



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL CASE NO 4 OF 2016

REPUBLIC

VERSUS

C N M

RULING

INTRODUCTION

1. The Accused person herein, C N M, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 9Laws of Kenya). The particulars of this offence were that on 21st October 2016 at unknown time within Taita Taveta County, he murdered H M (hereinafter referred to as “the deceased”).

2. He pleaded not guilty to the charge and the trial of the case proceeded. On 5th December 2017, the prosecution closed its case after calling a total of eight (8) witnesses.

3. The Court directed counsel for the State and counsel for the Accused person to file their respective Written Submissions on the question of whether or not the Accused persons had a case to answer. The Accused filed his Written Submissions dated 15th February 2018 on 16th February 2018. The State informed the court that it would not file Written Submissions but that it would instead rely on the evidence that had been adduced during the trial.

LEGAL ANALYSIS

4. Through his learned counsel, the Accused person contended that the case had not been made out to require him being put on his defence. He submitted that the evidence that was adduced by the Prosecution witnesses was contradictory leaving many gaps and that no evidence was adduced to demonstrate there was bad blood between him and the deceased sufficient to have proven malice aforethought. He further contended that Prosecution called irrelevant witnesses and left out relevant ones.

5. R N (hereinafter referred to as “PW 1”), a minor aged thirteen (13) adduced unsworn statement. She testified that she was the deceased cousin, as their mothers, D W (hereinafter referred to as “PW 2”) and the deceased’s mother, T M M (hereinafter referred to as “PW 1”) were biological sisters.

6. PW 1 further testified by the time of the deceased’s death, they attended [particulars withheld] Primary School where they were both in Class Seven (7). Her evidence was that on the material day, on 21st October 2016, she saw the deceased at school and that they left school together at around 5pm and headed home.

7. She stated that they parted ways when they got to the shops at Msorongu. She told the court that there were several routes to their homes but they used the one through the shops. She averred that the deceased was alone and she told her that she was going home. She contended that the following day was a school day but because she did not attend, she did not know if the deceased attended school.

8. In cross-examination, she stated that she knew of the “I go games” and that they took place the following day, on 22nd October 2016. She denied that the deceased spent the night at their home on the night of 21st October 2016 so that they could attend the “I go games” the following day. She, however, told the court that there were times the deceased used to sleep over at their house and they would go to school together the following day.

9. She added that when she parted ways with the deceased on the evening of 21st October 2016, the deceased entered into Mr Mwakio’s shop to purchase soap. She did not enter the shop with the deceased and also did not see the soap the deceased bought.

