



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 2 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

DALMAS CHACHA MASAI.....ACCUSED

RULING

1. **Dalmas Chacha Masai**, the accused person herein, was charged with the murder of **Mwita Omae Mwita** (hereinafter referred to as '**the deceased**') before this Court on 02/02/2016. It was alleged that on 25th day of December 2015 at Masangora Trading Centre in Kuria West District within Migori County in the Republic of Kenya the appellant murdered the deceased. The accused person denied the information and a trial was ordered.

2. Three prosecution witnesses testified in a bid to prove a *prima facie* case against the accused person. **PW1** was **Daniel Gesondo Mwikwabe**, a brother to the deceased. **Daudi Mwita Mwikwabe** testified as **PW2** and he was a brother to the father of the deceased. **Dr. George Sangai** who conducted the post mortem examination for the deceased testified as **PW3**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The evidence of PW1 and PW2 was taken before **Hon. H. Omondi, J.** and upon compliance with **Section 200** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya**, parties agreed and indeed proceeded with the hearing from where it had reached. This Court therefore took the evidence of PW3.

4. PW1 and PW2 were differently called in the evening of 25/12/2015 and informed that the deceased had been killed at Masangora Trading Centre. They both rushed there and found out that indeed the deceased had died, and the body was lying in a trench just off the road. They both witnessed the Assistant Chief call the police from Kehancha Police Station who visited the scene and collected the body of the deceased and took it to the Kuria District Hospital Mortuary for preservation and post mortem examination.

5. It was PW3 who conducted the autopsy on 26/12/2015 where he observed a penetrating sternal wound about 5cm and severe blood loss and clots in the pleura. He opined that the cause of death was bleeding and damaged pleura and lungs due to a penetrating injury. He filled in a Post Mortem Report which he produced before Court as an exhibit. PW3 also produced a Mental Assessment Report for the accused person which was prepared by his colleague one **Robi Wangwi Chacha**, a Clinician, which report certified that the accused person was fit to stand trial.

6. The prosecution then closed its case. At this point in time this Court is called upon to weigh the prosecution evidence on record and ascertain whether it establishes a *prima-facie* case (See the case of **Ramanlal Trambaklal Bhatt v. R (1957) E.A. 332**). In doing so this Court must have an eye on the ingredients of the offence of murder. There are three ingredients of the offence of murder which are: -

(a) *Proof of the fact and the cause of death of the deceased;*

(b) *Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence; and*

(c) *Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.*

7. With those ingredients in mind this Court must remain alive to the fact that the prosecution relied on circumstantial evidence based on a dying declaration and that the Court must further satisfy itself that the evidence attained the required legal bar. In the case of **Solomon Karimi -vs- Republic (2014) eKLR** the Court of Appeal in considering instances where a Court relies on circumstantial evidence expressed itself as under: -

“7. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy the tests that:

i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

8. Further in the case of **Ndurya v R (2008) KLR 135** the Court of Appeal held that before convicting someone based on circumstantial evidence, the Court has to be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt. (See also **Sawe v. Republic (2003) KLR 364** and **R v. Kipkering arap Koske and Another 16 EACA 135.**)

9. In arriving at a finding as to whether the prosecution has established a *prima facie* case for the accused person to be placed on his defense, this Court is not only called upon to look at whether some evidence was adduced but the Court must go further to look at the credibility, the weight and the sufficiency of that evidence vis-à-vis the ingredients of the charge and whether such evidence can hold a conviction even in the absence of any explanation from the accused person before deciding to call upon the accused person to render a defense. As said in the case of **Ramanlal Trambaklal Bhatt** (supra) ‘*a mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence...*’

10. By applying the legal principles to the evidence in this case the fact of the death of the deceased was proved by the three witnesses as well as the cause of death. However, there was no scintilla of evidence of who stabbed the deceased thereby killing him. PW1 and PW2 stated that they only heard people at the scene of murder say that the deceased had been stabbed by the accused person. Respectfully, that evidence was hearsay hence inadmissible.

11. The upshot is that there is no evidence connecting the accused person with the death of the deceased and as such the prosecution has failed to establish any *prima-facie* case against the accused person. Consequently, the accused person has no case to answer. Pursuant to **Section 306(1)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya, I find that the accused person herein **Dalmas Chacha Masai** is **NOT GUILTY** of the murder of **Mwita Omae Mwita** and he is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of June 2018.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Kisia Counsel for the accused person.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke– Court Assistant