



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 17 OF 2012 (AS CONSOLIDATED WITH CRIMINAL CASE NO 25 OF 2012)

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD MBUVI MBIKI.....1ST ACCUSED

JOHN WAMBUA KYAMBI.....2ND ACCUSED

RULING

Richard Mbuvi Mbiki, the 1st Accused person; and John Wambua Kyambi, the 2nd Accused person (hereinafter the 1st and 2nd Accused persons), are charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the charge as stated in the information from the Director of Public Prosecutions dated 26th September 2013 are that on 7th March 2012 between Ukia Junction and Ukia Market along Wote –Machakos road within Makueni District in Makueni County, the said accused persons jointly murdered Phillip Kimuyu Nzanu (hereinafter referred to as “the deceased”).

Both the 1st and 2nd Accused person pleaded not guilty to the offence on 26th September 2013 after their respective criminal cases were consolidated, and an amended information filed in Court dated 26th September 2013. The trial commenced before Mutende J. on 18th May 2015 who heard 3 witnesses. I took over the conduct of the trial on 29th September 2015, and after complying with the provisions of section 200 of the Criminal Procedure Code, and the Accused persons submitted that they wanted the case to proceed from where it had stopped. On 22nd June 2016 after several adjournments due to non-production of witnesses, and arising from non-compliance with the Court’s orders in this regard, I directed the prosecution to close its case, and that parties file their submissions on case to answer.,

After perusing the original and typed proceedings and submissions made by the prosecution and defence counsel, I am called upon to make a ruling pursuant to section 306 of the Criminal Procedure Code as to whether to find the Accused persons not guilty, or to put them on their 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 persons on their defence.

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.

John M. Mwangangi Advocate, the learned counsel for the 1st Accused Person, filed submissions dated 28th June 2016 and argued therein that PW1 and PW3 who were present when the confrontation leading to the death of the deceased occurred, did not identify the 1st Accused person during the identification parade nor see the 1st Accused attack the deceased. Likewise, that PW2 did not see the 1st Accused on the material day. Further, that the prosecution did not produce a post-mortem report to prove the death and cause thereof. Therefore that there was no evidence brought that incriminated the 1st Accused person.

B.M. Mungata Advocates, the learned counsel for the 2nd Accused Person, filed submissions dated 19th July 2016. It was argued therein that the 2nd Accused did not know the deceased, and did not have any reason to harm the deceased, and was mistakenly arrested in place of one Chanda, who the evidence showed was the one who had an altercation with the deceased. It was further submitted that no evidence was tendered to show the death of the deceased, as the prosecution did not call the investigating officer or a doctor to produce a post-mortem report or death certificate.

Lastly, it was submitted that only PW1 testified that he saw the 2nd Accused person at the scene of the crime, and could not give an account of the clothes the accused person wore as it was dark. However, his testimony was contradicted by that of PW3 who was also at the scene of crime and who testified that he did not see the 2nd Accused. Therefore, that the case against the 2nd Accused is based on circumstantial evidence which is not sufficient to stand the threshold of beyond reasonable doubt.

The prosecution submitted that they would not file any submissions and would be relying on the record of the trial.

I have analysed the evidence brought by the prosecution and arguments by the parties, in light of the threshold that needs to be met to establish a *prima facie* case of murder. Three witnesses gave evidence, namely Benjamin Maya Nzamu (PW1), a brother of the deceased, Simon Munyoki Muumbi (PW2) a businessman who was at Ukia market on the material day; and Francis Mwathi Makai (PW3) the deceased's cousin.

PW1 and PW3 were the two witnesses who were present during the incident leading to the deceased's death. According to the two witnesses, they went with the deceased and one Christin Kinithi on 7th March 2012 to visit the deceased's in-laws. On their way back three of them, namely PW1, PW3 and the deceased, alighted at Kyao centre and that is where a person they did not know confronted the deceased. According to PW1 the deceased called the said person by the name Kyambi, and asked him why he was beating him. That they managed to separate the deceased and the person and decided to leave the place and go home.

However, that before reaching the Ukia junction, they saw a group of people in motorcycles, who came and surrounded them. At this point PW3 testified that he ran away. PW1 on his part testified that and the group of people asked them why they were beating Kyambi, and started beating him and the deceased. Further, that they were rescued by two ladies who said they knew PW1 and the deceased, and that PW1 who was by then injured walked home and slept. He stated that as he left he saw someone lying by the side of the road, and that he was later told the next morning that his brother had died.

PW1 testified that he later identified the 2nd Accused person in an identification parade. He said that he told the police he could identify the person who first confronted the deceased by his facial features and voice, as he had also seen him talking with the deceased at the matatu stage earlier in the morning when they were boarding the vehicle.

PW2 on his part testified that he was called and told that a person had been assaulted at Ukia, and that upon reaching the place he saw a person who was bleeding lying by the road, and one Kisee who was with a motorcycle on the side of the road. Further, that the said Kisee, whom he identified as the 1st Accused, asked him to tell him the name of the person lying on the road and threatened to lynch him if he did not, at which point PW2 ran away and reported the matter to the police.

From the evidence adduced by the prosecution, no witness testified as to actually seeing the deceased dead, with PW1 stating that he saw someone lying by the road, whom he did not identify, and PW2 stating that he did not know the person who was lying on the road. In addition no evidence was called by the prosecution to establish the cause of death of the deceased. The fact and cause of death has therefore not been established. This Court cannot therefore proceed to examine the evidence on, or make a finding as to whether the acts or omissions of the Accused persons could have caused the deceased's death. I will however make certain observations as to the evidence linking the 1st and 2nd Accused persons to the death of the deceased particularly as regards their identification.

In this regard PW1 stated that he identified the 2nd Accused person in an identification parade. No evidence of such an identification parade having been conducted was however brought by the prosecution. There are also inconsistencies in the evidence as regards whether the 2nd Accused was the same person that had earlier been seen with, and confronted the deceased. During his cross-examination, PW1 stated that he has never seen the said person whom he referred to as Kyandi again, and that the said person has not been arrested. This contradicts his evidence that he identified the 2nd Accused person because he was the person who he had earlier seen with deceased. PW1 also testified that he saw the 2nd Accused person for the first time on that day, and there is thus doubt created by the assertion that PW1 recognized the 2nd Accused person's voice and facial features, particularly given that the attack on the deceased took place when it was dark.

In addition, PW3 testified that he knew that the 2nd Accused person owned two motorcycles, and that he did not see him on 7th March 2012. The evidence of PW2 as to the identity of the 1st Accused person is

however irrelevant as PW2 came to the scene and saw the 1st Accused after the attack on the deceased, and he was not present, nor did he witness the said attack.

I therefore find that the evidence brought by the prosecution is insufficient to put the 1st and 2nd Accused persons on their defence, and I hereby enter a verdict of not guilty under section 306(1) of the Criminal Procedure Code against Richard Mbuvi Mbiki, the 1st Accused person; and John Wambua Kyambi, the 2nd 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 29th DAY OF NOVEMBER 2016.

P. NYAMWEYA

JUDGE