



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.34 OF 2011

EUTICUS MIMAMO WAITHAKA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

Euticus Mimamo Waithaka was on 16th November, 2011 charged with the murder of Patrick Kanyi Macharia. It was alleged that he committed the offence on 25th October, 2011 at Munore village, Igano Location Mukurwe-ini District with Nyeri County.

The prosecution called 12 witnesses to support their charge against the accused person. 11 of them testified before Justice Mativo, and I took over at the point the 12th one – the Investigating Officer was to testify.

Upon his testimony the prosecution closed its case. It is now the duty of the court to determine whether the prosecution has established a *prima facie* case of murder contrary to section 203 as read with 204 of the Penal Code to warrant his being put on the defence.

The guiding principles are set out in the classic case of **Ramanlal Trambaklal Bhatt -Vs-Republic (1957) EA 332** where it was held: -

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 in 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.....”

Both counsel for the accused and the state made rival submissions. The facts of the case as set out by prosecution are that on the night of 24th October 2011, the deceased and his cousin Robert Kanyi Gichoho PW2 had drinks at View Point Bar in Mihito Shopping Centre.

They left together at around 9.30pm and went home. They lived in the same homestead but different houses and parted ways at the gate.

PW2 went to sleep. The following morning, he was woken up by his wife PW1 –who told him that she had noticed that the stones that made up the deceased’s chimney had been removed. PW2 got concerned and went to check. He called out his cousin in vain. He called his mother who came. On checking on the door, it was open. He went in. The house was smelling of a pesticide. He entered the bedroom only to see his cousin lying on the bed, with a bottle on his chest. He screamed that Kanyi was dead as he rushed out. That is when members of the public began flocking there including the assistant chief and the accused person.

According to the assistant chief PW8 Stanley Maingi Nduati, he received a phone call from PW2 at 7.15am on 25th October 2011 that his “brother in law” was dead. Upon arrival at the scene he found the deceased lying on the bed, facing up, with a bottle on his chest. The house smelt of chemicals.

To him this appeared to be a set up as it was not possible for one to take poison and still keep the bottle on his chest. He was told by an unnamed person that the accused had been seen drinking with the deceased on the night of 24th October 2011. He told the youth to begin searching for him. They were in luck because the accused brought himself but when he saw people “checking the house” he started to run away and that is when the youth caught him and brought him back to the scene and began to mob injustice him. He restrained them.

At this point, one Muthoni Mwangi came to enquire about some fertilizer and seeds (onion and Chilies (*pilipili*) the deceased had kept for her. They were looked for in the deceased’s house but were not found.

Someone suggested that the items he searched for in the accused's house. The mob proceeded to the accused's house where it is alleged they recovered the fertilizer in a black paper bag on the table. The onion and *pilipili* seeds were found in the room as well and the said Muthoni Mwangi confirmed they were hers. PW8 also recovered a rope which had 8 knots. They took the accused to his office to await the police but members of the public overpowered him, and took out the accused and beat him up. The police arrived and rescued him.

According to PW12 PC Gasambi Hamisi the Investigating Officer, they arrived at the scene near the PW8's office and found the accused lying on the ground with injuries all over his body. They rescued him and went with him to the home of the deceased.

His observations were that the deceased lay on the bed, with the bottle on his chest. He had injuries on his neck. The sitting room was in disarray. It appeared that the killer had gained entry into the house by removing the slab from the chimney of the deceased's house. He conducted investigations at the scene, and learnt from the chief PW8 that the accused became the suspect when upon seeing the body of the deceased he became confused and began to run away as a result of which he the assistant chief ordered members of the public to arrest him.

He said he preferred charges against the accused person because the accused was in the bar with the deceased the previous night, he saw the deceased body and ran away, exhibits were found in his home and he was found near the deceased's home.

With regard to the accused being found near the home of the deceased the Investigating Officer appeared to rely on the testimony of PW4 and PW5 where PW4 testified that they were guarding coffee within Rigi ward on the night of 24th October 2011 when around 12.00 midnight he met the accused carrying a green paper bag. He stopped him and asked what accused was carrying and accused said it was his property. The accused left. The following day they learnt of the deceased's death.

According to these witnesses people became suspicious when the accused came, saw the body then left, yet he was great friends with the deceased.

The cause of death was to be established by the pathologists and the Government analyst's testimonies.

PW7 Dr. Kima Paul produced the report on behalf of Dr. M. Njuki who conducted the post mortem. According to him death could have been caused by either poisoning or strangulation or both. However the report bore a question mark on the strangulation part and the Doctor expressed the view that it was possible that Dr. Njuki was not sure about the cause of death.

The Government analyst PW11 threw a spanner in the works. Upon examination of the tissue samples taken from various organs of the deceased during the post mortem examination, and of the chemicals she drew the conclusion that the pesticide could be harmful if ingested. She also found that the deceased blood contained ethanol and alcohol in concentration amounts indicating the intake of 11 half litre bottles of beer or 23 tots of whiskey. She said that high concentrations of ethanol in a human body could be lethal.

The only issue for determination is whether the prosecution has on the evidence before me established a prima facie case to warrant the accused person being put on the defence.

