



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 6 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN NJERU MUNYAMBO.....1ST ACCUSED

MURIMI MBURA MUNYAMBO.....2ND ACCUSED

RULING

A. Introduction

1. The accused persons were 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 29/12/2010 at Kavengero Village, Nguthi sub-location of Kanyuambora location in Mbeere North District of the Embu County, the accused murdered **John Muriithi Njue**.
3. The accused pleaded not guilty to the charge. Mr. P. N. Mugo represented the two accused persons at the trial. The prosecution called a total of nine (9) witnesses in this case. The ingredients of the offence of murder are proof of the following: -

a. The death of the deceased.

b. The death of the deceased was as a result of the unlawful act of the accused.

c. That in causing death there was malice aforethought on the part of the accused.

4. At the close of the prosecution case the defence counsel Mr. Mugo filed submission of no case to answer. The evidence adduced by the prosecution witnesses can be briefly stated.

B. Prosecution Case

PW-1, Silvester Njue Ndwiga testified that the deceased was his son and further that on the material day he went to check whether his sons, Gitonga, Njage and the deceased were at home. Upon inquiring from the deceased's wife, she said that the deceased had been taken by his friends.

6. PW1 then proceeded asked one of his sons namely Njage to escort him to the shamba. PW1 said he did not find the deceased in the shamba. He then proceeded to the water pond and found the deceased standing in the water and had a cut wound on the head. He noticed that the deceased was naked and was dead. The witness reported the incident on the following day to the chief.

7. In cross-examination, PW1 testified that he did not witness the killing and that his daughter told him that she had heard that somebody had been killed. He further testified that he had a land dispute with the parents of the accused over the property he was occupying. He testified that he was not aware of the murder weapon, as the accused had hidden it. PW1 testified that his son was not killed by a mob.

8. PW2 a daughter to PW1 and a sister to the deceased testified that on the material day around 5.00 pm she was on her way back from Embu market and at Kariguri when she heard screams of a single person, whose voice she could not identify. The screams were coming from the lower side of her father's land. She then proceeded to her home.

9. PW1 further testified that at 9.00 pm she heard screams from 3 people coming from where she had heard the first screams. She decided to go to her parent's house as her husband declined to escort her to check on what was happening at the place she heard the screams. PW1 testified that she came to know of her brother's death the following day from her father.

10. In cross-examination PW2 revealed that she did not know who killed her brother and further that, she heard the screams "uii thief" at 5.00 pm.

11. PW3 Leah Muthoni, a wife of the deceased testified on 23/12/2010 she and the deceased travelled from Nairobi to visit the deceased's parents. It was her testimony that on the 25/12/2010, Stephen Mureithi a friend of her husband, visited them and that Stephen and the deceased left the home together after taking tea. The deceased returned home later on that day.

12. She further testified that on the 26/12/2010, Stephen visited PW1's home again and the deceased informed her that Stephen was borrowing Kshs. 1,000/=. She further testified that on 28/12/2010 at 10.00 am, Stephen in the company of the 2nd accused and one Mbogo Ng'aro came and asked the deceased to go with them so that he could be paid his Kshs. 1,000/=. The deceased never came back home and was to be found dead later.

13. PW3 further testified that on the material night PW2 came and saw PW1 as the deceased had not come. She testified that the next morning PW1 went to the scene and when he returned said that the screams heard by PW2 were of people who were killing his son the previous night.

14. In cross-examination, PW3 testified that the 1st accused was friendly to her husband and even borrowed Kshs. 1,000/= and further that she never went to the scene nor heard any screams.

15. PW4 testified that he accompanied PW1 to Ishiara District Mortuary to identify the deceased's body during post mortem. On cross-examination, it was his testimony that in a statement to the police, he told them that a mob had beaten the deceased.

16. PW5 Dr. Joseph Thuo, testified on the accused competence to face trial and produced a report affirming the same.

17. PW6 testified that he was informed of a body found at Kanyuambora village where he proceeded to in the company of other officers and found the deceased's body halfway in a pool of water with cuts on the head, shoulder and hand. He testified that he found no one at the scene. On cross-examination, PW6 further testified he did not establish who killed the deceased or the motive nor recover the weapon used in killing the deceased.

18. PW7 Dr. Edward Weru, testified that he worked with Dr. Mawira who worked at Ishiara hospital who had prepared the post mortem report but was unavailable, as he had gone for further studies. The report revealed that the cause of death was cardio-pulmonary failure due to excessive haemorrhage due to the head injuries.

