



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 70 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

JOSHUA KABUE KANAMPIU.....1ST ACCUSED

RICHARD MEME M'IRIME alias CHARIRI...2ND ACCUSED

RULING

1. The accused are charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. It was alleged against the accused that between the night of 17th and 18th December, 2011, at Inono village, Nathu Location, Igembe North of Meru County, they murdered **David Kamanja ("the deceased")**. The prosecution paraded a total of 6 witnesses.

2. **PW1 Lucy Kanamu**, the deceased's wife testified that on the night of 18th December, 2011 at about 1am, she was woken up by one Charles Kauna who told her to go and see where her husband had been beaten by one Chariri M'Itirime. She woke up one Rose Kagendo and requested her to accompany her to the scene which was about 1Km away. On arrival she found Chariri and Kirumu in the farm where they had beaten the deceased who was in a serious condition as he could not talk. She went back home and slept until the next morning when she informed the brothers and sisters of the deceased who went to the scene and found found that the deceased had died. In cross-examination, she testified that at the scene, she found 3 people, Chariri, Kibue and Kirimi and that Chariri (2nd Accused) told her that he had beaten the deceased.

3. When recalled for cross-examination, **PW1** told the court that Charles Kiuna who had called her on the material night did not tell her where he was when he saw the deceased being beaten. That she did not know who the watchman for the miraa farm on the material night was and that it was dark.

4. **PW2 Eusebio M'Mkubitu** told the court that on the morning of 18th December, 2011 at about 7am, he saw a dead body in his farm which he discovered to be that of the deceased. That he informed the area sub-chief who called the police. That although he heard that some people had been arrested, he neither knew who they were nor had he seen them kill the deceased.

5. **PW3 Charles Nkunja M'Etirikia**, the Assistant Chief of the area testified of having received a report from **PW2** that the latter had found a dead body in his farm. He went to the scene and identified the body as that of Daniel Mati. That he established that Joshua Kabue (1st accused) was the watchman in the farm of M'Timanyuru's farm. On enquiring from him as to what had happened, the 1st accused told him that 2 thieves had come to the farm at night and when he fought them one died. He arrested him, called the police and handed him over to the OCS. That although the deceased was killed in Murea's farm, he did not inquire from Murea who was the farm's watchman on the material night.

6. **PW4 Steven Baario** told the court that on the 18th December, 2011, he took alcohol with the deceased in some bar between 11pm and midnight. The deceased told him that there was some miraa which they should go and harvest. That they then went to the farm of Murea M'Thanyuki to harvest the Miraa. When the deceased entered the farm leaving him on the footpath, he saw Chariri M'rime and Miriti M'Atheru attack the deceased with a jembe handle and a panga. That there was full moon. The witness run home and hid in his miraa. The following morning he heard that the deceased had been killed.

7. **PW5 ASP Joseph Asuriu Obara** was at the time the OCS Mutuati police station. On 18th December, 2011, he received a report that there was a body lying at a miraa farm. He went to the scene, recovered the body and took it to Meru Hospital. That on 22nd December, 2011, he went to the mortuary and postmortem was conducted in respect of 2 deceased persons namely, Joel Muriungi and David Mati. He further stated that at page 1 of the post mortem he deleted the name of Joel Muriungi and inserted Mati because he realized that the 2 post mortem forms he had carried had the same serial numbers. That the one for Joel was done differently and have 2 different death certificate numbers. He produced the post mortem report in respect of Joel Muriungi

8. **PW6 Nicholas Koome**, a medical officer at Meru Teaching and referral hospital testified and sought to produce a duplicate post mortem report on behalf of Dr. Njuguna in respect of the body of David Mati. Its production was objected to and the court ruled that it will rule on its admissibility in this ruling.

9. The prosecution then closed its case and Counsels submitted on whether a prima facie case had been established.

10. Mr. Otieno, Learned Counsel for the 1st accused submitted that the prosecution had failed to prove its case to the required standard. That none of the prosecution witnesses saw the 1st accused assault the deceased. That the post mortem report produced was unacceptable because of the numerous alterations therein.

11. On her part, Mrs. Nataragwi, Learned Counsel for the 2nd accused submitted that PW1's conduct was suspect as it could not be that her husband was murdered yet she went to sleep only to report to his brothers the following morning. That the testimony of PW4 should be disregarded as he alleged that he had gone with the deceased to steal miraa that night, that there was full moon yet he had not stated so in his statement to the police. With regard to the post mortem report, it was submitted that the same was worthless as PW5 himself had stated that when he went for post mortem, he had forms of Joel cancelled for use in respect of Mati's body. Mrs Ntarangwi, however submitted that on the authority of **Kimweri v. Republic [1968] EA 452**, the court can still rely on other evidence other than the postmortem report as to the proof of death.

12. Mr. Namiti Learned Counsel for the State submitted that the prosecution had established a prima facie case against the accused. Counsel relied on the evidence on record. With regard to the post mortem report, Counsel submitted that the same was properly explained by PW5 and properly produced by PW6. Consequently, he urged the court to place the accused persons on their defence.

13. At the close of the prosecution case, a trial court must consider the evidence so far tendered by the prosecution to determine whether a prima facie case has been established to warrant the calling of an accused to defend himself. If no such case has been made out at that stage, then the trial court must acquit the accused person as is provided for under ***section 306 (1) of the Criminal Procedure Code***.

