



**Republic v Mutua & 3 others (Criminal Case 5 of 2020)
[2024] KEHC 9692 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL CASE 5 OF 2020
SN MUTUKU, J
JULY 11, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

VINCENT NTHENGE MUTUA 1ST ACCUSED

BENSON MUNYAO MUSYOKA 2ND ACCUSED

ELIZABETH MUTHEMBWA MUTINDA 3RD ACCUSED

EDWARD LESHAN MASHUA 4TH ACCUSED

RULING

The Charge

1. The four (4) accused persons named above are jointly charged with murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on 3rd February 2020 at Mashuru Town within Kajiado County they murdered Albert Muteti Muthoka.
2. Initially, there were two cases: Criminal Case No. 5 of 2020 where accused number 1, 2, and 3 were jointly charged and Criminal Case No. 7 of 2020 where accused number 4 was charged. The two files were consolidated on 15th June 2022. The charges were read afresh to the four accused persons and each of them pleaded not guilty. The lead file in Criminal Case No. 5 of 2020.
3. Hearing proceeded with the prosecution calling a total of 8 witnesses to testify against the accused persons. On 28th May 2024, the prosecution concluded its case.



The evidence

4. The evidence or record shows that the deceased, Albert Muteti Muthoka, a boda boda operator, went missing on the night of 1st/2nd February 2020. According to the evidence of Immaculate Wavinya (PW4) sister to the deceased, she saw deceased last on 2nd February 2020 at around 8.00pm when he called him to take Patricia Mutile, who was visiting her, home located at Emali Makueni side. The following morning, Immaculate learned that the deceased was missing from their mother Asumpta Nduku Muthoka (PW5).
5. Samuel Makau (PW2), a boda boda operator who used to operate from the same boda boda stage at Sultan Hamud, testified that he saw the deceased last around 5.00pm on 3rd February 2020. He learned that the deceased had gone missing. Among the people the deceased interacted with before he went missing was Abdullahi Bare (PW3). Bare called the deceased at 12.20am on 2nd February. He was a customer of the deceased. He wanted to send the deceased to buy and deliver miraa (khat) to him. The deceased bought miraa for Bare and took it to him at around 12.40am on 3rd February 2020. They parted ways, according to the evidence of Bare.
6. The body of the deceased was found lying in the bushes at Sultan Hamud on 7th February 2020. Those who described the body include Boniface Kasyoki (PW1), the Chief of the area, Samuel Makau (PW2) and Immaculate Wavinya (PW4). The three witnesses told the court that the body was in a bad state. That it was decomposing, the head had no hair or skin, the left leg had been amputated and the body was tied with ropes.
7. The state the body was in when it was recovered is captured in the postmortem report produced in court as exhibit 6. The report shows that the body was markedly decomposed with skin slippage and maggot infestation. The hands had been tied together to the front using sisal braided rope and the left leg had a fracture amputation at the level of mid shaft tibia-fibula. The doctor formed the opinion that the deceased died due to asphyxia due to manual strangulation with trauma to the left leg and defence injuries to the hands.
8. Other than the evidence of CIP Reuben Biegon (PW8), the only other witnesses who mentioned the accused persons, or some of them, in evidence are the family members of the deceased. Immaculate (PW4) told the court that she knew Vincent, A1, as a neighbour and a customer of hers together with his wife. She said Benson, A2, used to participate in funeral preparation meetings of the deceased. Asumpta (PW5) testified that A1 used to live near where she worked and she used to see A2. Josephat, PW6, told the court that he knew A1 who used to frequent where PW6 used to play pool and A2 used to attend funeral preparations meetings.
9. None of the witnesses tendered evidence directly connecting the accused persons or any of them with the death of the deceased. It is the evidence of PW8 that seems to implicate the accused persons.

Submissions

10. The prosecution counsel informed the court that she would not file submissions but would rely on the evidence adduced in support of prosecution case. The defence team filed joint submissions dated 13th June 2024.
11. In the joint submissions the accused persons through their respective defence counsel have criticized the prosecution evidence as being insufficient. They submitted that there is no direct evidence against the accused persons or any of them. The defence raised the issue with the Safaricom call data records that did not capture the telephone call of PW3, Bare or the last call to deceased's telephone number



from telephone number 0745618292 registered to Boniface Musembi Mbulo. They took issue with the evidence of PW8 that it had many gaps.

12. The defence team submitted that the evidence of the prosecution does not establish a prima facie case requiring the accused persons to be placed on their defence and urged the court to find them not guilty at this stage.

Determination

13. The offence of murder is committed when

“any person with malice aforethought causes death of another person by an unlawful act or omission.”

Out of this definition, several factors manifest themselves. There must be death. There must be a perpetrator. There must be a victim. There must be presence of malice aforethought, the intention to cause the death or grievous harm to the victim. There must be an unlawful act or omission causing the death.

