



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 23 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES MUIA NDELEVA.....1ST ACCUSED

DANIEL MUSYOKA.....2ND ACCUSED

RULING

Charles Muia Ndeleva, the 1st Accused person, and Daniel Musyoka, the 2nd Accused person, (hereinafter the 1st and 2nd Accused persons), are charged with one count of murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the charge as stated in the information from the Director of Public Prosecutions dated 13th April 2010 are that on 30th March 2010 at Manooni sub location, Kakutha Location of Makueni District within Eastern Province, the said accused persons jointly murdered Elijah Kioko Kimia (hereinafter referred to as “the deceased person”).

The two Accused persons pleaded not guilty to the offence on 23rd November 2010, and the trial commenced before Asike-Makhandia J. (as he then was) on 5th November 2012, when the learned Judge heard one prosecution witness. The learned judge was subsequently elevated to the Court of Appeal, and the trial then proceeded before Jaden J. on 14th January 2013, who took over its conduct after complying with the provisions of section 200 of the Criminal Procedure Code , and heard the four prosecution witnesses.

I took over the conduct of the trial on 24th February 2016, and after complying with the provisions of section 200 of the Criminal Procedure Code, the Accused persons submitted that they wanted the case to proceed from where it had stopped. I heard one prosecution witnesses and ordered that the prosecution case be closed after the Prosecution was not able to avail the remaining witnesses. The Defence and Prosecution counsel were also directed to file submissions on case to answer.

B.M. Mungata & Company Advocates, the learned counsel for the 1st and 2nd Accused persons filed submissions dated 21st October 2016, wherein they relied on the definition of a *prima facie* case as one on which a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence as held in the case of **Republic v Abdi Ibrahim Owl, (2013) e KLR**. It was urged that the that the prosecution had not established a *prima facie* case for the following reasons:-

1. The prosecution case was full of inconsistencies.

2. There was no link established between the death of the deceased and the accused persons.
3. The evidence of PW4 who was the only eyewitness was not corroborated being that of a single identifying witness and his identity of the accused persons was in doubt.
4. There was failure to call the investigating officer .

Ms Rita Rono, the learned prosecution counsel, filed submissions dated 6th March 2017 wherein the evidence by the prosecution was summarized, and it was contended that the Prosecution had met the threshold set out in **Ramanlal Rambaklal Bhatt v R, (1957) EA 332** for reasons that the accused persons were placed at the scene of the killing, the fact of death was established and not challenged, and malice aforethought can be inferred from the injuries that resulted in the death of the deceased. Therefore, that the accused persons have a case to answer and be put to defense.

After perusing the original and typed proceedings and submissions made by the prosecution and defence counsel, I am called upon to make a ruling pursuant to section 306 of the Criminal Procedure Code as to whether to find the Accused persons not guilty or to put them on their defence. The issue before the Court therefore is whether the evidence brought by the prosecution establishes a *prima facie* case to warrant putting the accused persons on their defence.

The threshold for a finding of a *prima facie* case has been set out in several cases among them **Ramanlal Trambaklal Bhatt v R [1957] EA 332**, **Wibiro alias Musa v R [1960] EA 184** and **Anthony Njue Njeru v Republic [2006] eKLR**. The law in this regard is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

I have analysed the evidence brought by the prosecution and arguments by the parties in light of the threshold that needs to be met to establish a *prima facie* case of murder. Joseph Mwaki Kimia(PW1) and Daniel Nyanzi Kimia (PW2) who were brothers of the deceased, testified as to identifying the deceased's body during the postmortem and also finding the deceased body in the morning of 31st March 2010 respectively. Emmanuel Lopoisha who was PW6 testified as to the cause of death of the deceased as shown by the postmortem conducted on his body.

PW4 who was Patrick Mwongela Somba, witnessed the attack on the deceased and placed the two accused persons at the scene of the attack and death of the deceased. The other two witnesses called by the prosecution namely Titus Mutungi Kaviu (PW3) and Jeuas Muthusi Kisingo (PW5) who were both Assistant Chiefs from the deceased's location, testified as to receiving reports of his death, and of seeing the deceased's body at the scene of the crime.

After considering the testimony of the six prosecution witnesses, I am satisfied that there is sufficient evidence to put the 1st and 2nd Accused on their defence. The 1st and 2nd Accused are now informed of their right to remain silent, to give unsworn statement in which case they shall not be cross-examined or to give sworn testimony in which case they shall be cross-examined by the prosecution. They may also elect to make an address through their advocate. They are also informed of their right to call witnesses.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 29th DAY OF MARCH 2017.

P. NYAMWEYA

JUDGE