



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 8 OF 2009

REPUBLIC APPLICANT
=VERSUS=
NEVILLE KAMAU 1ST RESPONDENT
MICHAEL NDICHU 2ND RESPONDENT
JUSTUS NZOVOYE AMUGONE 3RD RESPONDENT

R U L I N G

The accused, **Michael Ndichu**, was originally charged along with **Neville Kamau** and **Justus Nzovoye Amugune** with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The allegation being that on 31st January, 2009, at Kiambaa Village in Uasin Gishu District within the Rift Valley Province, they jointly, with another not before the court murdered **Lucy Wangare** (hereinafter “**the deceased**”).

Before the trial commenced, **Ang’awa J** determined that **Neville Kamau** and **Justus Amugune** were detained in Police Custody for longer than required in Law and discharged them from the proceedings. The accused, **Michael Ndichu** is therefore the only one facing the said charge. He denied committing the offence.

After the testimony of twelve (12) witnesses, the prosecution closed its case. Learned counsel **Mr. Koros** for the accused person then submitted that the prosecution had laid no case requiring that the accused person be put on his defence.

Learned State Counsel, **Mr. Kabaka**, on his part contended that there was indeed a prima facie case made out by the evidence adduced by the prosecution.

The case for the prosecution was briefly as follows:-

M.W, (P.W.1) and **L.Wu**, (P.W.2), both minors, were with the deceased at various times on the material date but did not see her with the accused for the period they were with the deceased. **Veronica Njeri Giragu** (P.W.3) is the grandmother of the deceased, while **Rebecca Mumbi**, (P.W.5) and **Francis Muigai Kinyanjui**, (P.w.6) are her parents. The deceased at the time of her death was living with her grandmother, (P.W.3). She testified that on the material date, she left the deceased at her home and when she returned, the deceased was not there. She waited for her but when she failed to show up, she mounted a search for the deceased. She also reported her missing to Kiambaa Police Station and also to her parents, (P.W.5 and P.W.6).

Lucy Wanjiru, (P.W.4) meanwhile, on the material date went to collect her relief food from **Waweru’s** tent. On approaching the tent, she heard the cry of a cut and found **Neville Kamau** at the tent

with a frightened look. He did not want P.W.4 to enter the tent but took the relief food from inside the tent and gave it to P.W.4 who then left.

The following day, the search for the deceased intensified. P.W.4, P.W.5, P.W.6 and **Jane Mweu Kamau**, (P.W.7) were in the search team. The deceased's body was found in a well from where it was retrieved in the presence of P.C. **Jestimore Webi**, (P.W.8) and P.C. **Michael Waweru**, (P.W.9) who arrested some suspects. Sgt **Fredrick Simiyu Sirengo**, (P.W.10) took photographs at the scene.

Dr. Macharia of Moi Teaching and Referral Hospital was of the opinion that the cause of death was asphyxia due to neck compression due to manual strangulation. He produced a report to that effect. The body was then released for burial.

CPL Fred Wamalwa testified of how he had information that the deceased had been called by a suspect before she met her death. He further stated that in an identification parade mounted by the police, the accused was not identified.

I have carefully reviewed the above evidence to see whether the accused person has a case to answer as defined in the case of **Ramandal Bhatt –vrs- Republic [1957] E.A 334**. There, the predecessor of the present Court of Appeal stated as follows:-

“It may not be easy to define, what is meant by a prima facie case; but at least, it must be one on which a reasonable tribunal properly directing its mind to the Law and evidence could convict if no explanation is offered by the defence.”

The accused person herein is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Section 203 reads as follows:-

“203. Any person who of malice aforethought causes the death of another person by an unlawful act or omission, is guilty of murder.”

And, malice aforethought is defined in section 206 of the Penal Code as follows:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

- (a) An intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed 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, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not or by a wish that it may not be caused;**
- (c) An intent to commit a felony;**
- (d) An 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.”**

The deceased in this case died of strangulation. None of the witnesses presented by the prosecution gave evidence of strangulation of the deceased save of course the doctor. No witness therefore saw the deceased being strangled. Indeed, there is no iota of evidence connecting the accused to the death of the deceased. The prosecution has therefore not established, prima facie, the offence of murder as defined by section 206 aforesaid.

At this stage, I ask myself whether if the accused keeps silent, I can convict him. The answer is in the negative. In the premises, I have come to the conclusion that the evidence adduced by the prosecution does not establish a prima facie case against the accused person. I therefore dismiss the case against him and do acquit him under section 306 of the Criminal Procedure Code.

**DATED SIGNED AND DELIVERED AT ELDORET
THIS 28TH DAY OF JULY 2011.**

F. AZANGALALA
JUDGE

Read in the presence of:-

1. Mr. **Oluoch** for het State and
2. Mr. **Koros** for the accused.

F. AZANGALALA
JUDGE
28/7/2011.