

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 20 OF 2014

REPUBLICPROSECUTOR

VERSUS

JOEL MAINGA MUTHEMBWA.....ACCUSED

RULING OF THE COURT

1. The accused herein **JOEL MAINGA** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code where particulars are that on the 1st March, 2014 at Uvaa village, Kyuu location in Mbooni West District within Makueni County murdered **JULIUS KIMEU MUTHEMBWA**.

2. The Prosecution called seven (7) witnesses in support of its case. The Prosecution's case is that the deceased herein left for a nearby hotel for a cup of tea but did not afterwards return back to his house. The deceased's wife **Florence Mbeti Kimeu** (PW.1) got alarmed and reported to the police about her missing husband and a search was mounted. Four days later, the body of the deceased was discovered lying at a farm belonging to one **JOSEPH MBONDO**. The police were alerted and the body collected and taken to the mortuary. A post mortem was later conducted by **Dr. John Mutunga (PW.7)** who noticed a fracture of the skull and multiple bone fragments. He also noticed a deep cut wound on the right side of the neck. The doctor formed the opinion that the cause of death was severe head injury due to blunt trauma to the head. Chief Inspector Abraham Burburet conducted investigations into the matter and established that the deceased had last been seen at a certain hotel in Katilini market and further learnt that the deceased and accused had quarreled at the said hotel whereby the accused had attempted to hit deceased with a jembe but which missed him and hit the hotel wall. The hotel owner **Raphael Kimanthi Musau (PW.2)** was interrogated and who confirmed that the accused and deceased had had an altercation and he had to intervene between them. The hotel owner was assisted by one of the customers **Charles Muthoka (PW.3)**. The area Community Policing Chairman **Daniel Mutinda Muteti (PW.4)** joined the villagers in the search of the deceased and his body was later recovered in a maize plantation. The Investigating officer obtained several exhibits such as a mobile phone belonging to the deceased, one sandal also belonging to the deceased and a hoe belonging to the accused. The accused was subsequently charged as herein.

3. At this stage of the proceedings, the Prosecution was under a duty to establish a prima facie case against the accused so as to require him to be put on his defence. A prima facie case is one in which a reasonable tribunal directing its mind to the law and evidence placed before it could convict an accused if no evidence is tendered by the defence to the contrary (see the case of **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 he to elect to remain silent in defence.

4. Parties herein filed submissions on case to answer. It was submitted for the accused that no prima facie case has been made out by the Prosecution to warrant him to be put on his own defence. Counsel for the defence submitted that the case is based on mere speculation and further by the fact that the relationship between the accused and the deceased had been strained. It was further submitted that there was no eye witness to the incident.

It was submitted for the Prosecution that all the ingredients of the offence of murder have been proved and that a prima facie case has been made out against the accused who should be put on his defence pursuant to the provisions of Section 306 (2) of the Criminal Procedure Code.

5. I have considered the evidence presented by the Prosecution at this stage of the proceedings as well as the submission 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 charge preferred against the accused is murder contrary to Section 203 as read with Section 204 of the Penal code. The two essential ingredients to be proved are malice aforethought, and the actual act of killing i.e. the “*mens rea*” and “*actus reus*”. Section 203 of the Penal Code provides that any person who with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. Section 204 provides the punishment thereof. The Prosecution therefore was under a duty to prove that the deceased died and that it was the accused who had committed the unlawful act that caused the death of the deceased **JULIUS KIMEU MUTHEMBWA** and that he (Accused) had malice aforethought. The doctor who performed the autopsy (PW.7) stated that the cause of death was severe head injury due to blunt trauma to the head. Having established the cause of death, the next ingredient to be established is whether the accused is the one who had caused the death of the deceased. The evidence of PW.2 and PW.3 is that the deceased had entered the hotel belonging to PW.2 and ordered for tea and that afterwards the accused herein also arrived and sat at a separate table and the accused and deceased bitterly exchanged words as a result of which the accused attempted to hit the deceased with a hoe which missed him. It was then that PW.2 and PW.3 intervened and separated the two with the accused leaving by the front door while the deceased exited through the rear entrance. None of the two witnesses followed either of the two protagonists and that they were surprised to learn the following day that the deceased was missing. The accused was in the company of the deceased’s wife and children during the search and at no time did he run away. The accused willingly handed over the hoe he had had during his encounter with the deceased at the said hotel and the investigating officer confirmed that the same had no bloodstains. Indeed there was no eyewitness to the incident. The accused is only linked due to the fact that he had earlier attempted to injure deceased at PW.2’s hotel and further had issued threats to kill him. The injuries on the body of the deceased as observed by the Pathologist were so severe to suggest that they had been inflicted by a person whose main aim was to kill the deceased or inflict or cause grievous harm. The question to be asked is “*was the accused the killer?*” The evidence of PW.2 and PW.3 was that the accused and the deceased had exited the hotel through different exits and nobody followed them so as to establish if indeed the accused had rushed ahead of the deceased and laid an ambush or whether he had followed him from behind as he headed to his house. It would appear that the accused was fingered as the one who had murdered the deceased because of the earlier incident at the hotel belonging to PW.2. The investigating officer (PW.6) stated that the accused upon seeing the body of the deceased started to tremble but when cross-examined he admitted that it could have been due to shock on seeing the body which had been partly mauled by dogs. Hence it is clear that the accused was singled out for prosecution due to suspicion. It is trite law that suspicion alone is not sufficient to sustain a conviction. Indeed even a mere scintilla of evidence is not sufficient to sustain a conviction. If the accused elects to remain silent on defence, my considered view is that the evidence of the seven prosecution witnesses will not be sufficient to sustain a conviction against him. It became clear that no thorough investigations had been conducted by the police in this matter before deciding to prefer charges of murder against the accused person. I find the evidence presented at this stage by prosecution does not meet the threshold of a prima facie case against the accused person to warrant him to be called upon to make a defence under Section 306 (2) of the criminal Procedure Code.

6. In the result, it is the finding of this court that the Prosecution has not made out a prima facie case 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. He is to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated, signed and delivered in court at Machakos this **18th** day of **MAY** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Miss Mbuvi for accused.

Machogu for state.

C/A: Kituva.