REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 29 OF 2012

REPUBLIC.……..……...……..……..PROSECUTOR

VERSUS

ROBERT MWANZIA MUTUA ……...1ST ACCUSED

JOSEPH MUlA WAMBUA.....2ND ACCUSED

RULING

Robert Mwanzia Mutua, the 1st Accused person, and Joseph Muia Wambua, 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 Amended Information from the Director of Public Prosecutions dated 31st January 2017, are that on the 23rd day of August 2012 at around 9.00 pm at Kyumbuni market within Matungulu District in Machakos county, they jointly murdered Jane Mbeneka (hereinafter referred to as "the deceased person").

The two Accused persons pleaded not guilty to the offence and the trial commenced before Thuranira-Jaden J. on 31st October 2013, whereby the learned Judge heard six prosecution witnesses. I took over the conduct of the trial on 24th May 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 remaining prosecution witness before the Prosecution closed its case. The Defence and Prosecution counsel were subsequently directed to file submissions on case to answer.

Mike M. Muema Advocate, the learned counsel for the 1st and 2nd Accused persons, filed submissions dated 25th April 2017, wherein it was urged that that the information is defective as the particulars therein disclose that the deceased was murdered at Kyumbuni market, whereas the evidence adduced by the prosecution points that the deceased was found dead at a foot path towards her homestead. Further, that there were material contradictions that go the root of the prosecution case in reference to the deceased's identity and name, and the prosecution had failed to discharge the evidential burden placed upon them to prove beyond reasonable doubt that the offence was committed by the accused persons.

It was also submitted that there was no positive identification of the Accused persons as it was at around 9.00 pm on the material night as per the information, and all the witnesses attested that the reason as to why they had to use torches was because it was dark. Therefore, that the conditions were unfavourable to properly identify somebody in the dark, and when the attack was sudden and from behind. In addition that the only evidence implicating the accused persons was that of PW4 who was a single identifying witness. Reliance was placed on the decisions in **Roria vs R (1967) E.A 583** and **Kiilu & Anor vs Republic (2005) 1 KLR 174** in this regard.

According to the counsel, the prosecution has failed to demonstrate any evidence of a common intention so as to attribute the 2nd Accused Person to the commission of the offence, and that the evidence adduced points to the 1st Accused Person but is insufficient, falls short of the required standard, is unreliable and has not been corroborated by any other evidence. Lastly, that there was exonerating evidence from the Government Chemist which is in favour of the accused persons, and that this Court should thereby discharge the Accused Persons under section 210 of the Criminal Procedure Code.

Ms Rita Rono, the learned prosecution counsel, filed submissions dated 27th June 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.** The reasons for this contention were that a postmortem that was conducted established the fact of death; the accused persons were placed at the scene of the murder and were seen committing the offence; and malice aforethought can be inferred from the conduct of the accused persons prior to the incident where the 1st Accused warned the deceased that he would kill her.

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. 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 as there was evidence adduced of the death of the deceased, and that placed the two Accused persons at the scene of crime. In addition there was evidence of a weapon recovered from their residence of the 1st Accused. This evidence is sufficient at this stage to establish a *prima facie* case.

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 24th DAY OF JULY 2017.

P. NYAMWEYA

JUDGE