10. According to T M M (hereinafter referred to as "PW 2"), the deceased was the eldest of her three (3) children and she came with her when she got married to the Accused person. Her other children were J M and A M. She stated the last time she saw the deceased alive was on 21st October 2016, a Friday and a school day. She testified that on the said date, the deceased, who was in the company of her younger brother, J M, left home at 6.30 am and walked to school. On other days, they would go to school using the Accused person's Motorbike. Her evidence was that the deceased would get home between 7.00pm and 7.30 pm while her brother would reach home at about 5.00pm.
11. She testified that the deceased informed her that she would go to her aunt's house at [particulars withheld] Village after school and spend the night there. Her aunt, D W (hereinafter referred to as "PW 3") was PW 2's younger sister. She told the court that on the material day, J M came home around 5pm from school as was the norm since he was in class two and hence would arrive home earlier than the deceased. However, the deceased did not arrive at her usual time and she got worried.
12. She asked the Accused person to call PW 3 the following morning on 22nd October 2016 and she heard PW 3 tell him that the deceased was at her place. It was her evidence that although the phone was not on loud speaker, she overheard the deceased crying in the background and PW 3 scolding her that she was being looked for while she was still at her place. She added that she overheard PW 3 tell the deceased that she would finish her that day.
13. She said that she asked the Accused person to go and save the deceased since she suspected that PW 3 had disciplined her beyond what was reasonable. She testified that the Accused threatened her that if she went to Chakaleri to look for the deceased she would find her other two children dead. She said that she was so confused by the Accused person's threat that she stayed at home.
14. Her further evidence was that the Accused person stayed home until about 1pm when he left with his motorbike going to Msorongongo to look for the deceased. She said that they lived in the middle of the forest hence they did not have any close neighbours, the nearest was one (1) kilometre. She testified that the Accused came back home at about 5pm not having found the deceased.
15. She added that the Accused person's sister, one F M who stayed at Shilanga, near the place the deceased was found came to their home shortly after the Accused person had arrived carrying a panga. She said that the said F was looking for the deceased in order to discipline her for inserting fingers in her buttocks.
16. She further stated that the accused instead of leaving immediately, he started cleaning the house and fetching firewood which was unusual according to PW 2 as he never did any chores. She told the court that he finished around 12.30 and they had lunch together before he set off to fetch water from the borehole in Nyangoro. She testified that the borehole was approximately two and a half (2 ½) hours away from their house and the accused set off with six containers.
17. She said that the accused came back after about ten (10) minutes and when she asked why he had returned so soon, he told her that he had found the deceased's body on top of a culvert and he was carrying her school books. She said that the Accused person read her the names on the books confirming they belonged to the deceased. She did not read the books herself.
18. She identified the books that were adduced as evidence by the Prosecution, which were in a red paper bag and not in a purple one that was tendered in evidence.
19. In her Cross-examination, she stated that PW 3's children would accost the deceased on her way home and invite her to their home. She told the court that although she has never attended the "I-go games" on Saturday 22nd October 2016, she listened to the proceedings over the radio since it was aired on KBC. It was then that she heard the deceased introduce herself as "H M" but she was prevented from presenting her poem. It was her evidence that one "**Mama Sani**" informed her that the deceased was prevented from presenting her shairi (poem).
20. She also changed her testimony and told the court that the Accused person that he stayed home and did his charcoal burning, and that he left the house to go to the forest to continue his charcoal burning from 7.00am and returned at 10.00am.
21. She also that her son J M is the one who informed her that the Accused burnt the books that he had come with from the culvert in their kitchen. She said that Jones showed her the books that had been burnt and as a result, the books that were produced in court must have come from school and she was seeing them for the first time in court.
22. PW 3 testified that the Accused and PW 2 had been married for approximately five (5) years and that the deceased would visit her house for sleepovers frequently sometimes even in the middle of the week. She was emphatic that on the material day, the deceased never went to her house and neither was she expecting her.
23. However, during her Cross-examination, she stated that there were no particular days when she would expect the deceased who would just show up. She added that her children did not visit PW 2's home. She said that PW 2's phone was not working and they would therefore not talk over the phone. She denied that the Accused person or PW 2 called her on the material date. She was categorical that she did not have the accused's phone number neither did he had hers.
24. She stated that on 22nd October 2016, she attended the "I go games" which were held at Luma, approximately one (1) kilometre from Chakaleri together with her children, C and PW 1 and several ladies from her village. She said that the games took place between 8.00am and 3.00pm and she stayed until the end of the games. She denied seeing *Mama Sani* at the games and that there were about thirty (30) people present at the games.
25. C M T (hereinafter referred to as "PW 4") was a Board member of [particulars withheld] Primary School. He was married to PW 2's niece. He testified that his daughter, D, was also in the same class as PW 1 and the deceased at [particulars withheld] Primary School. He told the court that his daughter informed him that D had seen the deceased in school in the company of PW 1 on Friday 21st October 2016.

26. He stated that although the children of [particulars withheld] Primary used to attend the “I go games” in previous years, he was aware that were not allowed to attend the said games on 22nd October 2016. He stated that the only children who were allowed to attend were those who sang, recited poems and would only attend if accompanied by a teacher. He said that he did not know if the deceased recited poems.

27. He said that he was at home on 22nd October 2016 at about 2.00pm when the Accused person called him on the phone and asked him to inquire from his daughter D if she had been together with the deceased in school on that day. PW 4 told the court that the children that is PW 1, the deceased and D used to attend school on Saturday from around 8.00am to 12.00-1.00pm. He testified that D informed him that she had not seen the deceased in school on Saturday, but the deceased was in school on Friday and had left school in the company of her cousins from C. He confirmed that it was the Accused person who went to report the matter to the police after the deceased’s body was found in the culvert.

