



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL (MURDER) CASE NO.11 OF 2006

REPUBLIC PROSECUTOR

VERSUS

DAVID KIDAHA 1ST ACCUSED

LEONARD KISAMBE 2ND ACCUSED

KENNETH KISAMBE 3RD ACCUSED

R U L I N G

Introduction

1. After the Prosecution closed its case on 25/11/2015, Mr. Mango Counsel for the accused persons submitted that the Prosecution had failed to establish a prima facie case to warrant putting the accused persons on their defence. He submitted that from the record, none of the witnesses saw the persons who attacked the deceased. That even PW3 Beatrice Nangahi Kwese who purported to place the accused persons at the scene of crime was not steady in her assertions. Counsel further submitted that the medical evidence on the cause of death was clearly at variance with the evidence adduced by the other Prosecution witnesses. Counsel urged the Court to find the accused person not guilty and to set them free.

The Prosecution Case

2. The three accused persons were charged together with John Aluguza Jeji (1st accused) and Hezron Eludubwe (2nd accused) with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars being that on the 24th day of December 2005 at Solongo sub location of Vihiga district within western province, jointly murdered Nicholas Shituku. They all pleaded not guilty when the charge was read out and explained to them on 01/03/2006.

3. When the case came up for mention on 23/01/2007 for purposes of fixing fresh hearing dates the 1st accused was noted to be absent. The Court ordered the Prison-in-charge to explain the absence of the 1st accused when the case next came up on 19/02/2007. On the 19/02/2007 the Court was informed that the 1st accused died on 27/07/2006 when he was being taken to Moi Teaching and Referral (MTRH) Hospital for treatment. For one or the other reason, this case did not take off for hearing until 01/12/2010 before Hon. Mr. Justice Isaac Lenaola. In the course of time, the 2nd accused, Hezron Eludubwe also died leaving the 3 accused persons herein to proceed with the case against them.

4. The Prosecution called 6 witnesses. PW1 was Sylvester Mori Adacha. He testified that on the morning of 24/10/2015 at about 5.00a.m, he found his brother the deceased herein dead. He was unable to identify any of the persons who may have killed the deceased. PW2, Tafroza Nzavayi testified that on the night of 24/12/2005 at about 3.30a.m she was asleep in her house when she heard a voice crying and saying “msiniue” – do not kill me. Then she heard the footsteps of people running away and thereafter it all went quiet. Later that same morning she went to the home of her neighbour, Beatrice Kavese and was informed that the “liguru” or village elder had been on patrol. As PW2 was returning to her house she saw a man lying down. She flashed her torch and identified the man as the deceased. By then he was already dead. The Police later came to the scene and took the deceased’s body away. On that night PW2 said she saw the 3 accused persons together with the Police. When put under cross examination PW2 stated that she never saw any of the accused persons attacking the deceased and she could not say why the 3 accused persons were with the Police.

5. PW3 was Beatrice Kavese who testified that she was a changaa seller. She stated that on 24/12/2005, she was at her home between 2 – 3.00 a.m. when PW1 went to her house and asked her to open the door. When she opened the door, she saw PW1 being chased by some people who were saying “shika yeye, shika yeye” meaning “hold him hold him.” That she recognized the present 1st accused and John Aluguza Jefe (1st accused who died on 27/07/2006) and the 3rd accused herein. Then Tafroza (PW2) went to her house and asked her about the people who were making noise but she told Tafroza she did not know where the people had gone. Tafroza then left.

6. PW3 also stated that a little while later, Tafroza returned to her house and told her that she had seen the body of the deceased lying on the road. The two women then decided to go and report the matter to the Police but before they reached the Police Station they met with the Policeman. They informed the Police that some vigilantes had killed someone. PW3 stated that the Police officers were accompanied by 1st accused (deceased), 5th accused Kenneth Kisambe) and David Kidaha as well as Leonard Kisambe. Later PW3 recorded her statement.

