



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL (MURDER) CASE NO.6 OF 2012

REPUBLICPROSECUTOR

VERSUS

MATHEW KITAVI.....ACCUSED

RULING

Introduction

1. The accused person herein, Mathew Kitavi is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence being that on the 21st day of January 2012 at Churuma village in Shilongo sub location in Matura location in Kakamega North District within Western province, he murdered PETER SHAITA SHIUNDU. He denied the offence and the Prosecution called 7 witnesses in an effort to prove the charge against the accused person.
2. At the close of the Prosecution case defence Counsel, Mr. Matete submitted that the Prosecution had not made out a prima facie case against the accused person to warrant the accused being required to defend himself. Counsel therefore urged this Court to make a finding of not guilty and to acquit the accused person at this stage.
3. Mr. Omwenga Counsel for the Prosecution did not make any submissions on the issue of whether or not the accused person has a case to answer. He asked the Court to render its ruling.

The Law

4. The principles governing what amounts to a prima facie case were set out in the case of **Bhatt – vs- R [1957] EA 332**. In that case, the Court of Appeal for Eastern Africa explained what a prima facie case is in the following words: “Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt we cannot agree that a prima facie case on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the Court would not be prepared to convict if no defence is made but rather hopes the defence will fill gaps in the Prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. 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 determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a prima facie case” but at least it must mean one 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.”

5. I entirely agree with the above principles which shall guide me as I now proceed to analyze the Prosecution case.

The Prosecution Case

6. The Prosecution case was as follows: On 20/01/2012 at about 4.00p.m Daniel Makuto Sakula who testified as PW4 was at his kiosk at Shikuma village when the deceased herein in the company of the accused person herein went to the kiosk and bought two supermatch cigarettes before the two left together heading in the direction of the accused person's home.
7. On the following morning which was 21/01/2012 the deceased's father (deceased's father was not called as a witness) went to Daniel's kiosk and told him that on the previous night the deceased had gone to his house and commanded him to open otherwise he (deceased) would demolish the house. Daniel testified that he advised the deceased's father to go and report the matter to the Police but shortly thereafter Daniel heard screams. Daniel proceeded to the deceased's homestead and found the deceased's body lying in the kitchen. Police came to the scene thereafter and took the deceased's body away. On cross examination Daniel could not say whether the deceased and the accused person always moved together. He also said that after the pair bought the cigarettes, they never returned to his kiosk.
8. PW2 Joseph Musee who is a paternal uncle to the deceased told the Court that on 18/01/2012 the deceased herein went to his (Joseph's) homestead at night when he was drunk. Then during the night on 21/01/2012 Joseph heard the deceased screaming and calling out the name of his (deceased's) grandmother Anne Khasoa as he (deceased) headed towards the grandmother's house where he (deceased) used to stay. According to Joseph, the deceased was saying "Nikikufa Mungu nisamee makosa yangu." Joseph also stated that the deceased used to be a very troublesome person and as such he (Joseph) did not open the door of his house that night.
9. Joseph also stated that on the following morning, he received a report from one of his cousins that the deceased had died. He went to the house and confirmed the death of the deceased. Joseph also stated that the deceased's left cheek was swollen and he had a cut wound on the head. Joseph also testified that the deceased had excreted on himself. Later Joseph recorded his statement with the Police.
10. On cross examination Joseph told the Court that the deceased was a drunkard and that when drunk he could not walk. He also stated that there was no blood in the kitchen where the deceased's body was found.
11. PW3 Nangila Wamalwa the Assistant Chief of Shilongo sub location testified that on 21/01/2012 at about 7.45a.m she received a report from Henry Shiundu who was father to the deceased that the deceased was dead as a result of having taken poison. PW3 then informed the Assistant Chief and the Police as she also proceeded to the scene where she found Cpl Abdi and one Moses at the scene. According to PW3 the deceased's body was lying in the kitchen and had a swollen cheek and a cut wound on the back of the head. PW3 also stated that according to information given to her by the deceased's family members and members of the public, the deceased had been seen with the accused person the day before the deceased was found dead. It was PW3 who asked the accused person herein to record his statement but the accused person refused to do so until he was arrested by Number 99013375 Sgt Jonah Chesire who testified as PW5. PW5 stated that after arresting the accused person herein he handed him over to Sgt Abdi who was the Investigating officer for purposes of recording a statement.
12. PW1 was Mathias Shikolia Mutsangi, one of the village elders of Shilongo sub location. He testified that on 21/01/2012 he was directed by his Assistant Chief one Ernest Wamalwa to go and inform the accused person herein to go and record a statement at Shamberere Police Station. Mathias stated that his efforts to get the accused person to go and record a statement concerning the death of the deceased bore no fruit and Mathias notified the Assistant Chief accordingly.
13. PW7 was Dr. Dixon Mchana Mwaludindi who testified on behalf of Dr. Kamau who performed the post mortem examination on the body of the deceased on 23/01/2013. According to the post mortem report produced as PExhibit 2, the deceased's body had a cut on the right scalp above the right ear and there was also swelling on the left cheek. The deceased's lungs appeared dark meaning the deceased was either a smoker or lived in a smoky house where wood was used for cooking. Dr. Mchana also stated that according to the post mortem report the deceased's stomach

