



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Mutinda (Criminal Case 26 of 2017)
[2023] KEHC 1184 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 26 OF 2017
MW MUIGAI, J
FEBRUARY 16, 2023**

BETWEEN

REPUBLIC STATE

AND

JOHN KYALO MUTINDA ACCUSED

RULING

1. The accused herein John Kyalo Mutia has been charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars being that the accused on December 2, 2017 at Wamunyu trading centre, Wamunyu Location, Mwala Sub-County within Machakos County murdered Mirriam Mwikali Musau.
2. The mental assessment dated January 16, 2018 was carried out on and filed in court on January 18, 2018 found the accused person fit to plead. The accused person herein took plea on 5/02/2018 whereof after the charges were read out to him in a language that he understood he pleaded not guilty. A plea of not guilty was entered on his behalf by the court.
3. The accused person was represented by Mr Kituku Advocate while the State was represented by Mr Machogu and later Mr Mwongera.
4. The hearing took off and the prosecution called a total of Nine (9) witnesses in support of its case.
5. PW 1 Amos Kyalo Musau, told the court that the deceased herein was his sister. That on December 7, 2012 he was at Machakos Level Five Hospital where he identified the deceased's body for the purposes of post mortem examination.
6. PW 2 BMM, after the trial court conducted *voir dire* examination and PW2, the minor gave unsworn statement and told the court that the deceased herein was his mother. They used to live in a rented place at Wamunyu Market. He used to see the accused person within the place where they had rented.



That the deceased was a fruit's vendor at Wamunyu Market. That on November 30, 2017 the deceased arrived home with a chicken. They had another chicken in the house and the two chickens started cockfighting. The deceased asked PW 2 while he had allowed the chicken to fight. The accused person who was also present mistook that to mean he was the one being addressed and confronted the deceased for insulting him. Later on the accused sent the deceased a message complaining of being disparaged.

7. On December 2, 2017 Pw2 and his mother (the deceased) were removing fruits for sale. The accused person herein pretended to be placing clothes on the clothes line. The accused held the deceased and stabbed her with a knife on the chest and removed the knife and the deceased fell down screaming. Pw3 (Margaret Mumbua) witnessed the incident. The accused person then placed the knife on his chest and pressed it against the wall. The landlord came and took his mother to the nearest Police Station. The deceased later succumbed to injuries sustained. The accused person also sustained injuries but he survived. He did not know whether there were any differences between the deceased and accused person.
8. Pw3 Margaret Mumbua told the court that the deceased herein was her niece. On 2/12/2017 she had gone to Wamunyu market to visit the deceased. They spent the day together. The deceased informed her that there was a certain young man who was threatening her. They arrived back at home at around 6 p.m. whereby the accused person approached them and suddenly got hold of the deceased and stabbed her in the chest with a knife, then removed the knife and threw it away. Pw3 raised alarm which attracted members of the public. The Police Officers later took her body away.
9. Pw4 Ruth Wangare Kahiu a Government Analyst told the court that she carried out DNA analysis on exhibits originating from Masii Police station in respect of a police memo dated January 18, 2018. The following items being
 - (i) A1 silver knife with a blue handle in a khaki envelope,
 - (ii) (ii) A2 blood sample for John Mutungi (accused) and
 - (iii) (iii) A3 blood sample for Mirriam Wakoli (deceased) were to be examined to establish any biological evidential material.

After analysis it was established that the knife (A1) was heavily stained with human blood. Blood samples generated from A1 matched with A3. The Government Analyst Report of 30/9/2019 was produced as exhibit in court.

10. Pw5 dr Waithera Githendu a Consultant Human Pathologist at Machakos Level Five Hospital told the court that she performed post mortem on the body of the deceased herein. On examination it was found that the body was partially decomposed. There was a cut wound on the right forearm. There was a stab wound on the chest and which pierced through and injured the heart. She had severe internal bleeding. She formed the opinion that the cause of death was severe hemorrhage secondary to penetrating stab wound injury.
11. Pw6 Cpl Zimo Awadhi previously stationed at Masii Police Station. On 2/12/2017 he was the duty officer at the said police station when the OCS instructed him to rush to Wamunyu to check on a murder scene. On arrival he found a large crowd of people. It was in a rental premises with many tenants. He saw two persons a man and a woman lying on the ground. The woman was lying down facing upwards. She was bleeding from her chest and she was already dead. The man was also bleeding from the chest but he was still alive. There was a kitchen knife next to the man. The body of the deceased was taken away while the accused was taken to hospital.



12. Pw7 Pc Alfred Kifyaso Rupia a Police Officer based at Masii Police Station told the court that on 2/12/2017 he was directed by the OCS to accompany him to a murder scene. On arrival at the scene they found the body of the deceased. The accused person herein was unconscious. A son of the deceased (Pw2) told them that the accused person and the deceased had earlier disagreed over some chicken. Photographs were taken. The accused person was rushed to Machakos Level Five Hospital where he was admitted while under police guard. It was established that the accused had stabbed the deceased with a knife and later turned the knife on himself. The body was escorted to the mortuary. Blood samples were taken to the Government Chemist for analysis.
13. This court took over the matter after court proceedings were typed and availed to parties/counsel.
14. Pw 8 dr John Mutunga, a doctor at Machakos Level Five Hospital testified he examined the accused person herein and filled a P3 Form. The accused had a history of stabbing himself in the abdomen on the December 2, 2017. At the time of filling the P3 Form the approximate age of injury was one month and three weeks. The weapon used was a sharp knife.
15. Pw9 Inspector Ndunda Maurice scene of crime officer, testified that he received four coloured photographic prints from PC Alfred Kifasyo (Pw7) of DCIO Masii for investigation. The photographs were taken at the scene at closer view of the crime scene.
16. Pw6 Cpl Zimo Awadhi was recalled for cross-examination. The prosecution closed its case on July 27, 2022. The court directed the parties to file and serve their written submissions an order which the parties complied with.