The prosecution has established that a person died. The evidence is that he was either strangled or poisoned or both. The only suspect arrested was the accused person. The reasons: -

- i. That he was seen with the deceased on the night before he died.

This evidence is contradicted by PW2 the deceased's cousin who it is that was with the deceased. They drank, went home, and parted ways at the gate where each went to his own house in the same compound. There is no evidence that he left the house again –neither is there any evidence that the deceased was seen with the accused on the night of 24th October 2011.

- ii. That the accused was seen near the home of the deceased the night before he was found dead.

It was alleged the accused was seen near the home of the deceased on the night of 24th October 2011. There is no evidence of this. The persons who say they saw the accused that night did not place him anywhere near the home of the deceased. The testimony of PW4 is that he met the accused person while he and other vigilantes who included PW5 were guarding coffee in the village. There is no evidence from any of the other witnesses to support the Investigating Officer's theory that the accused was seen near the home of the deceased on the night of the murder.

It is alleged that these persons who allege to have seen him near the home of the deceased also saw him with a green paper bag suspected to have been carrying the items claimed to have been stolen from the house of the deceased and allegedly recovered in the house of the accused. According to their evidence neither PW4 nor PW5 checked inside the bag to see what was being ferried.

There is again no evidence that if indeed the accused was seen by PW4 and PW5 on 24th October 2011 he was carrying any items stolen from the home of the deceased.

- iii. That the accused was found in possession of items stolen from the house of the deceased.

The case for the prosecution was that certain items found in the house of the accused were stolen from the house of the deceased. According to the assistant chief PW8, the vigilante PW4, they took the accused to his house where they recovered items belonging to one Muthoni Mwangi, and Damaris the sister to the deceased.

Muthoni's testimony is bare. That she had 3kg of fertilizer in deceased's house and she found it in house of accused. There was nothing to prove that. The Investigating Officer could also not prove that items allegedly found in house of accused were taken from the deceased's house or belonged to the sister of the deceased.

The receipt alleged to be proof of purchase could not be produced as it violated the Evidence Act. No inventory of what was alleged to have been recovered in house of accused was made and no one signed any list. The exhibits cannot be relied upon to connect the accused to the alleged offence when there is nothing to connect them with him.

Evidence of suspicion however strong cannot prove the charge. The allegation that accused saw the deceased's body and became confused is not supported by evidence – in fact there exist various theories as to why he was arrested. One that the assistant chief was told that the accused was leaving after seeing the body yet he and the deceased were great friends- and that was suspect that he had been seen with the deceased the previous night and ordered for his arrest causing him to run away, that he is the only person who left after viewing the body and that was suspect.

All these remain to be theories.

The Investigating Officer was expected to establish a motive for the killing. What motive did the accused have to kill the deceased? Not a scintilla of evidence was led here. Witnesses said they 'knew' that it was the accused who had killed him. Witnesses did not say how they knew that or why he would do so. **See Republic -Vs- Andrew Moete Omwenga (2009)eKLR** and Section 206 of the Penal Code which defines malice aforethought.

When each of these witnesses was probed further on how they knew it was the accused- they just said they knew. Their so called knowledge did not transform into evidence proof.

I have carefully considered all the evidence before me. The Defence filed submission through the firm of Gichuhi Mwangi and Co advocates. They relied on the case of Regina vs. Vickers [1956] 2QB quoting lord Goddard's definition of murder:

'...murder is of course killing with malice aforethought, but malice aforethought is a term of art. It has always been defined in English Law as either an express intention to kill, as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on a victim, or implied where, by a voluntary act, the accused intended to cause grievous bodily harm to the victim, and the victim died as a result.'

The defence was of the view that the evidence before the court did not establish any of the ingredients of murder, the intention to kill and the actual killing.

The state through Mr. Magoma placed its arguments on the evidence of PW10 and her fertilizer, that it was the accused who was last seen with the deceased, that PW4 saw accused carrying a black paper bag the night before deceased was found dead, that the accused acted suspiciously upon viewing the body.

There is no direct evidence to tie the accused to the death of the deceased. All is circumstantial evidence. It is in **SAWE -V- REP [2003] KLR 364** the Court of Appeal held: ***In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt...Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.***

The prosecution bears the onus to show that all these theories are so water tight that they can only point to the guilt of the accused person.

However, they begin to leak heavily the moment the question: what was the motive for the killing? is asked. None has been established.

It is noteworthy that the police did not investigate what at first appeared to be a case of suicide. The theory that the deceased was strangled and forced to drink the pesticide was not established. The fact that he had ingested a lot of alcohol indicated he could have been drunk, in fact the government analyst pointed out that amount of alcohol and ethanol in the body could also be lethal.

It is unfortunate that a life was lost. It is also unfortunate that this matter has taken 7 years in the criminal justice system. But in a nutshell, the accused was arrested on suspicion which ***"...however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."***

The prosecution has failed to establish a case upon which the accused can be put on his defence for the offence of murder c/s 203 as read with s. 204 of the Penal code. I make a finding of not guilty as provided for under s. 306(1) of the Criminal Procedure Code.

Dated, Delivered and signed at Nyeri in open Court this 21st day of September 2018.

Mumbua T. Matheka

Judge

In the presence of:

Albert CA

Accused person

Ms. Nyakio for accused

Ms. Jebet for state