



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 26 OF 2009**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**ANN MUTHINI MBUSI .....ACCUSED**

**RULING OF THE COURT**

1. **Ann Muthini Mbusi** is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code. It is alleged that on the 26<sup>th</sup> day of February 2009 at around 9.00 p.m. at Changamwe market within Coast province murdered **Mulwa Mwangatu**.

2. At the close of the prosecution's case, 8 witnesses had been called. The Prosecution's case is that on or about the 12<sup>th</sup> and 13<sup>th</sup> February 2009, the family of the deceased herein received reports to the effect that the deceased had been injured while at his place in Mombasa. Some of the deceased's brothers travelled from Kitui area to Mombasa to follow up on the issue. They found the deceased indeed had some injuries on the hand and chest and they rushed him to hospital but he later succumbed to injuries on the 26/2/2009. The autopsy was later conducted by Dr. Mandala of Coast General Hospital and he noticed a fracture of 10<sup>th</sup> left rib, cut wound on right hand, swollen brain, blood clot on occipital area that extended to the base of the brain and he formed the opinion that the cause of death was due to the increased intracranial pressure due to bleeding in the skull. The deceased's brothers Kyalo James (PW.2) and Nguta James (PW.3) managed to see and talk to deceased before his condition deteriorated and learnt from him that he had been injured by the accused herein who had been the deceased's lover. After the deceased died a report was lodged with the police and PC. James Aroyo conducted investigations and later had the accused arrested.

3. At this stage of the proceedings, the Prosecution is under a duty to establish a prima facie case against the accused so as to require her to be put on her own defence. A prima facie is one in which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. (See **BHATT =VS= REPUBLIC [1957] EA 332**. Hence the evidence so far adduced by the seven (7) prosecution witnesses should be sufficient to sustain a conviction against the accused person were she to elect to remain silent in defence.

4. Parties filed submissions on case to answer. It was submitted for the accused that the Prosecution has not made out a prima facie case against the accused to warrant her to be put on her own defence. It was further submitted that there was no nexus between the accused and the death of the deceased since none of the witnesses gave evidence to the effect that they had seen the accused assaulting the deceased on the 8/2/2009.

5. It was submitted for the Prosecution that a prima facie case had been made out against the accused. It

was further submitted that the deceased's brother Elijah Kyalo James (PW.2) had been informed by the deceased that it was the accused who had stabbed him with a knife on the ribs when he (deceased) broke up from the relationship they had. It was further submitted that the statement made by the deceased to PW.2 and PW.3 was a dying declaration within the meaning of Section 33(a) of the Evidence Act. Finally it was submitted for the prosecution that the accused had intention of inflicting injuries or grievous harm on the deceased which injuries subsequently led to his death and hence there was malice aforethought within the meaning of Section 206 (a) of the Penal Code and consequently the accused be put on her defence.

6. I have considered the evidence presented by the Prosecution at this stage of the proceedings as well as the submissions of the learned counsels for the parties herein. The issue for determination is whether or not the Prosecution has made out a prima facie case against the accused herein. To begin with, the accused faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code and there is need to establish whether the essential ingredients have been proved by the Prosecution. Section 203 of the Penal Code provides:-

***“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”***

7. The Prosecution was under obligation to establish the following essential elements in its bid to prove their case against the accused herein:-

***a. Evidence of the fact and cause of the death of the deceased.***

***b. Evidence that the deceased met his death as a result of an unlawful act or omission on the part of the accused.***

***c. Evidence that the said unlawful act or omission was committed with malice aforethought as provided for under Section 206(a) of the Penal Code. Further as regards the issue of malice aforethought the essential elements thereof are:-***

***i. Intention to cause death or grievous harm to any person whether that person is the one who actually died or not.***

***ii. Knowledge that the act or omission causing the death will probably cause the death or grievous harm to some person whether that person is the person actually killed or not.***

***iii. Intent to commit a felony.***

***iv. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

8. The doctor who testified herein confirmed that the cause of the deceased's death was increased intracranial pressure due to intracranial bleeding. The doctor further added that there was head injury. Hence the injuries inflicted on the body of the deceased as observed by the Pathologist were severe to suggest that they had been inflicted by a person whose main aim was to kill or cause maim or grievous harm to the deceased. This then leads to the question ***“is the death of the deceased linked to the accused herein?”*** The deceased's two brothers (PW.2 and PW.3) stated that prior to the demise of the deceased, he had informed them that it was the accused who had attacked him. The two brothers confirmed that the accused and deceased had been lovers in the past. This was also confirmed by Phoebe Mulewa Musyoka (PW.5) who stated that she had known the accused way back in 2008 as deceased's lover and further narrated an incident around that time where the accused and deceased had fought after having drinks at the witness bar in Mwangeni market. The alleged incident of December 2008 might not be relevant to support the Prosecution's case that the accused was behind the death of the deceased. The incident that is said to have given rise to the demise of the deceased is said to have taken place on the 8/2/09 as PW. 2 and PW.3 stated that the deceased informed them that it was the deceased who had stabbed him with a

knife. However another relative of the deceased Frank Kiema Katumi (PW.4) stated that the deceased informed him that a hurricane lamp had exploded in his house and thus he sustained the cut on his hand. PW.4 further stated that he administered first aid and advised deceased to seek medication at a health centre although the deceased appeared drunk and could not explain things appropriately. It seems therefore that the information given to PW.4 by the deceased regarding the cause of the injuries is quite different from the one given to PW.2 and PW.3. This therefore puts into doubt the Prosecutions claim that the deceased had made a dying declaration to PW.2 and PW.3 in which the accused was adversely mentioned. Indeed if the two statements made by the deceased to PW.2 and PW.3 as well as the one made to PW.4 are to be treated as dying declaration pursuant to Section 33(a) of the Evidence Act, then they are contradictory as to what caused the death because on the one hand the accused is implicated while on the other hand a hurricane lamp is said to have been the cause of the injuries. Under those circumstances it is doubtful whether or not the accused was responsible for the injuries inflicted upon the deceased and which eventually claimed his life after some days. The accused having been known to be lovers with the deceased was naturally a prime suspect but then in the absence of eye witnesses and conflicting statements allegedly made by the deceased to the three witnesses, it is clear that the accused has been charged due to some suspicion. It is trite law that suspicion alone is not sufficient to sustain a conviction. Since even a mere scintilla of evidence is similarly not sufficient. This is because of the fact that it is the duty of the Prosecution to always prove its case beyond any reasonable doubt. Again the failure by the Prosecution to call the investigating and arresting officers to testify further weakened the Prosecution's case. Hence if the accused was to elect to remain silent in defence, the evidence so far tendered will not be sufficient to sustain a conviction against her. I find the prosecution has not established all the essential ingredients of the charge of murder against the accused herein and thus the evidence at this stage of the proceedings does not meet the threshold of a prima facie case against the accused person to warrant her to be called upon to make a defence.

9. In the result, it is the finding of this court that a prima facie case has not been made by the Prosecution against the accused. The accused has no case to answer and is acquitted of the charge under Section 306 (1) of the Criminal Procedure Code. She is to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered in court at Machakos this **18<sup>TH</sup>** day of **MAY** 2017.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Kaluu for accused .....

Machogu for state.....

C/Kituva.....