28. It was evident that the deceased who was aged thirteen (13) years was killed in a most cruel manner. The Post-mortem examination that was conducted on 24th October 2016 at Wesu Sub-County Hospital by Dr Mohamed Machi (hereinafter referred to as “PW5”), in the presence of the deceased’s mother, PW 2 and W M M, showed that the deceased died due to snapping of the neck and multiple head injuries on the occipital. She had injuries on the face and lower limbs.

29. The deceased was found partially hidden inside a road culvert along Mwanda-Mwakitau road. Her body had undergone partial decomposition and had general bloating and degloving of the left hand and the trunk. PW 5 told the court that he did not see the need to conduct internal examination because the cause of death was obvious. He further stated that he was unable to confirm whether the deceased had been defiled because of the state of decomposition.

30. Although DNA samples were taken from the deceased’s body, no analysis was done at Wesu Sub-County Hospital as it did not have the facilities to do so. The samples were to be taken to Mombasa but PW 5 did not have the results.

31. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

32. In this particular case, there were inconsistencies and contradictions between the testimony of the star witness, PW 2 and all the other Prosecution witnesses. She stated that the Accused person burnt the deceased’s books and denied that the books that were shown to her during trial belonged to the deceased.

33. She had also stated that the Accused person told her that he found some clothes where the deceased was found. She identified a black and cream skirt as having belonged to PW 1, a beige skirt that belonging to C S, PW 1’s sister and a purple and blue skirt which belonged to the deceased.

34. Strangely though, when PW 3 was shown the same clothes she told the court that she did not recognize them at all. She also told the court that the deceased would not come over to her house in home clothes, only school uniform which she would sleep in and go to school in the following day.

35. It was not clear from PW 2’s and PW 8’s evidence as to who really burnt the deceased’s books and clothes, if at all. PW 8 also stated that he visited PW 4 to enquire if the Accused person called him to establish the deceased’s whereabouts but he said they never spoke. However, PW 4 confirmed that the Accused person called him enquiring about her whereabouts.

36. PW 2’s evidence as to where the Accused person really went to was unclear. She did not adduce any evidence to point to the fact that the Accused person went anywhere near the culvert. No witness also adduced evidence to demonstrate that he went near there. This was important because PW 2 stated that the culvert was in an open place and it was found in broad daylight.

37. The person who discovered where the body was called as a witness to the case herein. That was, however, not fatal because it was a fact that the deceased’s body was discovered hidden in a culvert. What was pertinent herein was that no one said that the deceased was the first person to discover where the body of the deceased was.

38. Indeed, PW 3 told the court that on 23rd October 2016 at about 1.00pm she received a call from PW4’s wife, called E, informing her that the deceased’s body had been found.

39. PW 2’s assertions that the deceased had told her on 19th October 2016 that people had collaborated to kill her, even asking her to accompany her to school in order to confirm from Mr. Mwakio were not proven. Her assertions that Mr Mwakio had conspired with PW 3 to kill the deceased because the deceased wrote what PW 2 considered “**extremely good compositions**” was not proven. Indeed, PW 2 had contended that the deceased used to defeat PW 3’s children in school.

40. Regrettably, Wanyigha Kilolo (hereinafter referred to as “PW 6”) merely stated that he knew the Accused person physically but only got to know his name when he came to court Sophia Wakio (hereinafter referred to as ‘PW 7’) stated that she never attended the “I- go games” on 22nd October 2016 and could not therefore confirm whether or not the deceased was at the said games.

41. In addition, PW 8 did not get the phone records from Safaricom in order to establish who was telling the truth between the accused, PW 2, PW 3 and PW 4. The phone records would have also assisted the court in establishing if indeed the accused called PW 3 on Saturday morning looking for the deceased.

42. The testimony on the "I go games" held on 22nd October 2016 was contradictory. PW 2 alleged that she heard the deceased on the radio and was told by PW 7 that the deceased was present at the games. PW 7 in her testimony denied this allegation and that she attended the games. Whereas PW 3 stated that she attended accompanied by her children and some neighbours but did not see the deceased. PW 4 in his testimony stated that he was a Board member of [particulars withheld] Primary School and that the children were not permitted to attend the games thus were in class on the material day. So this begs the question who of the four (4) witnesses was telling the truth.

