

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 13 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS MUTHUI NZII.....ACCUSED

RULING

Thomas Muthui Nzii, hereinafter “the accused”, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of this offence are that on 23rd day of February 2010 at South B Nairobi Area, he murdered W. O. O. The accused pleaded not guilty to this charge. He is represented by Mr. Wandugi, advocate.

The Accused was initially charged jointly with one S. I. W, (PW3) the mother of the deceased child. On 3rd November 2010, the State entered a Nolle Prosequi dated 27th October 2010 in respect of PW3 prompting the court to discharge her. Hearing proceeded against the accused after the information was amended.

Seven witnesses have testified for the prosecution. From their evidence, PW3, the mother of the deceased left her son with the accused on 5th January 2010 and went to work. She did not have a nanny at the time. The accused called her and informed her that the child had fallen and got injured. On her arrival PW3 found her son swollen on the forehead. She applied cold compress on the swelling and the it subsided. On the 10th January 2010 PW3 left the deceased with the accused for a second time. In the course of the day, the accused called her and informed her that the child had fallen and injured his head again. She took the child to Nairobi Hospital where a minor surgery was performed and the child admitted in hospital up to 12th January 2010 when he was discharged. A few days later the child developed blood-shot eyes. He was taken back to Nairobi Hospital and admitted up to 25th January 2010 when he was discharged. The blood spots in the eyes started clearing.

Two days later PW3 left her son with the accused to attend a meeting. The accused called her and informed her that the child had developed labored breathing. The child was taken to Mater Hospital and resuscitated. Another surgery was performed and the child admitted at HDU. He was discharged and went home but his condition did not improve. He had high fever and was vomiting. He was taken to Nairobi Hospital and treated. He was later discharged but did not improve.

On 23rd February 2010, PW3 left home to go on duty. He left the accused with instructions to take the deceased to her office from where they would take the child back to hospital. The accused called her later that day at 1.00pm and informed her to rush to Gertrude’s Children Hospital where the child had been taken. By the time PW3 arrived at Gertrude’s, the child had died.

The matter had attracted the attention of the Children’s Department who reported the same to the police and asked for investigations. This led to the arrest of the accused and PW3. They were both charged with murder. As indicated above, the State terminated proceedings against PW3.

Dr. Peter Muriuki Ndegwa (PW7) examined the body of the deceased and found that he had several head injuries and bleeding in the brain. He formed the opinion that the cause of death was due to increased intracranial pressure due to intracranial haemorrhage (subdural haematoma) due to head injury due to blunt force trauma.

At the close of the prosecution case, Prosecution Counsel submitted that the prosecution has established a prima facie case against the accused and urged the court to place him on his defence. On the other side Mr. Wandugi for the accused submitted that the deceased died due to medical negligence; that the accused did not kill the deceased and that PW7 confirmed that the operation of the deceased had not been successful pointing to medical negligence. Counsel further submitted that throughout the evidence there is no evidence to connect the accused with infliction of injury on the deceased and that he took efforts to assist the child. It was submitted that a *prima facie* case has not been established against the accused and that this court must find him not guilty.

Mr. Wandugi relied on three cases in support of their case: **Ramanlal Trambaklal Bhatt v. R Criminal Appeal No. 76 of 1957** to support his submissions that the evidence is weak and discredited and therefore it falls short of establishing a *prima facie* case.

Mr. Wandugi further submitted that there is no direct evidence and that the case for the prosecution relies on circumstantial evidence. He cited the case of **Sawe v. R [2003] KLR 364** on the principle that suspicion, no matter how strong, cannot form the basis of conviction. Counsel further cited **Kimeu v. R Criminal Appeal No. 126 of 2001** to support the point that circumstantial evidence cannot be relied on unless it irresistibly points to the guilt of the accused.

I have read, with great care, the evidence by the prosecution both before me and before my predecessor Justice Florence Muchemi. I have analysed the same in detail. I have also read and considered rival submissions and the cited authorities. In the **Bhatt case** (supra) the court went further to state that:

“It is true, as Wilson, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It is not easy to define what is meant by a “prima facie case,” but at least it must be one which a reasonable tribunal, properly direction its mind to the law and the evidence could convict if no explanation is offered by the defence.”

I am persuaded to find that the evidence on record implicates the accused. For this reason it is my considered view that a prima facie case has been made out against the accused and therefore he has a case to answer. He shall be placed on his defence. This court hereby informs the accused of his right, in compliance with Section 306 (2) of the Criminal Procedure Code, to inform this court the manner in which he wishes to defend him: whether he will testify under oath or without taking oath and whether he will be calling any witnesses. It is so ordered.

Dated, signed and delivered in open court this 27th March 2017.

S. N. Mutuku

Judge