14. What constitutes a prima facie case was considered in the case of **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332**, where at pages **334 and 335** the court held:-

“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 would not be prepared to convict if no defence is made, but rather hopes the defence 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 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. Does the evidence in this case satisfy the threshold set above? Save for **PW4**, none of the prosecution witnesses witnessed the incident. **PW1**, the deceased's wife, testified that she was woken up at 1am by Charles Kiuna who informed her to go and see how her husband, the deceased had been beaten by Chariri M'Itirime. She woke up her neighbour, Rose Kagendo, who accompanied her to the scene. On reaching the scene, she found that the deceased had been badly beaten and could not talk. She left and went back to sleep. That she saw Chariri (2nd accused) and one Kirumu at the scene and that the 2nd accused told her to take the deceased which she declined because of his condition. She said that the 2nd accused was a brother to the deceased and had hired out his father's land and that that is why they used to fight.

16. The incident occurred at night. **PW1** told the court that it was dark. She did not state how she identified or recognized that the person she was talking to at that time was the 2nd accused. Even if she knew him as the brother of the accused, it was incumbent upon the prosecution to establish how or the means by which **PW1** identified or recognized the 2nd accused. In any event, she never testified that she saw any of the accused assault the deceased.

17. Another thing is the conduct of **PW1**. In all probability, can a wife find her husband badly beaten to the point of death, just look at him, turn back and go to sleep soundly till morning when she tells her husband's brothers? Is such conduct plausible in all probability or consistent with what is expected of a wife or a close relative of such a victim in normal circumstances or won't she have screamed for help, either at the scene or when back in her homestead. It is my view that, in a normal case scenario, the wife of the deceased would have called out for help that very night and that on the following morning, be the very first to notify the area manager or sub-chief. This was not the case in the instant case which casts doubt in the testimony of **PW1**.

18. **PW2 and PW3** corroborated each other. **PW2** testified that he found the body of the deceased lying on his farm on 18th December, 2011 at about 7am. He then informed **PW3** who came to the scene. I find it difficult to believe the testimony of **PW3** about what he was allegedly told by the 1st accused which led him to arrest him. In his statement to the police, he never indicated it although it was crucial. It is doubtful if what **PW3** told the court is what he got from the 1st accused, to wit, that 2 thieves invaded the land of Murea M'Thianjuri the previous night and the fight that ensued between them left the deceased dead. In any event, that cannot be admitted in so far as it tends to be a confession as it is not in accordance with the provisions of ***section 25A of the Evidence Act, Cap 80 of the Laws of Kenya***.

19. **PW4** alleged to have been with the deceased at the material. He admitted that he was drunk at the time and that that was the very first time he took alcohol. That once he saw 2 assailants jump over the fence to Murea's farm where the deceased had entered to harvest Miraa, he ducked into a sugarcane plantation which also had banana stems.

20. In all probability, is it possible for a drunk person, a first time drunk for that matter, under cover of darkness in the midst of a sugarcane and banana bush be able to positively identify a person. I note here that while **PW1** testified that there was darkness that night, **PW4** stated that there was full moon. He did not tell the police that it was full moon. He admitted that he first stated that fact in court when giving his testimony.

21. PW5 and 6 on the other hand were the then OCS Mutuati police station and a doctor attached to Meru Level 5 hospital. PW5 produced a copy of the post mortem report of Joel Muriungi. This court's opinion is that the evidence of PW5 is of no use. He testified and produced evidence relating to a different body than that of the deceased. **PW6** disclaimed the post mortem report in respect of the body of the deceased in this case.

22. The court had directed that the original postmortem report in respect of the body of Joel Muriungi be produced. It was not. Further, it was not established where the copies of the original postmortem reports for the body of the deceased and that of Joel Muriungi were. I reject the production of the postmortem report for reasons that the alterations were not satisfactory and for the failure to explain where the original was.

23. As if the foregoing was not enough, very crucial witnesses were not called by the prosecution. There was Murea M'Thianjuri, the owner of the farm where the deceased was allegedly killed and Charles Kiuna who allegedly called **PW1** and informed her that her husband had been killed by the 2nd accused. There was also Rose Kagendo who allegedly accompanied **PW1** to the scene on the material night. There was no explanation that was offered why these witnesses were not called.

24. The three were important as Murea would have told the court who the watchman in his farm at the material night was, Charles Kiuna would have told the court whom he saw killing the deceased and where he was at the time while Rose Kagendo would have either corroborated or otherwise the testimony of **PW1**.

25. The prosecution witnesses admitted that these crucial witnesses were freely available in the village but they were not called. The only inference in law is that the evidence they would have tendered would have been against the prosecution and that is why they were shielded from the court.

26. In a murder trial, as in all other criminal trials, the prosecution bears the onus of proving the case against an accused beyond reasonable doubt. The prosecution must lay bare evidence capable of assisting the court to make a finding that the case for the prosecution warrants an accused being put on his defence. Certainly such is not the case in the present case. At this stage, there are many gapping holes in the prosecution case as I have already shown above. The accused cannot be called upon to fill up those gaps. In my view, the evidence so far tendered is so weak that no conviction can be based thereon if the accused decided to remain silent and offer no defence.

27. In the circumstances, I am satisfied and so hold that the prosecution has failed to establish a prima facie case on which this court by any standards, while properly directing its mind to the law and the evidence, cannot convict the accused on the evidence tendered.

28. Accordingly, I acquit the accused of the charge of murder pursuant to Section 306 (1) of the Criminal Procedure Code, CAP 75 of the Laws of Kenya.

DATED and DELIVERED at Meru this 12th day of April, 2018.

A. MABEYA

JUDGE