



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 6 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

DENIS NTHENGE CHARLES.....ACCUSED

RULING ON A CASE TO ANSWER

1. The accused Denis Nthenge Charles was charged with Murder contrary section 203 as read with Section 204 of the Penal Code. The particulars were that the accused on the night of 12th January, 2009 at Ngelani Sub-Location Ngelani Location in Machakos District of the Eastern Province murdered Albanus Mutisya Kavita (*“the deceased”*).

2. A plea of not guilty was entered on 18th February, 2009. The prosecution called a total of five (5) witnesses. It emerged from the evidence that **Antony Kioko Mackenzie (PW1)**, **Nicholas Mbithi (PW2)** and **John Kyalo Mailu (PW3)** that they were walking home together with the deceased on the material day when the accused joined them and later started walking about 3 metres ahead of them with the deceased. On reaching a junction, the deceased asked them to wait for him. PW1 stated that on turning, he heard the deceased screaming and saw him holding his stomach. The deceased told them that he had been stabbed on the stomach. The deceased fell after pulling out the knife from his stomach. The accused was said to have fled. PW2 saw the accused lift his hand and stab the deceased. He could see because there was full moon and he was standing about 3 metres from the deceased and the accused. The accused thereafter took off. PW3 heard the deceased tell the accused that his business was down and that they should meet the next day but before he could finish, the accused stabbed him on the abdomen. The deceased screamed and removed the knife and threw it on the ground. PW3 used a t-shirt to tie the wound. PW4, PC Benard Onjula went to Mtituni Chief Camp in company of PC Ashinda on 13th January, 2009. The accused had been arrested by members of the public. He was handed over to PW4. He was informed that the accused had stabbed the deceased. He was charged with a holding charge of assault and later murder after the deceased succumbed to the injuries on 14th January, 2009. PW5, Dr. John Mutunga conducted a postmortem on the deceased. He confirmed that the deceased had a wound on the abdomen which had already been stitched. He found massive accumulation of blood in it. He also found sutured wounds on the liver and small intestines. He thereafter arrived at a conclusion that the cause of death was hemorrhage shock due to massive bleeding.

3. At the close of the prosecution case, the defence made submissions on a case to answer. It was submitted on behalf of the accused that it is not in dispute that the deceased died as a result of being stabbed in the stomach but that the prosecution failed to prove that the wound was caused by the accused. It was further submitted that the prosecution has not adduced evidence to prove elements of malice aforethought as provided under Section 206 of the Penal Code thus:

“Malice aforethought shall be deemed to be established by evidence establishing any one of the following circumstances-

i. 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;

ii. 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 might not be caused;

iii. An intent to commit a felony;

iv. An intention by the act or omission to facilitate the flight or escape from the custody of any person who has committed or has attempted to commit a felony.”

4. This court’s concern at this stage of the proceedings is whether or not a prima facie case has been made out by the prosecution. A prima facie case is one in which a reasonable tribunal directing its mind to the law and evidence placed before it can convict an accused person in

the absence of evidence presented by the accused to the contrary. Hence in a nutshell the evidence so far tendered must be sufficient to sustain a conviction even if the accused elects to remain silent in defence. I have given due consideration to the prosecution evidence and the submissions tendered and without delving into the merits of the case, I find that a prima facie case has been made by the prosecution against the accused person which is sufficient to require him to answer. In the circumstances, I find the accused to have a case to answer.

It is so ordered.

Dated and delivered at Machakos this 26th day of July,2018.

D.K. KEMEI

JUDGE

In the presence of:-

Machogu - for the state

Langalanga for Ndiwa - for the Accused

Josephine - Court Assistant