



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

H.C.CRIMINAL CASE NO.53 OF 2011

REPUBLIC PROSECUTOR

VERSUS

DANSTONE ADOLU ACCUSED

RULING

1. **DANSTONE ADOLU, the accused herein**, has been arraigned before this Court for the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. It is alleged that on 17th day of September, 2011 at Ikholi village, Ikolomani District, Kakamega County, he murdered **Khayati Adolu**. The prosecution called 4 witnesses in an attempt to prove its case against the accused.
2. This is a case of 2011, and on 20th April, 2015, the prosecution was given a final adjournment to call its remaining witnesses and the court fixed the case for hearing on 27th July 2015. On that day, as it turned out, the prosecution was not again ready to proceed because it did not have its witnesses in court and as usual applied for another adjournment. After lengthy arguments both in support of the adjournment and opposition, the court issued a warrant of arrest against the witness who had not turned up and the case was fixed for mention on 16th September, 2015, when the case was again fixed for hearing on 14th December, 2015. On that day PW4 was produced under a warrant of arrest and testified after which the prosecution closed its case prompting this ruling.
3. PW1 **Christopher Itembetembe** told the court that on 17th September, 2011 at about 8 pm while at home, he received a call from the Assistant Chief to proceed to Choili Andidi's home (the accused's home) and find out what was happening. On arrival, he found the accused's hands tied and on inquiring what had happened, he was informed that the accused had killed his own child after he hit him with a harmer. He went into the house and found the body of the deceased on the floor. He directed that the accused be taken to Malinya APs Post. The mother of the deceased was not at home and when the Assistant Chief came they decided to go and get her at her parents' home and they brought her to her matrimonial home. Later, the police came and the body was taken to the mortuary.
4. PW2 **No.99013341 Sgt Protus Nyongesa** told the court that on 18th September, 2011 he was called by **APC Chemilil** from Ikolomani APs Post and told that a village elder and members of Community Policing had taken to that Post a man who had allegedly killed his child. The witness testified that he informed his senior **SSGT Maclout Wasike** and together they proceeded to Malinya AP's camp and from there they visited the scene. At the scene they found the body lying on the floor with a swollen right hand. They searched the house and recovered a hammer which they took with them. Soon police officers from Kakamega Police Station arrived and re-arrested

the suspect and took the body of the deceased to the mortuary. He told the court that when he visited the scene, he did not find anybody in the house. They were accompanied by PW4, mother to the deceased. In cross examination the witness told the court that they visited the scene without the accused. He also told the court that his colleague **SSGT McClout** recovered the hammer but it was not in court. He said he did not know how the deceased met his death.

5. PW3, **No.81735 SGT David Opiyo** on his part told the court that on 19th September, 2011 he was at Kakamega Police Station, when at about 8.00 a.m. he was called by his superior and informed of an incident at Malinya and asked to proceed there. They proceeded to Malinya where they met Administration Police Officers who led them to the scene. At the scene, the deceased's body was found inside the house. They collected the body and took it to Kakamega Hospital mortuary and the suspect was re-arrested and charged with murder. According to the witness, the mother of the deceased identified the body. In cross examination the witness told the court that a hammer, the murder weapon, was recovered at the scene. According to him, the deceased's mother discovered that the baby had died when she attempted to breast feed him at around 2 a.m.

6. PW4, **Josephine Khasiala**, and mother to the deceased, testified that on 17th September, 2011 at about 8 pm, she was in the house doing house chores when the accused came with a piece of meat and dropped it into water that was boiling in the kitchen. On being told that she had already cooked some meat, the accused started fighting her, picked a hammer and attempted to hit her with it. She ducked and the hammer hit the child she was holding on the head killing the child. She told the court that she had lived with the accused as husband and wife for more than one and a half years, and the deceased was the only child they had.

7. In cross examination, the witness told the court that on the material night, the accused was drunk and that the only people in the house, were the accused, herself and the deceased. She told the court that they had a quarrel and that the accused did not intend to hit the child. After the incident she placed the child on the bed and went to call the accused's mother. When she came back, at about 2 am she breastfeed the child and placed him to sleep. When she woke up to breast feed him again, she found him dead. That is when she left for her parents' home.

8. At the close of the prosecution's case, Mr Ondieki learned, counsel for the accused, submitted that the prosecution had not established a **prima facie** case to require the accused to be put on his defence. He therefore urged the court to acquit the accused on that account.

9. Mr Oroni on his part submitted that the prosecution had led sufficient evidence to require the accused to be put on his defence. He pointed to the evidence of PW4 saying she witnessed the incident where a hammer was used and therefore asked that the accused be put on his defence.