43. It was unusual that PW 2 expected the deceased home early on 21st October 2016, despite the deceased having informed her earlier that she would be going to her aunt's house. The step father-daughter relationship between the Accused person and the deceased was not sufficient cause to prove motive. In fact, from PW 2's testimony, she appeared to have taken greater issue with the relationship between the deceased and PW 3 and her children on account of her child's good performance in school.

44. All in all, PW 2's testimony was full of contradictions and what appeared to be embellishments thus could not be sufficiently relied on by the court. When she testified, this court formed the opinion that she may have been mentally disturbed. Her evidence was inconsistent and incoherent and had to be stepped down on one occasion as her evidence was not making sense to the Prosecution.

45. Although the life of a young girl has been lost, justice demands that courts must consider whether indeed there is evidence that it is the accused person that killed her. The duty or burden is on the prosecution to establish or tender evidence that connects the accused to the crime.

46. Under Section 306 (1) of the Criminal Procedure Code (Cap 75 Laws of Kenya), the court is required to determine whether or not an accused person has a case to answer. In such an instance, if an accused person decides to remain silent and not tender any evidence in his defence, the evidence of the prosecution should be sufficient to sustain a conviction.

47. The test on whether or not the prosecution has laid down a *prima facie* case to warrant the accused being placed on his defence was established in the case of **Ramanlal Trambaklal Bhatt -Vs- Republic (1957) E.A. 332** 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."

48. Appreciably, an accused person ought not to be put on his defence if at the close of the prosecution's case, inference of his guilt cannot be remotely inferred. Circumstantial evidence can only be accepted when an Accused person's guilt can be inferred based on the evidence adduced by the prosecution in which case it can only be displaced by an Accused person giving his side of the story.

49. Clearly, this was a case that was based on circumstantial evidence. However, the evidence was purely speculative and based on mere suppositions and suspicions by PW 2 of what may have transpired on the material date. Whereas it was not required to demonstrate that the Accused person had any motive to unlawfully cause the deceased's death, it was obligated to demonstrate from the evidence of its witnesses that there was malice aforethought on the part of the Accused person.

50. Having perused the evidence that was adduced by the Prosecution and the Written Submissions this court came to the firm conclusion that the Prosecution did not adduce sufficient evidence that would satisfy the ingredients of malice aforethought as defined in Section 206 of the Penal Code to warrant the Accused person being put on his defence.

51. The Prosecution merely tendered evidence herein which merely raises suspicion. Such evidence is not adequate to establish that they committed the crime as was held in the case of **Sawe vs Republic [2003] KLR 364**. Though it is wrong to kill somebody, it is also wrong for the court to find fault in people against whom there is no evidence, or sufficient evidence.

52. It is unfortunate that no one will ever know exactly what happened to the deceased. Putting the Accused person on his defence to fill the gaps of the Prosecution case or as the Prosecution opined so that he can tell the court what exactly happened would be shifting the burden on him to show that he did not cause the death of the deceased when it had clearly not discharged its legal burden herein. This would be against the tenets of rules of natural justice that a person is presumed innocent until proven guilty based on evidence that has been presented before a court by a prosecutor.

53. Indeed, the burden of proof had not shifted to the Accused person as was envisaged in the case of **Julius Maina Ndirangu vs Republic (Supra)** and in Section 111(1) of the Evidence Act that provides as follows:-

"When a person is Accused person of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person Accused person shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the Accused person in respect of that offence."

54. In a nutshell, the Prosecution was unable to demonstrate that the deceased met his death as a result of the unlawful acts or omissions on the part of the Accused person or that the alleged unlawful acts or omissions were committed with malice aforethought or that he failed to prevent the unlawful death of the deceased.

55. With the evidence on record, this Court finds that the accused has no case to answer. No *prima facie* case was established against him. It is this Court's duty to acquit him and it does so under Section 306 (1) of the Criminal Procedure Code.

DISPOSITION

56. For the foregoing reasons, this court has no option but to find that the Accused person was not guilty of the offence that he had been charged with. This court therefore orders and directs that the Accused person be and is hereby acquitted under Section 306(1) of the Criminal Procedure Code and that he be set free forthwith unless he be held for any other lawful cause.

57. It is so ordered.

DATED and DELIVERED at VOI this 29th day of March 2018

J. KAMAU

JUDGE

In the presence of:-

C N M for Accused person

Miss Anyumba for State

Susan Sarikoki– Court Clerk