7. During cross examination, PW3 stated that when she saw the accused persons on that moonlit night from a distance of about 20 metres they were beating someone. She could however not say what weapon (s) the accused persons were using to beat someone. She also testified that she did not know the deceased before that night of the incident.

8. PW3 further stated that the accused persons were members of the vigilante group but Hon. Mr. Justice Lenaola who took the evidence of this witness noted that the witness was wavering and unclear. She then stated that she saw the accused persons killing the deceased though in one breath earlier on she said, “I never saw them where the beating was taking place.”

9. Godfrey Asembekha testified as PW4. He stated that at about 5.00a.m on 24/12/2005, he heard his cousin Mori, PW1 screaming and saying that as they were delivering changaa, they were attacked and the deceased had died. On 29/12/2005, PW4 attended the post mortem examination conducted on the body of the deceased who was his brother.

10. From 01/12/2010 the Prosecution did not call the next witness until 25/10/2015 when Dr. Solomon Kamau testified as PW5. According to the findings the deceased had a penetrating wound on the right side measuring 3cm wide between the 6th and 7th ribs, resulting in the piercing of the right lung. The right side of the chest was filled with blood. In the opinion of Dr. Kamau the cause of the deceased’s death was blood in the chest cavity on the right side which was pressing on the right lung due to the penetrating injury caused by a sharp object. The Post Mortem report was produced in evidence as PExhibit 1.

11. The Prosecution closed its case with the testimony of Number 75709 Cpl William Juma who testified as PW6. PW6 gave evidence in place of the Investigating Officer Cpl John Langat who had since died.

12. It is the above evidence which Mr. Mango defence Counsel submitted falls short of establishing a

prima facie case to warrant putting the accused persons on their defence.

13. Before concluding whether or not the evidence so far adduced by the Prosecution establishes a prima facie case it is important to say what a prima facie case is.

What is a Prima Facie Case

14. A prima facie case according to the definition given by the Court of Appeal for Eastern Africa in the case of **Bhatt –vs- R [1957] EA 332** at least means a case “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.” A prima facie case is not made out if the evidence on record is disjointed or lacks credibility or weight or if such evidence is worthless no matter how much it is. Further, a prima facie case is not one where the available evidence proves conclusively that the accused person committed the offence. That conclusion can only be reached when the Court has heard evidence from both the Prosecution and the defence.

Analysis and Findings

15. From the evidence on record, I do not think that the Prosecution has established a prima facie case requiring the accused persons to be put on their defence. In a case of murder the Prosecution must place evidence before the Court on the following matters:-

- a. The death of the deceased and the cause of that death.
- b. That the death was caused by an unlawful act or omission on the part of the accused persons.
- c. That the accused persons in committing the unlawful act or omission had malice aforethought.

16. As pointed out earlier the evidence on the above issues need not be conclusive as to the guilt of the accused persons but it must be such evidence that if the accused persons offer no explanation this Court would be ready to convict. The finding of this Court is that even with the reduced threshold the Prosecution has not placed any evidence before this Court, other than the fact and cause of death of the deceased that the deceased died as a result of the unlawful act or omission on the part of the accused persons jointly or of any one of them. Having failed to prove that the deceased died as a result of the unlawful act or omission on the part of any or all accused persons, the issue of malice aforethought does not arise. The evidence by PW3 who alleged to have seen the accused persons beating the deceased person cannot be believed. She kept wavering between a position of positive identification of the deceased’s attackers to a position of not having been able to see the attackers from where the deceased was being beaten. I can only describe the evidence by PW3 as lacking in credibility and weight and it is worthless.

Conclusion

17. For the reasons given above, I find and hold that the Prosecution has not established a prima facie case to warrant putting any or all the accused persons on their defence. I accordingly record a finding of not guilty to the charge of murder and acquit each of the three accused persons under Section 306 (1) of the Criminal Procedure Code. Unless they are otherwise lawfully held the accused persons shall be released from prison custody forthwith.

18. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 21st day of January 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Omwenga (present) for the State

Mr. Mango (present) for all 3 persons

Mr. Lagat - Court Assistant