



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

EMILIO KINYUA.....1ST ACCUSED

MARGARET WANJA.....2ND ACCUSED

R U L I N G

A. Introduction

1. The accused persons are charged with the offence of murder, contrary to **Section 203** as read with **Section 204 of the Penal Code**.
2. The particulars of the offence are that on the 3rd day of January, 2013 at Mugui village, Kagaari Northwest location within Embu County jointly with others not before court murdered **Anthony Muchangi Nyaga**.
3. The accused herein pleaded not-guilty to the charge. The prosecution called 9 witnesses in support of their case.

B. Prosecution Case

4. The prosecution case is that on 3/01/2013 at about 3.00 am, PW1, an uncle of the deceased was called by a Peter Rugendi, who told him that his nephew was being beaten at Mugui Tea-buying Centre. He further testified that he proceeded to Mugui Tea centre in the company of his brother, Ezekiel Mugo is PW8 in this case. PW1 further testified that upon arrival he witnessed the 1st accused assaulting the deceased with a rungu on the head.
5. **PW1** further testified that he identified a number of people assaulting the deceased but did not identify the 2nd accused and further that the crowd moved away when he arrived with PW8. PW1 testified that the deceased was still alive but had sustained several panga cuts on different parts of his body. He testified that the deceased later on passed away the following day.
6. In cross examination PW1 initially conceded that he had told the police at Runyenjes that the deceased was beaten by a mob however later in his cross examination, PW1 testifies that he couldn't remember telling the police the same. He also testified that the 1st accused was hitting the deceased with a stick (one used on a hoe) and the other members of the mob who were 9 in number were also carrying sticks and as such he couldn't tell where the panga injuries on the deceased came from.
7. PW1 further testified in cross-examination that in his O.B. report to the police, he did not mention the 1st accused as having assaulted the deceased and further that when he recorded his statement on the 7/01/2013 it was not read back to him by the police.
8. **PW2**, Marion Igandu Mwaniki testified that she was called by the wife of the 1st accused who informed her that her shop had been broken into. She went to the scene and upon arrival found a crowd of people had gathered at the scene and the deceased lying on the ground.
9. PW2 testified that she did not see anyone assault the deceased and that she later learnt the deceased had been assaulted by a mob.
10. **PW3**, testified that on the material day he was at work and noticed a crowd. He said he to which he drove towards the said place. Upon reaching the crowd he saw a man lying who informed him that he had been assaulted by a mob on grounds for the reason that he had broken into a shop. PW3 testified that the deceased did not give him the name of any of his attackers.
11. **PW4**, Peter Njiru Ndwigwa testified that he did not witness the assault on the deceased. He said he noted that no one in the crowd was

armed. PW5, Dr. Thuo testified that the accused persons were both fit to face trial. PW6, the father to the deceased testified that he heard his son had been assaulted and taken to hospital and subsequently passed on.

12. **PW7**, Dr. Moses Maina testified on the post mortem report he had prepared that stated the cause of death was head injuries and severe blood loss. PW7 confirmed the injuries sustained by the deceased as being consistent with a mob attack.

13. **PW8** testified that he went to the scene after receiving a call from PW-1 and upon arrival was shown where the deceased was lying in critical condition. He further testified that he could not identify any of the persons in the mob. On cross examination, PW-8 revealed that his statement to the police was to the effect that the deceased was assaulted by a mob.

14. **PW9**, Chief Inspector Francis Njomo was the investigations officer of the case and testified that he recommended that a public inquest be held since the deceased had been assaulted by a mob. On cross examination it was his testimony that he did not include the name of the 2nd accused in his statement. He said that he had stated in his report that he recommended holding an inquest that his investigations did not find the accused culpable of murder.

C. Defence Submissions

15. It was submitted on behalf of the 1st accused that there was no evidence to corroborate the inconsistent evidence of PW1. Further counsel for the 1st accused submitted that evidence by PW9 exonerated his client and the co-accused as it provided no evidence to support the charge of murder. Counsel further submitted that it was a fact that no murder weapon was produced as an exhibit in court. Counsel for the 1st accused thus submitted that the prosecution had failed to prove that the 1st accused had committed the offence of murder and consequently asked court to acquit him.

16. It was submitted on behalf of the 2nd accused that there was no incriminating evidence produced by the prosecution against the accused and as such a prima facie case had not been made by the prosecution. Counsel of the 2nd accused relied on the testimony of the PW9 who despite being ordered to carry out fresh investigations, found no evidence incriminating either of the accused.

D. Analysis of the Law

17. The **Criminal Procedure Code section 306 (1)** provides as follows: -

“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit recording a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.....”

18. The Kenyan courts in defining a *prima facie* case have heavily relied on the legal principles in the celebrated case of **R.T. BHATT VS REPUBLIC [1957] EA 332 – 334 & 335** to define what constitutes a *prima facie* case. The court of Appeal of Eastern Africa stated thus:

“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 case, the case is merely one which on fully 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.”

19. The legal principles to guide a trial court in making a determination on a prima facie case have clearly been stipulated in both the persuasive authorities and in the Eastern African case of **R.T. Bhatt v Republic (Supra)**. The legal principles which run through the cases cited revolves around sufficiency of evidence capable of establishing the ingredients of the offence the accused is charge with. Secondly, a mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence. Thirdly it is evidence adduced by the prosecution such that a reasonable tribunal properly directing its mind would convict the accused in absence of any explanation when called upon to answer or put on his defence.

20. In the present case, there was no incriminating evidence produced by the prosecution against the accused persons. In fact, it was the testimony of the PW9 who despite being ordered to carry out fresh investigations by the court that undertook the inquest into the deceased's death, found no evidence incriminating either of the accused. It thus boggles the mind as to why charges were levied against the accused herein.

21. The testimony of PW1 is in my opinion unbelievable as there are many contradictions in it by itself and further it is in contradiction of every other statement provided by other prosecution witnesses, even those in his company on the material day.

22. In my evaluation of the evidence the explanation offered by the prosecution witnesses, especially PW1, as to the accused being involved in the murder is not cogent. This is because the standard of proof required on the part of the prosecution is one of prima facie evidence to help or dispel differences between onus of proof and strong suspicion against an accused person. The investigation by PW9 exonerates the

accused herein fully.

E. Determination

23. I have carefully perused the evidence of the prosecution witnesses. I am of the considered view that there is no evidence to establish any essential elements of the offence including positive identification. None of the witnesses placed the accused persons at the scene of the crime.

24. It is my finding that the prosecution have not made up a *prima facie* case against the accused persons. Accordingly, the accused persons are acquitted of the charge under **Section 306 of the Penal Code** and are hereby set at liberty unless otherwise lawfully held.

25. It is hereby so ordered.

DELIVERED DATED AND SIGNED AT EMBU THIS 27TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Njeru Ithiga for 1st Accused

Ms. Nzekele for Ms. Muthoni for 2nd Accused

Both Accused persons