



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 33 OF 2011

REPUBLIC PROSECUTION

VERSUS

ANTHONY MUTINDA WAMBUA 1ST ACCUSED

RICHARD MUTINDA MUTUA 2ND ACCUSED

RULING

1. **Anthony Mutinda Wambua** and **Richard Mutinda Mutua** hereinafter “**the 1st and 2nd accused respectively**” are charged with the offence of **murder contrary to section 203 as read with section 204 of the penal code.**

The particulars of the offence are that “*on the 16th day of May 2011 at Kiuma village of Kaliluni sub-location, Iveti Location within Kathiani District of Machakos County, jointly with others not before court murdered Amos Wambua Nthenge*”.

2. Facts of the case are that on the 16th March 2011, PW 1 Fredrick Muriu Nzuki a manager a Teleza Bar, Kaliluni in the company of other people was on his way home at about 1.00 a.m. when he saw a motor vehicle identified as belonging to the deceased parked alongside the road.

As they moved on, they noticed a person tied on an electric pole. They recognized him as the 1st accused herein and they notified his family members.

PW 2 Boniface Musyoka Nthenge, PW 4 Bernard Kyalo Nzioka, PW 6 Makau Matheke, PW 7 Joseph Mumu and PW 8 Jackson Kasyoka Mutua were informed of the incident. They later went to the scene and found the 1st accused who had been tied on a pole. His shirt had blood stains.

3. They untied the 1st accused and searched around for the deceased. The body of the deceased was later found some approximately 3 metres away from the electric pole on which the 1st accused had been tied.

4. PW 10 No.58621 P.C. Bernard Onjula one of the investigating officers investigated the case and arrested the 1st accused person. The 2nd accused was mentioned by the 1st accused hence the arrest.

5. To prove the case the prosecution was required to prove beyond any reasonable doubt that the accused persons herein caused the death of the deceased by an unlawful act or omission and with malice

aforethought.

(See Section 203 of the Penal Code.)

6. The fact of death of the deceased was proved by evidence adduced by PW 5 Dr. Fredrick Okinyi a pathologist who performed a postmortem on his body. He formed the opinion that the cause of death was head injury that had led to haemorrhagic shock and increased intracranial pressure that was caused by a blunt trauma.

7. At the close of the prosecution's case there was no eye witness to what transpired. The prosecution therefore relied on circumstantial evidence.

Principles to be applied in a case of circumstantial evidence were well set out in the case of *Abanga alias Onyango vs Republic* Criminal Appeal No. 32 of 1990 (UR) where the Court of Appeal stated thus:

“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests:

i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii. Those circumstances should be of a definite tendency unerringly pointing towards guilty of the accused;

iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

8. With regard to the 2nd accused person, according to PW 10, the accused was arrested following the co-accused's confession to CI Mwaura. On cross examination he stated that there was no independent evidence against the Accused 2. CI Mwaura did not testify therefore the evidence against accused 2 was hearsay that was inadmissible in evidence.

There was absolutely no evidence whether direct or circumstantial to connect Accused 2 with the offence in issue.

9. In respect of accused 1 circumstantial evidence connecting him to the death of the deceased was the blood stains on clothes which matched the DNA profile that was generated from the body samples of the deceased. The long sleeved pinkish shirt that belonged to the 1st Accused which he was wearing on the fateful night had blood stains as aforesaid. The shirt was recovered at Kathiani Market a distance from where the 1st Accused and the body of the deceased were found. This fact required an explanation by the defence.

Further the heinous act was stated to have been committed by more than one person. Circumstantial evidence adduced may unerringly point to the accused 1 as one of the persons who did it.

10. To be put on their defence a prima facie case must be established by the prosecution. In the case of **Trambaklal Bhatt vs Republic (1957) EA 332** it was stated that:-

“..... We cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction”. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather that the defence will fill the gaps in the prosecution case. A mere scintilla of evidence can never be enough: nor can

any amount of worthless discredited evidence. It may 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.”

11. With the case cited in mind in respect of accused 2, at the conclusion of the prosecution’s case there was no evidence that he committed the offence. I therefore return a finding of **Not Guilty**. Accordingly he is acquitted under section 306(1) of the CPC.

12. However, for the 1st accused person, evidence adduced so far requires him to defend himself in accordance with section 306(2) of the CPC.

13. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of MAY, 2015.

L.N. MUTENDE

JUDGE