



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 32 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

ANNASTACIA NTHAMBI ATANUS.....ACCUSED

RULING

1. The accused herein **Annastacia Nthambi Atanus** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 14th day of September, 2012 at Mukumuku village, Matetani sub-location, Kangundo District in Machakos County murdered **Catherine Kavoo Wambua** alias **Serah Kavuu Wambua**.

2. The case for the prosecution is that on the material date the deceased and her relatives were coming from a family meeting and as they approached their home, the accused herein and her sister hurled insults at them to the effect that they should not be in a celebratory mood about an impending wedding since their female relatives would be brought in coffins. The accused's sister further claimed that one of the deceased's mother in law was a witch. The deceased and her group decided to confront them over the insults whereupon the accused dashed into their home and came while armed with a knife and stabbed the deceased. The deceased was rushed to Kangundo District Hospital where she passed on. A post mortem was later conducted and the cause of death was established to be right sided massive haemothorax and blunt injury due to penetrating, stab wound. After investigations, the accused was arrested and charged. Eight witnesses were called by the Prosecution.

3. At this stage of the proceedings the prosecution is under a duty to establish a prima facie case so as to require the accused person to be placed on her defence and to conduct her defence in the matter. In the celebrated case of **RAMANLAL TRAMBAKLAL BHATT =VS= REPUBLIC** [1957] EA 332 the court of Appeal gave the definition as to what amounts to a prima facie case as follows:-

“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, on full consideration might possibly, be thought sufficient to a conviction. This is perilously near to suggesting that the court would not be prepared to convict if no 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 is true as Wilson J said that the court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case. Conclusively; that determination can only properly be made when the case for the defence has been heard. 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 evidence could convict if not explanation is offered by the defence.”.

4. Going by above definition of a prima case, it follows that the strength of the evidence establishing a prima facie case must be the kind of evidence upon whose basis the court could convict if the defence says nothing in rebuttal. At this stage the prosecution does not have to prove its case beyond reasonable court since proof beyond reasonable doubt is required when the defence has also given its evidence or has closed its case.

5. The charge preferred against the accused herein is that of murder contrary to Section 203 as read with Section 204 of the Penal Code of the Penal Code. Section 203 of the Penal Code provides that any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and shall be liable to be sentenced to death as provided for under Section 204 of the Penal Code. The prosecution must prove the fact of death and then proceed and establish the essential ingredients of the offence namely malice aforethought and finally proceed to establish accused as the culprit. The key Section relating to *mens rea* (malice aforethought) is Section 206 of the Penal Code which defines malice aforethought in terms of any one of the following circumstances on the part of the accused:

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused.

The prosecution's duty is to prove one or a combination of the above circumstances and in the process the element of malice aforethought will be deemed to have been established. To this end therefore, it is now imperative to analyse the evidence on record with a view to establishing whether or not the same meets the threshold set out in the case of **BHAT =VS= REPUBLIC (Supra)**.

James Kamanza Mutua (PW.1) testified and stated that on the 14/09/2012 he and several family members were on their way home after attending a wedding preparation for another relative when the accused herein and her sister one Muniyiva engaged them in a verbal confrontation which degenerated into an ugly scene whereby the accused rushed to her home and armed herself with a knife and sought to stab him but the deceased stepped in and in the process the accused stabbed her from the back fatally wounding her. **Miriam Muloko Mbuvi (PW.2) Mbeneka Mutua (PW.3), Stephen Mutinda Kamanza (PW.4)** all stated that they witnessed the incident.

PC. Geoffrey Chweya (PW.8) who was the investigating officer stated that he visited the scene and recovered a blood stained knife from under a bed in one of the bedrooms inside accused's home. He produced the said kitchen knife as exhibit one. He finally confirmed that the accused intended to stab James Kamanza Mutua but when the deceased rushed to his help she stabbed her instead.

Dr. James Muoki (PW.7) testified that he conducted a post mortem on the body of the deceased and established that the stab wound had penetrated through the right lung. He formed the opinion that the cause of death was massive haemothorax and lung injury due to a penetrating stab wound. He also established the weapon to have been a sharp and pointed object. He produced the post mortem examination report as exhibit 2.

Submissions:

6. Learned Counsel for the defence submitted that the prosecution has not made out a prima facie case as the witnesses who identified the body during post mortem were not called to testify. It was further submitted that the death if any had been a misfortune since the accused had no malice aforethought towards her as there had been no enmity between them. It was finally submitted that the alleged murder weapon namely a knife was not properly dusted for finger prints to link the accused to the crime and that most of the witnesses did not identify it in court.

7. Learned Counsel for the prosecution submitted that the cause of death had been established and that it was the accused who had committed the unlawful act which caused the death of the deceased. It was also submitted that the accused had the intention to commit the murder when she rushed to her home and came armed with a knife and after the deceased had intervened and led away James Kamanza Mutua the accused stabbed her from behind yet she was unarmed and bore no threat to her. It was finally submitted that the injuries inflicted on the deceased left no doubt that accused intention was to inflict grievous harm to the deceased and which led to her death and hence a prima facie case has been made out against her to be put on her defence.

Determination

8. I have considered the evidence adduced by the prosecution witnesses as well as the submissions. Indeed at this stage the ruling on a prima case need not be that elaborate where the court is of the view that the defence is required to make a defence so as not prejudice the defence case. The prosecution witness namely **PW.1, PW.2, PW.3** and **PW.4** all testified and stated that they were from a family wedding preparation when a confrontation ensued between them and the accused herein over a spat involving PW.1 and the accused which degenerated into insults forcing the accused to rush to her home and come while armed with a kitchen knife. The accused's attempt to stab PW.1 were thwarted by the deceased who led PW.1 away and the accused who was still in a fit of rage stabbed, the deceased from behind fatally wounding her. The witnesses gave an account of what they saw and heard at the scene. The evidence of the prosecution witnesses placed the accused at the scene of the crime. Hence if the accused were to elect to remain silent in defence then the evidence tendered appears to me to be sufficient to sustain a conviction. This then calls for the accused to rebutt the prosecution's case evidence by being called upon to make a defence.

9. In the result it is the finding of this court that the prosecution has made out a prima facie case against the accused to require her to make a defence. I find the accused has a case to answer and is now called upon to elect to conduct her defence in line with the provisions of Section 306 (2) of the Criminal Procedure Code.

Orders accordingly.

Dated and delivered at Machakos this 30th day of May 2018.

D. K. KEMEI

JUDGE

In the presence of:

Machogu - for the State

Kyalo for Kavita - for the accused