19. PW8 testified that he was on duty on the 30/12/2010 around 9.30am when he proceeded to the scene of crime in the company of other officers. They found the body of the deceased which was identified by his relatives.

20. He further testified that the lower part of the deceased's body was inside the water and the upper part outside, in a sitting position with multiple cuts on the head, neck, shoulder and hands. He testified that they took the body to Ishiara sub-district hospital mortuary for post mortem. He further testified that he was not involved in the arrest of the accused persons.

21. In cross-examination PW8 testified the position he found the body in and further that it appeared that the body was dumped there after the deceased was killed elsewhere. He further testified that he did not investigate the case and that the body was still fresh when they recovered it.

22. PW9 testified that on the 30/03/2012 he received inquest file No. 22 of 2016 from Directorate of Criminal Investigation Chief Inspector Njogu, which had come from the Directorate of Public Prosecution's Office. He testified that he was instructed to record further statements from the witnesses and suspects mentioned in the letter of the DPP.

23. He further testified that he carried out his assignment and returned the file to the DCIO for transmission to the DPP and that the file was returned with instructions to charge the two accused as well as Mbogo Ngaru who was at large.

C. The Defence Submissions

24. It was submitted on behalf of the accused that there was no evidence connecting the accused with the offence, in fact counsel for the accused submitted that no one saw the accused at the scene leave alone killing the deceased. It was the counsel for the accused submission that there was no case to answer and subsequently the accused should be acquitted.

D. Analysis of Law

25. It is important that evaluation of the prosecution's evidence, the submissions by the defence and the applicable law do guide this court in determining whether a *prima facie* case has been established under Section 306 of the Criminal Procedure Code.

26. The courts 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.”

27. 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)***).

28. 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 hearing the defence case.

29. It is not in dispute that none of the prosecution witnesses witnessed the deceased’s death and even if that is not the case, still none of the prosecution witnesses placed either of the accused at the scene of crime.

30. I have considered testimony by PW3, wife of the deceased, and consider it circumstantial. The investigating officer in my view who handled the matter did not present cogent evidence to implicate the accused persons jointly or severally with the crime. The accused persons were arrested on the basis that they were in the company of the deceased on the same date he passed away.

31. It is not in dispute that the deceased was killed on the night of 29/12/2010. There was no eyewitness to the murder. Any circumstantial evidence of identification must be cogent, credible and consistent for this court to safely rely on it in its determination on whether the accused persons have a case to answer. That aspect of identification and placing the accused persons at the scene of the crime is mere suspicion which does not assist this court.

32. The evidence of the prosecution is purely circumstantial which fact is not in dispute. The test of circumstantial evidence requires that the inculpatory facts must be incompatible with the innocence and incapable of explanation upon any other hypothesis than that of guilt.

33. This proposition was well stated in the case of **SIMON MUSOKE VS REPUBLIC [1958] EA 715** and **TEPER VS REPUBLIC [1952] AC 480** as follows:

“It is also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

34. The prosecution have not established a nexus between the accused persons and the fatal injuries sustained by the deceased. In applying these legal principles on the totality of the evidence, it is not disputed that the deceased was found dead in the morning of 30.12.2010. The deceased was found by PW-1 having sustained multiple injuries to the head and other parts of the body. There was no eyewitness to the assault on the deceased. PW-3’s evidence was purely circumstantial.

35. The position in law on the evidence of a single witness is well illustrated in the case of **CHARLES O. MAITANYI V REPUBLIC [1986] KLR 198** where the court held”

“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lesser the need for testing with greatest care the evidence of a single witness respecting identification.”

36. In the instant case the testimony of PW3 was that the accused and deceased left the deceased’s house together. In my view, the testimony of PW3 was not corroborated. No one followed them to know what transpired after the left the deceased’s home.

37. The test of evidence in line with the principle in ***Charles O. Maitanyi vs Republic Case (Supra)*** falls short of the legal threshold of a testimony of a single identifying witness.

38. It is my considered opinion that the prosecution have failed to discharge the burden of proof in establishing a *prima facie* case.

39. Accordingly, I find that the accused person have no case to answer and are hereby set free forthwith unless otherwise lawfully held.

40. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 26TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Mr. Gachuba for P. N. Mugo for the accused

Both accused persons present