14. The prosecution, whose duty it is to prosecute the offence of murder, bears a heavy duty of proving the above elements beyond reasonable doubt. At this stage of this criminal trial, the duty of the court is to determine whether the prosecution has established a prima facie case requiring this court to call upon the accused persons to adduce evidence in defence. What is prima facie case in a criminal trial?
15. In *Republic v. Abdi Ibrahim Owl* [2013] eKLR, I adopted the following definition of what a prima facie case:

“Prima facie” is a Latin word defined by *Black’s Law Dictionary*, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In *Ramanlal Trambaklal Bhatt v. R* [1957] EA 332 at 334 and 335, the court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, 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 hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends 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. It is true, as Wilson, J said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that determination can only properly be made when the case for the defence has been heard. It is 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."

16. The question that I must answer in my quest to establish whether the prosecution has established a prima facie case is this: does the evidence tendered by prosecution witnesses establish a case on which this court, properly directing its mind to the law and the evidence, could convict the accused persons if no defence is offered by the accused persons?
17. The duty of the court at this stage of the trial, is clearly spelt out under section 306 (1) and (2) provides as follows:
 306. Close of case for prosecution
 - (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
 - (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.
18. The decision will be either section 306(1) or 306(2) of the *Criminal Procedure Code*.
19. The charge shows that this offence was committed at Mashuru within Kajiado County. The evidence before the court clearly shows that the body of the deceased was found in some bushes in Sultan Hamud. There is no evidence pointing to the scene where the body was found to be in Mashuru. Boniface Kasyoki, PW1, told the court that the body was found in his location called Mwani Location which is situated in Makueni County. He wondered why the case was filed in Kajiado High Court when there is a High Court in Makueni County.
20. The evidence does not show where the deceased was killed. Was it at the scene where the body was found or was the deceased tortured and killed elsewhere and the body moved to the place it was found? Was the deceased killed in Mashuru area or anywhere else within Kajiado County and the body moved? When was the deceased killed?
21. The evidence does not provide answers to these pertinent questions. All the evidence shows is that the deceased went missing on the night of 2nd February 2020, perhaps during the robbery where the motorbike he was riding was stolen. If the reason for his death was due to a robbery, then the torture is not explained or perhaps it can be said that the robbers tortured and killed the deceased in the course of that robbery.
22. PW8 was at pains to connect the accused persons to the events that led to the death of the deceased. He testified that after getting the data from Safaricom, the police looked for people who were placed at the scene of crime through mobile data. The evidence does not show where the scene of crime is. At the conclusion of the evidence of PW8, what came out was that the accused persons were found either with sim cards, or mobile handsets or identity card numbers that did not belong to them. For instance,



he testified that A1 was placed at the scene. He explained this further by stating that the sim card A1 was using was in constant communication with the deceased. He also said that the A1 received money from A4 and that A1 sent money to A3. He further stated that A2 is connected to the death because he was using Airtel number belonging to John Mutune who, upon interrogation, denied giving his identity card to anyone to register a sim card.

23. PW8 further testified that two (2) phones were recovered from A4, and that one of those phones, a Tecno was paired with telephone No. 0726911298 belonging to A4.
24. PW8's evidence is disjointed, confused and unclear. He admitted that some calls, including that of PW3 who called the deceased at 12.20am on 2nd February 2020, are not captured in the Safaricom data.
25. The evidence of the prosecution, as presented, leaves many gaps. It would be a travesty of justice if this court were to place an accused person on his defence for purposes of filling the gaps left by the prosecution case. It would be a waste of precious judicial time and an injustice. The family of the deceased told the court that they did not report that any of the accused persons was involved in the death of the deceased and that it is the police that decided to arrest them.
26. Losing a member of the family is painful. But justice demands that those held responsible for that death must be so held because evidence points to them as the culprits. The deceased and his family will not get justice. The reason is due to poor investigations into this matter. It is trite that sufficient evidence ought to be presented to aid the court in finding the person presented before it responsible for the death of a deceased person. In this matter, such evidence is lacking. Short of the accused persons confessing and admitting they killed the accused, I do not see any other way the accused persons or any of them can be held accountable for that death after the prosecution has closed its case given the gaps in the prosecution evidence. There is no other evidence expected at this stage.
27. My careful analysis leads me to section 306 (1) of the [Criminal Procedure Code](#) that provides that:

When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.
28. It is my duty therefore to make a finding, which I hereby do, that the evidence presented before the court is not sufficient and it does not disclose that the accused persons or any of them committed or is connected with the commission of the offence for which the four of them are charged with. I find that none of the four accused persons before this court has a case to answer. I return a finding of not guilty in respect of each of the four accused persons and order that they are free to go home unless for any lawful reason they are held in custody.
29. Orders shall be issued accordingly.

DATED, SIGNED AND DELIVERED THIS 11TH JULY 2024.

S. N. MUTUKU

JUDGE

In the presence of:-

1. Ms Akunja for the Prosecution
2. Mr. for the 1st Accused
3. Mr. for the 2nd Accused



4. for 3rd Accused

5. for the 4th Accused