had minimal food and had a strong alcoholic smell. The cause of death was said to be alcoholic intoxication.

14. During cross examination Dr. Mchana stated that according to the evidence of PW6, Joyce Wairimu Njoya the laboratory analyst with the Government Chemist Nairobi an analysis of the stomach contents of the deceased revealed the presence of an insecticide known as Baygone, although the witness could not conclusively say whether it was the pesticide which caused the death of the deceased.
15. In response to a question from the defence Counsel Dr. Mchana stated that indeed a pesticide was found in the contents of the deceased's stomach. Dr. Mchana also stated that the pesticide found in the deceased's stomach could have been taken directly or through food.
16. It is the above evidence which the defence contends is not sufficient to establish a prima facie case against the accused person herein.

Issue for Determination

17. The issue for determination by this Court is whether the evidence outlined above has established that the accused person herein has a case to answer namely whether this Court properly directing its mind to the law and the evidence could convict the accused person if no explanation is offered by the defence. In a case of murder such as the instant one, the Prosecution must lay before the Court evidence proving:
 - a. The death of the deceased and the cause of that death;
 - b. That the death of the deceased was caused by the accused person through an unlawful act or omission.
 - c. That the accused person caused such death with malice aforethought.

18. As I consider the above, I am well aware of the fact that it is not open to me at this point to decide whether the Prosecution has proved its case beyond reasonable doubt. That stage can only be reached when the defence has also given its side of the story. What I need to determine now is whether on the evidence availed by the Prosecution I am prepared to convict if the defence says nothing.

Analysis and findings

19. From the evidence on record and applying the principles set out in the Bhatt case (above) this Court is of the considered opinion that the Prosecution has not established a prima facie case requiring the accused person to be put on his defence. Although the Prosecution has indeed proved that the deceased died, it is not clear what the cause of the deceased's death was. There is the evidence of Dr. Mchana who testified that the probable cause of death was alcoholic intoxication. Dr. Mchana also testified during cross examination that a pesticide was found in the deceased's stomach as confirmed by PW6, the laboratory analyst who confirmed finding a pesticide- Baygone in the contents of the deceased's stomach. So, while the deceased's death has been confirmed its cause is not confirmed. There is also evidence on record suggesting that the deceased took poison. That theory of the deceased taking poison was not eliminated with the available evidence. Maybe if the Investigating Officer had testified he would have shed some light on the issue after making the findings of his investigations known to the Court.
20. On the second issue there is no evidence adduced by the Prosecution tending to show that the death of the deceased was caused by an unlawful act or omission on the part of the accused person or that the accused person committed such act or omission with malice aforethought. Section 206 of the Penal Code Chapter 63 of the Laws of Kenya provides as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

- b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused:

 - c. an intent to commit a felony;”
 - d. an intention by the act or omission facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

21. In the considered view of this Court none of the circumstances stated above have been established by the evidence on record. The only evidence on record tending to connect the accused person with the murder of the deceased is that of Daniel PW4 who stated that at about 4.00pm on 20/01/2012 both deceased and accused person went to his kiosk together and bought two super match cigarettes and then left. Daniel did not see the pair again. Even if it were to be argued that the fact that the accused person having been seen in the company of the deceased at 4.00pm on 20/01/2012 may mean that accused person ought to account for the deceased's death, the medical evidence which is also contradictory does not subscribe the death of the deceased to the injuries on the head and left cheek. It may be that in his drunken state, the accused fell on some object and hurt himself.

Conclusion

22. In light of the above analysis and findings I agree with the defence Counsel that the evidence tendered by the Prosecution does not establish a prima facie case against the accused person to warrant his being put on his defence. I therefore record a finding of not guilty against the accused person and acquit him accordingly under the provisions of Section 306 (1) of the Criminal Procedure Code. Unless he is otherwise lawfully held the accused person shall be released from prison custody forthwith.
23. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 18th day of January 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Omwenga (present) for State

Mr. Matete (present) for Accused

Mr. Lagat - Court Assistant