



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 1 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

PETER MUTINDA MUTISOACCUSED

RULING

The Accused person, Peter Mutinda Mutiso, is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the information dated 6th January 2014 were that on the night between 20th December 2013 at Twamavindi village, Iiani sub-location, Kivaa Location in Masinga District within Machakos County, he murdered Kyalo Mutiso (hereinafter referred to as “the deceased”).

The trial commenced before Mutende J. who heard eight prosecution witnesses. I took over conduct of the trial in accordance after complying 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 ninth and last prosecution witness, and after perusing the original and typed proceedings, I am now called upon to make a ruling pursuant to section 306 of the Criminal Procedure Code as to whether to find the Accused not guilty or to put him on his defence.

The issue before the Court therefore is whether the evidence brought by the prosecution establishes a *prima facie* case to warrant putting the accused person on his defence. The prosecution and defence counsel were invited to make submissions on this issue, which this Court has considered together with the evidence brought by the prosecution.

The threshold for a finding of 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.

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, Dr Simon Kioko Muli (PW7) who conducted the post mortem on the deceased produced a post mortem report in court as the prosecution exhibit 2, which identified the cause of death as cardiopulmonary arrest and pulmonary collapse due to penetrating chest injuries inflicted by a sharp object. Jackson Makau Kamutu (PW4) and Corporal Augustus Mureithi (PW9) testified that they found the deceased on 20th December 2013 lying unconscious on the ground after trailing his bloodstains, with an arrow next to his body. PW4 and PW9 also testified that the deceased told them he had been shot by an arrow by his uncle one Nyamae Mutiso, who PW4 testified is the accused.

PC Richard Odera (PW5) also testified that the deceased made a report at Matuu Police station that he had been shot with an arrow by one Peter Mutinda, and that he came with the arrow. Cpl. David Sang (PW6) thereupon arrested the accused person after the deceased later died, and produced the arrow in Court as the Prosecution's exhibit 1.

The other witnesses (PW1, PW2, PW3 and PW8) testified that they were either with the deceased at the river prior to his murder, and/or were informed of the murder of the deceased, but did not witness the said murder. However, Dickson Muasya Wambua (PW8) in addition testified that on 20th December 2013 he heard people shouting, and upon going to the place where the people had gathered, he saw the accused with a bow and arrow standing by the river, and that he heard the accused say that he was waiting to strike another person as he had with Kyalo (the deceased).

The learned Prosecution Counsel, Mr. Cliff Machogu in submissions dated 25th January 2016 submitted that the prosecution had met the threshold set out in **Ramanlal Trambaklal Bhatt v R [1957] EA 332**, as the fact and cause of death of the deceased as set out by PW7 is not challenged. Further, that the evidence showed that the accused had a clear motive and intention to harm the deceased as he armed himself with a bow and arrow to stop the deceased from harvesting sand from a river. It was submitted that it is the accused who used an arrow to cause the death of the deceased.

The learned Defence Counsel, J.N Kimeu & Company Advocates filed submissions dated 4th November 2015, wherein it was argued that the prosecution case is premised on hearsay, and that the arrow that was used to kill the deceased which was produced as an exhibit was not linked to the accused. Further, that the statement made by the deceased that he was shot by the accused was a dying declaration, and under section 33 of the Evidence Act cannot be sufficient to find the accused person guilty as no other evidence was adduced to link the accused person to the offence. Reliance was placed on the decision in **Sospeter Mayenga Amenya vs Republic, Kisii H.C Criminal Appeal No. 79 of 2008**, **David Ngugi Gichuru vs Republic, Nrb C.A Criminal Appeal No. 134 of 2007** and **Nelson Julius Karanja Irungu vs Republic, Nrb C.A Criminal Appeal No. 24 of 2008** in this regard.

The key evidence that therefore links the accused to the death of the deceased is the deceased's statement

before his death that he had been shot with an arrow by his uncle Nyamae Mutinda. The accused was identified as the said Nyamae Mutinda in Court by PW4. Section 33 (a) of the Evidence Act gives the circumstances which a dying declaration can be accepted in evidence. The general principle is that a dying declaration is admitted in evidence because it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful considerations to tell the truth. It is also necessary for such evidence to be corroborated under section 124 of the Evidence Act.

The evidence of the post mortem report by PW7 as to the cause of death; of PW4 and PW9 about recovering an arrow next the deceased when they found him; and that of PW8 as having seen the accused at the scene of the crime with a bow and arrow is in my view sufficient to corroborate the evidence of the statement made by the deceased.

I therefore find that the accused has a case to answer and order that he be put on his defence. The Accused person is hereby informed of his right under section 306 (2) of the Criminal Procedure Code to address this court in the manner in which he intends to defend himself whether by giving sworn or unsworn testimony. He is further informed of his right to call witnesses in his defence and to inform this court whether he wishes to call any witnesses.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 24th DAY OF MAY 2016.

P. NYAMWEYA

JUDGE