



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CR CASE NO. 62 OF 2011

REPUBLIC.....PROSECUTOR

VS

MOSES KIMATHI.....ACCUSED

RULING

Moses Kimathi, the accused herein, is charged with the offence of murder contrary to **Section 203** as read with **Section 204 of the Penal Code**. The particulars of the charge are that on the night of 19/11/2011, at Kiegoi Location in Igembe South District, Meru County, murdered **Precious Makena**. The accused denied the offence and the case proceeded to hearing with the prosecution calling a total of four witnesses.

Having closed their case, the question to consider at this stage is whether the prosecution has established a prima facie case against the accused for him to be called upon to enter his defence. The East Africa Court of Appeal defined what a prima facie case is in the celebrated case of **Ramamlal Trambaklal vs Rep (1957) EA 332 pg 334** where the court stated:

“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 is made out if, at the close of the prosecution case, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction”. This is perilously near suggesting that the court would be prepared to convict if no defence is made, but rather hopes the defence will fill the 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 the accused on his defence.” A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence ... It may not be easy to define what is meant by “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”.

It is now my duty to analyse and examine the evidence adduced before this court to determine whether the standard set in the above case and which has been followed in many other cases, has been arrived at.

The deceased was aged about 2½ years old, a daughter to PW1 Harriet Kaari, who is wife to Benson Gikundi. Benson Gikundi is a brother to accused and the deceased was therefore a niece to the accused.

PW1 Harriet Kaari, recalled that on 19/11/2011, she left home about 2.00 p.m. for Maua Town, leaving

the child with her sister **Irene Kagendo (PW2)**. Present at home with Irene was PW1's mother-in-law, Grace Mpekethu and aunt to deceased by name Nchororo. Upon her return home, PW1 found PW2 had left and the child was nowhere to be found; that Nchororo and Grace denied knowing where the child was. She also enquired from the accused who was in his house in the same homestead, but he told her not to disturb him as he was sick. PW1 noticed that accused's clothes had dirt and were blood stained. PW1 shouted for help. Neighbours came and helped search for the child and the body was found in the garden with the head severed off from the body. She said that her father-in-law then left with accused claiming to be taking him to hospital. PW1 told the court that accused was in bad terms with her husband because he always claimed that her husband was favoured by the parents.

PW2 Irene Kagendo, recalled that indeed she was left with the child as PW1 went to Maua; that she was in the home with Grace, Nchororo and accused who was in his house in the same compound; that at about 4.30 p.m., PW2 left the child with Grace and Nchororo and went home. Later that evening, the deceased's father called PW2 enquiring where she had left the child and she explained that it was left with Grace and Nchororo. She later learned that the child had been found murdered.

PW3 PC Moses Mutevu of Maua Police Station was one of the officers who visited the scene on 19/11/2011. He was shown where the child's body was, about 20 metres from the house. He gathered from members of public that the suspect had gone to Maua District Hospital where PW3 went and arrested the accused. He did not manage to record statements of Grace and Mchororo because they had disappeared till he left Maua Police Station.

PW4 Dr. Steven Chege, produced the post mortem report on behalf of **Dr. Mwaitai** who conducted the post mortem on the deceased. The Doctor found that the deceased's head had been severed from the body, and he formed the opinion that the cause of death was severe haemorrhage due to severe head injury.

The accused was certified fit to plead to the charge by **Dr. Mwenda Ricu of Meru Level 5 Hospital** on 7/12/2011. Since there were allegations that accused claimed to be out of sound mind or was sick when the offence was committed, this Court directed that another mental assessment be carried out on accused, and it was done on 7/5/2015 by **Dr. Mwikamba Andrea** of Meru Level 5 Hospital. He also concluded that the accused was normal and fit to plead.

PW2 told the court that she left the deceased in the care of Grace Mpekethu, the grandmother of the child and the child's aunt, Nchororo. However, these key witnesses were not called to explain what happened to the child after PW2 left. PW3 the officer who went to the scene said that the two disappeared from December until January when he left the station. However, the prosecution is not able to explain whether or not any effort was made to trace these witnesses after January 2012 because another Police Officer must have taken over the investigation of this case. The deceased was related to these witnesses but not even the deceased's father was called to tell the Court whether these witnesses could be found or not. The father of the deceased was a key witness in the case as it was alleged that he was on very bad terms with accused. He too was not called. No explanation was given.

PW1 testified that when she returned home that evening, she saw accused's clothes were dirty and stained with blood. Yet PW3 who went to the scene and later arrested accused denied seeing anything on accused that could have connected him to the murder. PW1 also said that police went to their home 3 days later, and a *panga* was recovered and that accused was still wearing the blood stained clothes. The evidence of PW2 and 3 was quite contradictory as regards the state of accused at the time of arrest and whether or not there were exhibits received. What the Court can conclude from the handling of this case by the Police is that there was extreme laxity on the part of the Investigation Officer, lack of interest or police complicity that has resulted in a cover up as to who really committed the offence. Key witnesses were not bonded, exhibits were not produced or taken to the Government analyst.

I note that at the time of plea, the accused admitted to killing the child but denied having intended to do so. However, so far, there are three suspects to the murder: Grace Mpekethu, Nchororo – who was left with the child and of course, accused. If accused is placed on his defence and he opts to be quiet, the

court would have no option but acquit him.

For the above reasons, I find that the prosecution has fallen far too short of establishing a prima facie case against the accused to warrant him to be placed on his defence. He is therefore acquitted of the charge of murder under **Section 306 (1) of CPC.**

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF FEBRUARY, 2016.

R.P.V. WENDOH

JUDGE

22/2/2016

PRESENT:

Mr. Musyoka for State

Mr. Riungu for Accused

Ibrahim/Peninah, Court Assistants