



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE NO. 73 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

M M N.....ACCUSED

RULING

M M N, the Accused person, was charged with the murder of B N M contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the information dated 22nd November 2010, were that on the Accused person committed the said offence on the 13th day of November 2010 at Misakwani village, Katheka sub-location, Kangundo District within Machakos County.

The trial commenced before Mutende J. who heard eleven prosecution witnesses. The prosecution closed its case on 8th July 2015, whereupon the learned Judge gave directions for submissions to be filed by the Defence. I took over conduct of the trial on 19th January 2016 in accordance with the provisions of section 200 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya), after the learned judge was transferred. After perusing the original and typed proceedings, I am now called upon to decide whether the prosecution has established a *prima facie* case to put the accused person on his defence.

The evidence by the prosecution in this regard is as follows. PW1 who was L W W testified that on 13th November 2010, she going to Nairobi for a church conference at Coptic church, and she left her son B N with one A N. When she returned back home at 8.00pm she was informed that B was missing. They searched for the Brian for three days, and eventually found him dead on 16th November 2010 with head injuries and that his right leg had been amputated.

Francis Mbithi Musyoka (PW2) is the one who found the body of the dead child (B) as he was going to herd cattle, when his dog ran to the place the child's body was. Charles Ndunda, PW3, claimed he met the deceased on 13th November 2010 and upon inquiry the deceased told him he was coming from church. He was then later told that there was a search for the deceased and on 17th November 2010 he was told B had been found and he went and saw the dead child. PW4, Musau Muia, identified the body of the deceased child at Kangundo hospital during the post mortem, while PW5 was Dr Masenge Nyangau David who performed the postmortem on the deceased, who was 7 years old. He found the cause of death to be massive haemorrhage following amputation of the right limb.

A M M (PW6), A M T (PW7) and K R (PW8) all testified as to how they got the information that the deceased was missing, and later that he had been found dead. The report about the missing child was made to Cpl Isaiah Ochieng Abina (PW9) who stated that he received the report on 16th November 2010 from one Muhuso Mbithi Ndungu and visited the scene where they found the body of the deceased. He

also stated that they revisited the scene on 17th November 2010 after youth were said to have recovered sandals worn by the deceased from a pit latrine at the grandmother's homestead, and that he recovered a brick which had bloodstains from the accused's house which was in the said homestead. He then sent the sandals and brick to the Government Chemist for analysis, together with a pair of the trousers the accused was wearing. He also took photographs at the scene of the crime.

The Government Analyst, Lawrence Kinyua Muthuri (PW10) testified that he received 5 items from PC Richard Kamau of Kangundo Police station, which were a blood sample of the deceased Mutua Nzao, a blood sample of the accused, Mulwa Nzau, a stone rock, a blue trouser of the accused and beige sandals said to belong to the deceased. He found the stone to be stained with human blood and that the trousers and sandals were not stained with blood. He was of the opinion that the DNA profile generated on the stone matched the DNA profile generated from the blood sample of the deceased.

The last witness was PW11, Cpl Virginia Wanjiku, who stated that she is based at CID Headquarters Crime Scenes Support Services, and that she was familiar with the handwriting and signature of Cpl. Gerald Wasike, who she used to work with from 2000 until he died on 25/6/2011. She produced a certificate signed by Cpl. Gerald Wasike certifying that he had received film under an exhibit memo on 3/12/2010, and that he prepared 14 photographs of the film, which PW11 produced in Court.

The issue before the Court is whether the evidence brought by the prosecution establishes a *prima facie* case. What amounts to 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.

The Prosecution Counsel, Mr. Rono informed the Court in this regard that the prosecution would not be filing submissions and would be relying on the court record. The Defence Counsel, Mr. Kaluu, filed submissions dated 28th September 2015 wherein it was argued that the prosecution has not made out a *prima facie* case to warrant putting the accused on his defence, and has not adduced evidence linking the accused person to the death of the deceased. Further, that none of the prosecution witnesses implicated the accused person in the death of the deceased. Various judicial authorities were cited by the Defence Counsel including the decisions in **R vs Abdi Ibrahim Owl (2013) e KLR** and **Ramanlal Trambaklal Bhatt vs R. (1957) E.A. 332**

In my analysis of the evidence brought by the prosecution, I am mindful that section 203 of the Penal Code defines the offence of murder as follows

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

Therefore in order to establish the offence of murder the prosecution is required to tender evidence sufficient to prove the following three ingredients:

1. Evidence of the fact and cause of the death of the deceased.
2. Evidence that the deceased met his death as the result of an unlawful act or omission on the part of the accused.
3. Evidence that the said unlawful act or omission was committed with malice aforethought.

Malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died 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.

- c. Intent to commit a felony.
- d. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

In the present case, other than the evidence by PW9 and PW10 as to the bloodstain on the stone found in the Accused's house, and which stone was analysed by the Government Analyst, no other evidence linked the Accused to the death of the deceased, and indeed no other evidence was brought as to who the perpetrator of the said crime was or how the crime was committed. PW5 and the post mortem report he produced identified the cause of death to be massive haemorrhage following the amputation of the right limb, and according to PW5 the said amputation was caused by a sharp object like a *panga* (machete) or axe. It is therefore not evident what the linkage of the blood stained stone to the cause of death was, neither was any evidence brought that showed that the Accused used the said stone to attack and kill the deceased.

In addition the Government analyst's report indicated that the DNA profile of the blood on the stone matched the DNA profile generated from the blood sample marked item "BI" of the deceased. Both the exhibit memo form dated 23/12/10 produced as exhibit 9 and the Government Analyst report dated 17th September 2012 produced as exhibit 6 shows that the said blood sample marked "B1" was taken from a deceased by the name Mutua Nzao. It is not known who this deceased person is, as the deceased in this trial was known as B M N.

Lastly, no evidence placed the accused at the scene or near the scene of the crime from the time of the deceased's disappearance until the time his body was found, and there was also no evidence as to any motive and intention on the part of Accused that would have made him commit the offence.

I therefore find that the evidence by the prosecution is insufficient to put the accused person on his defence, and hereby enter a finding of *not guilty* in respect of the Accused Person under S. 306(1) of the Criminal Procedure Code. The Accused person to be set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 23rd DAY OF MARCH 2016.

P. NYAMWEYA

JUDGE