



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 58 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK MUSYIMI KILYUNGI.....1ST ACCUSED

JOHN MUSEMBI KYENGO.....2ND ACCUSED

RULING

The 1st and 2nd accused persons, Patrick Musyimi Kilyungi and John Musembi Kyengo, were initially charged with the murder of Tabitha Koki Kaluki together with a third accused person, being Patrick Muema Musembi, who died while the trial was ongoing. The 1st and 2nd Accused person subsequently pleaded not guilty to the amended charges of murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the amended information dated 7th November 2013 were that on the night between 6th and 7th October 2010 at Kawethei village, Ndithini Central sub-location, Ndithini Location in Ndithini Division of Masinga District in Machakos County, they jointly murdered Tabitha Koki Kaluki.

The trial commenced before Mutende J. who heard five prosecution witnesses. I took over conduct of the trial 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 hearing the sixth and last prosecution witnesses and 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 on their defence.

The evidence by the prosecution in this regard is as follows. PW1 who was APC IP Bosco Wafula testified that on 8th October, 2010 while based at Kakuzi Division Ithanga Thika East, he was informed that a child had been abandoned at AIC Ithanga church and taken to the police station. He stated that he asked a lady by the name of Naomi to take custody of the child as they investigated to find the mother of the child. Further, that on 9th October, 2010 the said Naomi came to the police station with the child and a lady by the name Katungwa, who admitted to having been given the child to take to the church. The said Katungwa volunteered to show them the person who had given her the child, who was one of the persons suspected to have murdered the mother of the child who was known as Kaloki. Katungwa then volunteered to lead PW1 to where the body of the deceased had been hidden.

The body of the deceased was then found covered with a bedsheet in Masinga area, and PW1 testified that he together with Cpl. Amos Mwamba and APC Macharia took it to Ithanga police post and notified Yatta

police station to come and take over investigations. Further, that they arrested three (3) suspects at Kamotei center who were mentioned by Katungwa.

PW2 who was Naomi Syokau Makuthu testified to having found a child in the AIC Church and reporting the same to the police station. She testified that she was asked by the chief to take care of the child. PW3 was Beth Sowai who testified that on 8th October 2010 she was informed by her son that her daughter Tabitha Kaloki had been killed, and that evening she also received a call from a lady who told her that a child had been found in a church. She stated that she went and found the lady with her grandchild, and also found one Katungwa who was seen with the child, whom they took to the police station.

The fourth prosecution witness (PW4) was Cpl Amos Muombe who testified that he is the officer in charge of Ithanga police post in Muranga County. He stated that he received information on 9th October 2010 that a child had been found at AIC church Ithanga, and that he sent police officers to the church who brought the child to the police station. Further, that on the next day members of the public brought a girl to the station known as Anne Kathure who was seen with the child on 7th October 2010. PW4 further testified that upon interrogation of Anne Katunge, she stated that three people namely Patrick Musyimi, Patrick Muema and John Musembi had killed the mother of the child and given her the child. Further, that they ordered her not to divulge what she had seen. PW4 testified that he then arrested the 3 suspects together with the said Anne Katunge.

The 5th witness called by the prosecution was Dr. Linkon Njogu, who stated that he was a medical superintendent at Matuu hospital. The Prosecution's application to have PW5 produce the post mortem report prepared by a Dr. Mulwa was however opposed by the Defence, and the Court ruled that the prosecution avails Dr Mulwa to produce the report.

Dr. Joakim Mutua Mulwa, the sub-county medical officer of health for Makeni Sub County in Makeni County was called as the last prosecution witness (PW6). He testified that on 19th October, 2010 he was requested to perform a post mortem on the body of Koki Kaluki who had died on 7th October, 2010. Further, that the body was already 12 days old and had been preserved in the mortuary. PW6 further testified that the body of the deceased was already decomposed, and that there were bruises around the neck, the bone at the neck was fractured and all the internal organs were badly decomposed. It was his testimony that from the bruises on the neck and broken neck bone he formed the conclusion that the death was as a result of strangulation, and that he prepared a report on 19th October, 2010 which he produced as Prosecution Exhibit. 1

The issue before the Court is whether the evidence brought by the prosecution establishes a *prima facie* case to warrant putting the 1st and 2nd accused persons on their defence. 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. Shijenje sought to rely on the court record for a finding of case to answer. The Defence Counsel, Mr. Muema, filed submissions dated 18th December 2015 wherein it was argued that other than the death of Tabitha Koki having been established to be due to strangulation, there was no direct or circumstantial evidence that the accused persons caused the unlawful act that caused the death of the deceased. It was also submitted by the Defence that there was no evidence upon which malice aforethought on the part of the accused could be implied or inferred.

I find that I must agree with the Defence counsel. This is for the reasons that the only evidence linking the 1st and 2nd accused persons to the death of Tabitha Koki was the testimony of PW1 and PW4 as to what they were told by one Katungwa and/or Anne Katunge, to the effect that the Accused persons are the ones who killed Tabitha Koki. The said Katungwa and/or Anne Katunge was not called as a witness to shed

light as to how she got this information, and the circumstances in which the said alleged killing occurred. No other evidence was adduced by the prosecution that placed the accused at the scene of the crime.

I therefore find that the evidence by the prosecution is insufficient to put the accused persons on their defence, and hereby enter a verdict of not guilty under section 306(1) of the Criminal Procedure Code against Patrick Musyimi Kilyungi the first accused person, and John Musembi Kyengo the second accused person. The said 1st and 2nd accused persons are accordingly acquitted and are set free unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 14th DAY OF MARCH 2016.

P. NYAMWEYA

JUDGE