10. By this ruling, the Court has been called upon to determine whether the prosecution has made out a **prima facie** case and if it should put the accused on his defence. The prosecution maintains that it has, while the defence says the prosecution has not. In the case of **Ramanlala T. Bhatt v R** [1957] EA 332, the Court defined the meaning of a **Prima facie** case as follows:-

“It may be difficult 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 evidence could convict if no explanation is offered by the defence.

11. A **prima facie** case does not therefore merely mean there being “just evidence”. The prosecution is required to lead credible cogent and reliable evidence that connects the accused to the charge or information laid out against him, which would require him to offer an explanation and without which, the court could convict him on the evidence on record.

12. The accused herein faces the information of murder. **Section 203** of the Penal Code creates the offence of murder which is defined as follows:-

S203 “Any person who of malice aforethought causes the death of another person by an unlawful act is guilty of murder.”

13. A person who causes the death of another through an unlawful act or omission, while actuated by malice aforethought commits the offence known as murder. For the prosecution to make out a case of murder, it must prove that a person is dead, that the person was killed through an unlawful act or omission on the part of the accused, and that the accused had malice aforethought. That is to say the prosecution must prove **actus reus** as well as **mens rea**.

14. For the prosecution to prove malice aforethought or **mens rea** as defined under **section 206** of the Penal Code, it must establish through credible evidence that:-

- a) there was the intention to cause death of or grievous harm to a person whether that person be the one who is actually killed or not.
- b) the person had knowledge that the act or omission causing death would probably cause the death of or grievous harm to a person whether that person be there one actually killed or not,
- c) there was an intention to commit a felony
- d) there was 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.

And only upon satisfying the above requirements would the prosecution have made out a **prima facie** case to require the accused to be put on his defence.

15. In the present case, PW1 testified that he received information about an incident at the accused's home and when he went there he found a body lying in the house. He learnt that it was the accused who had allegedly killed his child. The accused was taken to a nearby AP camp and a report was made to the police who came and took the body to the mortuary and the accused to the police station.

16. PW2's testimony was that he received a report of the incident and when he went to the home of the accused, he found the body of the deceased lying in the house. He and a colleague searched the house and recovered a hammer said to be the murder weapon which they took away. The deceased's body was taken to the mortuary. PW3 also a police officer received the report of murder and proceeded to Malinya where AP officers led them to the scene. They found the body of the deceased which they collected and took to the mortuary. They re-arrested the accused whom they later arraigned in court for the offence of murder.

17. The last witness, PW4, the wife to the accused and mother to the deceased, testified that on the material night, the accused came home and picked a quarrel with her. In the process he picked a hammer which he aimed at her but she ducked and the hammer hit the child she was carrying, who later died. After the incident she went to her parents' home. In cross-examination she said that the child must have died after 3 a.m. because she had breastfed the child earlier at about 2 a.m. She said she discovered that the child had died when she tried to breastfeed him again. That is the evidence of the prosecution.

18. Out of the 4 prosecution witnesses, only the evidence of PW4 tried to connect the accused with the offence he is charged with. PW4 told the court that the hammer that hit the deceased was aimed at her but hit the child after she ducked. Although the accused is charged with murder, the prosecution did not tender evidence to prove death. The prosecution could only prove death by calling specific evidence through a post-mortem examination report to prove that indeed there was death and the cause of such death. The prosecution proceeded in a casual manner and did not even attempt to seek an adjournment to call this vital evidence to prove death and what caused such death. In the case of **Ndungu v Republic** [1985] KLR 487 the Court of Appeal said:-

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution.”

That point was again revisited in the case of **Chengo Nickson Kalama v Republic** [2015] eKLR where the same court stated:-

“It is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post mortem examination report of the deceased.”

19. In the present case, there is evidence that someone died, in that the body of the deceased was found lying in the house, and was taken to the mortuary. The court however was not told, whether a post mortem examination was conducted on that body. None of the witnesses told the court what injuries, if any, were found on the body of the deceased, and if those injuries caused the death of the deceased. The cause of death was therefore not proved beyond reasonable doubt. Although there is also evidence that a hammer which was allegedly used was recovered, that “murder weapon” was also not produced, and no explanation was offered for not producing it. That is why I say the prosecution proceeded with this case in a casual manner.

20. Given the kind of evidence led by the prosecution and weighing that evidence against the applicable law, I come to the conclusion that the prosecution has not established a prima facie case against the accused. To ask the accused to defend himself would be to ask him to fill gaps in the prosecution’s case.

21. For those reasons, I enter a verdict of not guilty and acquit the accused of the information of murder. I order that he be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 28th day of April, 2016.

E.C. MWITA

JUDGE