Written Submissions

Prosecution submissions dated 29/09/2022

17. The Prosecution submitted that it availed 9 witnesses in order to prove its case and relied on four issues to determine its case as follows:-
 - (a) Was the accused involved in the murder of the deceased?
 - (b) Did the accused have malice?
 - (c) Was the accused identified appropriately?
 - (d) Was the cause of death as a result of the injuries inflicted?
18. On the issue of whether the accused was involved in the murder of the deceased the testimony of Pw2 and Pw3 clearly placed the accused person at the crime scene. The evidence that the accused stabbed the deceased and also stabbed himself cannot be controverted.
19. On the issue of malice on whether the accused have malice section 206 of the Penal Code states that 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 of 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 bodily 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.

In this case it is evidence that the accused person had malice aforethought because he inflicted injury to the deceased by stabbing her with a knife. The malice stems from the quarrel the accused had with the deceased over the chicken fight, he mistakenly thought that the deceased was talking to him.

- 20. On the issue of identification the accused person was properly identified by both the Pw2 and Pw3 who saw him stab the deceased with a kitchen knife.
- 21. On the issue of whether the cause of death was due to a result of the injuries inflicted, the doctor testified that the death was due to severe haemorrhage secondary to penetrating stab wound injury.
- 22. Reliance was made in the case of *Ronald Nyaga Kiura v Republic* [2018] eKLR wherein paragraph 22 it is stated as follows: -

It is important to note that at the close of prosecution, what is required in law at stage is for the trial court to satisfy itself that *prima facie* has been made out against the accused person sufficient enough to put him on his defense pursuant to the provisions of section 211 of the *Criminal Procedure Code*. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person.

- 23. Also, in the case of *Ramanlal Bhat v Republic* [1957] EA 332 at 334 and 335 relied on by the state the court stated as follows: -

“It 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 defense.”

- 24. Similarly, in *R v Jagjivan M Patel & Others* 1, TLR, 85 the Court stated; -

“All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defense, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

- 25. The prosecution finally submitted that by availing testimonies of (nine) 9 witnesses as well as documentary evidence it has proved its case beyond reasonable doubt and the accused ought to be placed in his defense under section 306 (2) of the *Criminal Code*.



Accused Person's Submissions

26. On behalf of accused it is submitted that there are tremendous doubts as to the prosecution version that the accused person stabbed the deceased then also stabbed himself. From the forensic analysis the alleged murder weapon only had blood matching the deceased.
27. Pw2 and Pw 3 differed on the alleged date of the offence and Pw3 never mention Pw2 presence at the scene.
28. It is finally submitted that the prosecution failed to establish a *prima facie* case against the accused person to warrant him to be put on his defense because the evidence adduced is not sufficient to prove the charge of murder beyond reasonable doubt and sustain a conviction as required by law.

Finding

29. The matter commenced hearing on November 13, 2018 by Hon. D K Kemei J who took the evidence of Pw1, Pw2, Pw3, Pw4, Pw5, Pw6, Pw7.
30. This court took over the matter on October 21, 2021 and proceedings were typed and parties/counsel obtained the copies of these proceedings
31. On 9/2/2022, section 200-201 CPC was explained and confirmed that on 14/2/2021, the accused person's advocate agreed to the matter proceeding from where the matter stopped and the accused person asked the court to speed up the matter.
32. On 23/3/2022 *vide* a letter to the Presiding Judge dated 28/2/2022 by the Trial judge, he expressed logistical difficulty to come back to the station and complete the case.
33. At the close of the prosecution case, this court read through the court record and documentary exhibits produced during trial and considered the totality of the evidence.
34. In the case of Anthony Njue Njeru vs Republic Court of Appeal No 77 of 2006; the court determined the scope and content of case or no case to answer ruling by the court as follows;

[Is] Was there a *prima facie* case to warrant the trial court to call upon the appellant to defend himself? it is a cardinal principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a *prima facie* case is not made out if, at the close of prosecution the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction".

35. The issue of what is a *prima facie* case in criminal trials was clearly explained in Ramanlal Trambaklal Bhatt v R [1957] EA 332 at P 334-335 where it was said:-

"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 defense is made, but rather hopes the defense 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 defense.”

34. In the instant case, on record the evidence recorded is that on 9/2/2017 Pw2 & Pw3 witnessed the accused person pierced the deceased with a knife and she died. The photographs from scenes of crime, the recovered knife, the blood stains on the knife upon examination and the Government Analyst Report confirm a *prima facie* case.

Disposition

1. Upon this court’s consideration of the totality of the evidence adduced and on record, the prosecution has proved a *prima facie* case that warrants the accused person to be placed on his defense.
2. Defence hearing on March 15, 2023.

DELIVERED, SIGNED AND DATED IN OPEN COURT IN MACHAKOS ON 16TH FEBRUARY, 2023 (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

John Kyalo Mutinda accused Person

Mr. Mwongera for the Prosecution

Mr. Mutinda H/B Mr. Kituku for the accused Person

Patrick/Geoffrey - Court Assistant(s)

