



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 6 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

SIMON NDWIGA.....1ST ACCUSED

ABIDAH WANJAGI NJERU.....2ND ACCUSED

AGRIVINA NGUNGI NJERU.....3RD ACCUSED

SAMUEL NYAGA WANJAU.....4TH ACCUSED

BENEDITA NGITHI NDWIGA.....5TH ACCUSED

NGONDI NGUNYA.....6TH ACCUSED

STEPHEN MURIITHI NGARE.....7TH ACCUSED

RULING

A. Introduction

1. The accused persons are charged with murder, contrary to **Section 203** as read with **Section 204 of the Penal code**.
2. The particulars of the offence are that on the 4/03/2011 at Kamishiara Village Thambo sub location Mbeere North District of the Embu County, the accused jointly murdered **Moses Iguna Kinothe**.
3. The accused pleaded not guilty to the charge. The prosecution called a total of eight (8) witnesses in support of their case. It is established law that the ingredients of the offence of murder are as follows: -

a.

6. PW-1 further testified that the 4th accused asked the rest of his companions what they were waiting for before hitting the deceased with a jembe on the back. PW-1 further testified that the 3rd accused threw a stone which hit the deceased on the forehead. PW-1 further testified that the 7th accused had a panga which he used the flat side to hit the deceased with.
7. It was PW-1 further testimony that the 2nd accused was giving others stones to hit the deceased. She further testified that the 6th accused boxed the deceased on the head however the deceased managed to cut the 6th accused on the neck. She further testified that the 1st accused picked timber and used it to beat the deceased. It was her testimony that the 5th accused managed to snatch the panga from the deceased and proceeded to beat him while saying that he must die the same way the calf died.
8. PW-1 further testified that she ran into the bushes and escaped to the police station where she found the 5th accused and another leaving having got letters to take the 6th accused to hospital. She then informed the police that 5th accused had killed her husband and they went back with the police to her home where they found her husband had been burnt however there were no weapons on the scene.
9. In cross examination by Ms. Nyaga, PW-1 stated that she tried to alert others but no one came and further that she had nothing against the 1st accused even if he caused her son's arrest. She reiterated her testimony while under cross examination by all advocates for the accused.
10. PW-2, a daughter of the deceased testified that on the material day, the 2nd accused confronted the deceased about her missing calf whose carcass had been found on the deceased's shamba. It was PW-2's testimony that as soon as the 2nd accused started screaming at the deceased a group containing the 3rd and 4th accused started beating the deceased and later another group containing the 1st accused as well as the 6th accused joined in. In cross-examination she identified the accused persons as having beaten the deceased.
11. PW-3, Ephantus Gitoga, a nephew of the deceased did not witness the crime but identified the body on the 16/11/2011 during post-mortem. PW- 4 Dr. Joseph Thuo testified on the accused's mental capacity to face trial.
12. PW-5, Pius Mburu the area elder testified that the 2nd accused had reported the matter to him as well as the area assistant chief and further that he pleaded with the 2nd accused to await the return of the assistant chief, who had subsequently left for the D.O's office, to solve the matter but this seemed to anger the 2nd accused. He further testified that at around 5.00 pm when he went to check whether the assistant chief had returned was shocked to learn of the deceased's passing. PW-6, Eustace Ireri, the assistant chief corroborated.
13. PW-7, Corporal Samuel Onyango testified that on the material day PW-1 reported the deceased's death after which he proceeded to collect the body as well as arrest those identified by PW-1 as the attackers.
14. PW-8, Corpral Samson Kipsang the investigations officer testified that the accused were arrested and charged after his investigations implicated them. PW-9, Dr. Anne Effy Ouma testified and produced the post-mortem report of the deceased that revealed the cause of death to be excessive burns and inhalation of smoke as well as massive sub-dural haematoma.

C. The 2nd Accused's Submissions

15. It was submitted on behalf of the 2nd accused that there was no attempt by the prosecution to prove malice aforethought on his part. Counsel for the accused further submitted that there was no common intention amongst the accused persons. He relied on the case of **AUGUSTINO ORETE & OTHERS V UGANDA [1966] EA 430**. Consequently, Counsel for the 2nd accused submitted that since the prosecution had failed to prove the guilt of the 2nd accused or that there was circumstantial evidence against the 2nd accused, that she subsequently had no case to prove.

D. Analysis of Law

16. It is important to look at the applicable law and the prosecution witnesses' evidence.

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 courts have heavily relied on the legal principles in the celebrated case of **R.T. BHATT V 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. I have considered the prosecution evidence and the issues raised by the counsel for the 2nd accused. It is the duty of this court to determine whether the accused persons have a case to answer.

20. 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 are charged 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. (See *R.T. Bhatt v Republic (Supra)*, *Daboh & Another v State (Supra)*, *PP v Mohammed Abu Bakar (Supra)*).

21. In the instant, the testimony of each of the nine (9) witnesses called by the prosecution has been evaluated against the charge of murder facing the accused. The standard of proof required at this stage is not that of beyond reasonable doubt as the court has not had the advantage of the defence.

22. It was the submission of Counsel for the 2nd accused that the 2nd accused was a mere by-stander, only screaming, and that he did not engage in beating the deceased. I am constrained, at this early stage, to remind the 2nd accused of the Court of Appeal decision in the case of *NJOROGE -VS- REPUBLIC [1983] 197* that:

“If several persons combine for an unlawful purpose and one of them in the prosecution of it kills a man, it is murder against all who are present whether they actually aided or abetted or not, provided that the death was caused by the act of someone of the party in the cause of his endeavours to effect the common object of the assembly.....”

23. I wish to state that it is established law that where the court finds that the accused has a case to answer, a detailed ruling especially on evidence and reasons should not be rendered. The reason behind this position is to avoid pre-empting the defence of the accused person.

24. I have considered the testimony by PW-1 and PW-2, wife and daughter of the deceased, that of PW-5 and PW-6 and I am satisfied that the test of a prima facie case has been met by the prosecution to warrant the accused persons to be called upon to answer.

25. The upshot of all these is that, the accused persons, in their entirety, should be called upon to answer the charge as per the steps outlined under **Section 306(2)** as read together with **section 307 of the Criminal Procedure Code**.

26. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

In the presence of: -

Nzekele for Okwaro for 3rd accused and for Kathungu for 6th accused

Ms. Mbwiria for R. Njeru for 5th accused and for Mr. Momanyi for 1st accused