



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 64 OF 2008

JOSEPH MURIUKI

MWAI.....ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

RULING

The accused person, **Joseph Muriuki Mwai**, is before this court to face a charge of murder contrary to Section 203 as read with Section 204 of the penal Code. The particulars of the offence are that on 28th October, 2008 at Karima Village, in Kirinyaga District within Central Province, he murdered Amos Warui Rwiga. The prosecution closed its case after presenting the evidence of 8 witnesses. At the close of the prosecution's case, learned counsels from both sides were invited to make submissions under *Section 306(1)* of the Criminal Procedure Code.

The question which this Court must grapple with at this stage is whether the prosecution has made out a *prima facie* case to enable this Court place the accused on his defence? I have considered the evidence plus the oral submissions of learned counsel for the defence. It is the submission of Mr. Njuguna Kimani, learned counsel for the defence, that the prosecution has not established a *prima facie* case to enable this Court place the accused on his defence. It is the learned advocate's view that there was no proof of *actus reus* nor malice aforethought on the accused's part. It was further pointed out that there was no conclusive proof of the cause of death. Miss Ngalyuka was on her part, of the view that, the accused should be placed on his defence because the prosecution had presented evidence which established a *prima facie* case. The Court of Appeal for Eastern Africa held *inter alia* in the case of **Ramanlal Trambaklal Bhatt =Vs= R [1957] E.A. at 333** as follows:

“(i) The onus is on the prosecution to prove its case beyond reasonable doubt. A prima facie case is not made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought to sustain a conviction”

“(ii) The question whether there is a case to answer cannot depend only on whether there is ‘some evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence.’”

I have already stated that the prosecution lined up the evidence of 8 witnesses to support its case. **James Wanjohi** (P.W.1) told this Court that on 28th October 2008 he together with Amos Warui Ruriga (deceased) went to harvest rice. At 2.00 p.m., the deceased was paid his day's dues of Ksh.500/=. P.W.1 said he overheard Joseph Muriuki Mwai, the accused, complain that the deceased had not paid him. P.W.1 claimed a quarrel erupted between the deceased and the accused leading to a fight. P.W.1 alleged that he saw the accused punch the deceased on his face with his fist. The duo were separated and chased away. At 6.30 p.m. P.W.1 said he saw a crowd gathered around the deceased who was lying down on the ground. The deceased is said to have told P.W.1 that the accused had attacked him. The deceased is said to have passed away three days thereafter. From the evidence of P.W.1 it is clear that the accused and the deceased fought in a drinking joint. In cross-examination, P.W.1 said, that he heard the deceased tell his cousin one **Julius Mureithi** (P.W.2) that he had been attacked by the accused. He admitted that he did not witness the accused assault the deceased. P.W.2 merely told this Court that he was informed by the deceased that he was attacked by the accused using a metal bar. In cross-examination, P.W.2 said the deceased gave him the information in the presence of P.W.1. **Josphat Murigi Gesanji** (P.W.4) stated that on 28th October 2008 at 2.00 p.m, the deceased, Joseph Mburu and P.W. 1 went to ask for change from him. Shortly the accused is said to have arrived and demanded from the deceased to pay him Ksh.95/=. P.W.4 said a quarrel started between the deceased and the accused when the deceased refused to give the money. P.W.4 said he was prompted to separate the duo. P.W.4 said he saw the accused leave riding on a bicycle while the deceased walked on foot. P.W.4 alleged he saw the accused hit the deceased twice on the face using his fist. **Alex Githinji Ngigi** (P.W.5) alleged that on 28th October 2008 at 7.30 p.m. he visited the scene where the deceased was lying. He alleged the deceased told him he had been attacked by the accused using a metal bar when he refused to pay his debt. In his statement recorded at the Police Station, P.W.5 admitted he did not mention that the deceased had been attacked with a metal bar. Dr. Paul Mbalu (P.W.7) did the postmortem on the deceased's body. In the postmortem report, P.W.7 made the following observations:

First, that there was blood clot sitting on the brain thus exerting pressure on the brain. Secondly, that there were features of old pneumonia. Thirdly, that there was poor oxygenation on the lungs thus leading to respiratory failure. The doctor formed the opinion that the deceased died as a result of head injury, poor oxygenation and respiratory failure. There was no evidence of a fracture on the head. The doctor formed the opinion that the head injury was caused by a heavy blunt object. **C.I.P. Gabriel Lesikon** (P.W.8), the investigating officer, gave a summary of the prosecution's case. P.W.8 was of the view that the accused should have been charged with the offence of manslaughter instead of murder as it happened here because there was no proof of malice on the part of the accused. After a critical examination of the evidence, I have come to the conclusion that the accused person was placed at the scene of crime. There is consistent evidence that he had a quarrel with the deceased over a debt of Ksh.95/= the deceased owed him and that a fight arose thereafter. In the end I am convinced the prosecution has established a *prima facie* case which enjoins me to place the accused on his defence. It is now upon the accused and his legal advisors to answer the following questions:

- (i) Whether or not the accused will personally testify?
- (ii) If the answer to (i) is yes, whether he would give sworn or unsworn testimony?
- (iii) Will the accused summon independent witnesses?

Dated and delivered at Nyeri this 10th day of February, 2012.

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J. K. SERGON
JUDGE