warrant placing the accused on their defence. At this stage, I am not required to decide whether or not the evidence before me is weighty enough, if believed, to prove the case beyond reasonable doubt. This determination can only be made after the case for the defence has been heard.

18. I am therefore satisfied that the prosecution has made out a prima facie case against the accused. I accordingly place the accused on their defence in accordance with section 306 of the Criminal Procedure Code.

19. I also wish to inform the accused of their right under section 306 (2) of the Criminal Procedure Code to inform this court whether they intend to give a sworn or unsworn statement in their defence and whether they intend to call any witnesses.

Dated Delivered and Signed at Kericho this 31st day of January 2018.

MUMBI NGUGI

JUDGE