



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 109 OF 2010

REPUBLIC PROSECUTOR

VERSUS

ESTHER MUTHONI MURAGE 1ST ACCUSED

ANN NYAMBURA MUNGAI 2ND ACCUSED

RULING

The two accused persons **ESTHER MUTHONI MURAGE** (hereinafter referred to as the 1st accused) and **ANN NYAMBURA MUNGAI** (hereinafter referred to as the 2nd accused) are jointly charged with offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were given as follows

“On 21st day of October 2010 at Gwa-Kiongo trading centre in Nyandarua District within Central Province jointly with others not before court murdered MWANGI”

Both accuseds pleaded ‘**Not Guilty**’ to the charge and their trial commenced at the High Court in Nakuru on 11/11/2015. The prosecution led by **MS NGOVI** learned State Counsel called only two (2) witnesses in support of their case. **MS KERUBO** Advocate represented both accused’s person.

PW1 R W W told the court that during the month of October 2010 she fell pregnant and as young girls are wont to do she ran away from home. She went to Gwa-Kiongo trading centre to a certain pub where she met the two accused persons working there. After explaining her predicament, the two accused’s took pity on **PW1** and welcomed her to live with them and help them in the pub. **PW1** stay there sleeping with the 1st accused in a house behind the pub for a total of five days.

On 21/10/2010 at 11.00pm as they were closing the pub, the 2nd accused who resided elsewhere left to go home. **PW1** and the 1st accused retired to sleep in their room behind the pub. During the night they heard a commotion. The 1st accused went outside to check what the problem was. **PW1** did not go out. She remained in their room. A few minutes later the 1st accused returned with muddy clothes. She washed up and slept. The next day at 6.00am police came and arrested both **PW1** and the 1st accused. They were put into a police vehicle in which lay the naked body of a dead man.

PW1 did not know who the deceased was. They were both taken to the police station and placed in cells. **PW1** recorded her statement and was later released but the 1st and 2nd accused were eventually charged

with the offence of murder.

PW2 CHIEF INSPECTOR ANTHONY GITONGA told the court that at the material time he was based at Mirangine police station. On 21/10/2010 at about 6.00am he received a call from a member of the public informing him that a man was lying badly injured at the stage at Gwa-kiongo Trading Centre. **PW2** rushed to the scene. He found a naked man who had been badly beaten lying shivering beside a pool of water. **PW2** rushed to call a doctor from Mirangine Health Centre. The doctor came to the scene but upon checking the man's pulse pronounced him dead. A watchman guarding a nearby premises informed **PW2** that the man had been beaten by one Esther (1st accused). Police arrested the 1st accused who said she was with the 2nd accused. Police then arrested the 2nd accused. Both women were arraigned in court on a charge of murder.

Despite the prosecution having been allowed several adjournments, this case having been filed in October, 2010 they were unable to avail any further witnesses and closed their case. At this stage the court is required to consider the evidence on record and make a determination as to whether the accused persons ought to be placed on their defence. In other words this court must decide whether the evidence on record suffices to establish a *prima facie* case.

The definition of *prima facie* case was given in oft cited case of **RAMANLAL T. BHATT Vs REPUBLIC [1957] E. A 332** where it was held

“It may not be easy 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 the evidence could convict if no explanation is offered by the defence”.

In any murder case, it is a basic requirement that the cause of death of the deceased be proved. It must be shown that the deceased met his death due to an act of culpable homicide. In this case there was no eye-witness to the incident. Nobody was able to give first hand evidence of how the deceased sustained the injuries that eventually took his life. The prosecution in this case failed to tender any evidence to prove that the deceased died as the result of culpable homicide. No doctor was called to testify. No post mortem report was produced in court. As it is the court has absolutely no idea what caused the death of the deceased. In the case of **CHENGO KALAMA Vs REPUBLIC [2015] eKLR**, the Court of Appeal sitting in Malindi held as follows

“The position appears to be that save in very exceptional cases stated above 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...”

In any criminal case the onus lies exclusively on the prosecution to prove each element of the charge beyond reasonable doubt. Failure to avail medical evidence and post mortem report is fatal to the prosecution case. An essential element of the offence of murder being cause of death remains unproven. On this basis alone this charge would fail.

Even if the cause of death had been sufficiently proven (which is not the case here) the evidence adduced remains scanty and insufficient to establish a *prima facie* case.

As stated earlier there was no eye-witness to the incident. **PW2** arrested the 1st accused because he was informed by a watchman that she was one of the persons who beat the deceased. **PW2** who was a senior police officer did not bother to get the name of this watchman, did not take him to the police station to record a statement, and cannot even remember where that watchman works. This remains hearsay evidence which is not admissible against the 1st accused.

PW2 told the court that the deceased had tried to rob her as she walked home. She raised an alarm and members of public responded and beat him up. **PW2** confirmed to the court that he established that 2nd

accused was telling the truth. It would appear that the deceased was a victim of mob justice (or rather mob injustice). Why would police opt to charge the 2nd accused who only raised an alarm to defend himself from a robbery instead of conducting exhaustive investigations to establish exactly who beat up the deceased. The police investigating were clearly sloppy and they took the easy way out in charging the 2nd accused. It is telling that the investigating officer did not appear to testify in this case to explain what if any investigations he conducted into the matter. The failure of the investigating officer to testify severely weakens the prosecution case.

PW2 further stated that he only arrested the 1st accused because the 2nd accused named her as one of the people who responded to her cry for help. Thus police relied on the evidence of a co-accused to implicate the 1st accused in this matter. The testimony of **PW1** is of no value whatsoever. She told the court that although she heard a commotion, she never went outside to check what was happening she did not know the deceased and had no idea how he met his death.

All in all I find that no meaningful investigations were conducted into this case. Police only arrested and charged the two accuseds because it was convenient to do so. If both accuseds elected to keep silent in defence no conviction would be forth coming. In short the prosecution has failed dismally to prove a *prima facie* case. I enter a verdict of '**Not Guilty**' and I acquit both accuseds of this charge of murder under Section 306 (1) of the Penal Code. Each accused is to be set at liberty forthwith unless otherwise lawfully held.

Dated in Nakuru this 19th day of August 2016

Mr. Maragia holding brief for Ms Kerubo. Both accused's in person.

Mr. Chirchir for State.

Maureen Odera

Judge