



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei – J

**CRIMINAL (MURDER) CASE NO.12 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES MUTINDA NDAVI.....1<sup>ST</sup> ACCUSED**

**SAMUEL MUINDI MUISYO.....2<sup>ND</sup> ACCUSED**

**DANIEL WAMBUA.....3<sup>RD</sup> ACCUSED**

**RULING**

1. The accused persons, **JAMES MUTINDA NDAVI**, **SAMUEL MUINDI MUISYO** and **DANIEL WAMBUA** were jointly charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It is alleged that on the 9<sup>th</sup> Day of June, 2017 they jointly murdered **FELIX KITUKU MUSYOKA**.

2. The accused persons were initially represented by Mr. Kimeria and later by Mr Kamolo whilst the State was represented by Mr Machogu and later by Mr Mwangera.

3. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under section 203 as read with section 204 of the Penal Code are: -

*i. That the deceased is dead;*

*ii. That the death was caused unlawfully;*

*iii. That there was malice aforethought; and*

*iv. That the accused persons directly or indirectly*

*participated in the commission of the alleged offence.*

4. The Prosecution called a total of nine (9) witnesses in support of its case. **Pw1** was **Paulo Mawiyoo Kituku** who testified that on 9.6.2017, he met the 1<sup>st</sup> and 2<sup>nd</sup> accused as well as one Jackson Mumo while he was on his way home and who confronted him and demanded to know the whereabouts of his brother's son as he was needed by the chief. He told the court that they parted ways and that the following day, he learnt that the deceased had been assaulted and killed. On cross examination, he testified that he did not witness the incident.

5. **Pw2** was **JK**, a minor. After a *voir dire* was conducted the court established that he was possessed of sufficient intelligence but however did not understand the nature of an oath and was thus directed to give unsworn evidence. He testified that he used to live with the deceased and that on 9.6.2017, he saw the 1<sup>st</sup> and 2<sup>nd</sup> accused persons as well as Mumo Munyao pick up the deceased from his house. He testified that the deceased did not return by the following day and later he learnt that the deceased had been beaten up and killed.

6. **Pw3** was **Samuel Kitheka** who testified that on 9.6.2017 he was awoken by noise and that he approached the scene where he found the deceased being beaten by about six persons. He testified that he identified the 1st accused, the 3rd accused and Mumo Munyao as the assailants. He testified that he saw the 2<sup>nd</sup> accused bringing avocado fruits that were alleged to have been stolen by the deceased.

7. **Pw4** was **Wilson Maingi Matheka** who testified that on 9.6.2017 he received a call from the 3<sup>rd</sup> accused that they had nabbed a person who had been found stealing fruits. He testified that he heard that the deceased was beaten and who died in hospital.

8. **PW5** was **Peter Musyoka Kituku** who testified that the deceased was his third born son and that he identified the body of the deceased to the doctor who was conducting a post mortem.

9. **Pw6** was **Pc Peter Gitahi Kariuki** who testified that on 10.6.2017 he received a report from CIP Joel Kipkoros that there was a person being beaten at Kariobangi Centre. He testified that on arrival at the scene he found the victim had injuries and that he was informed that the deceased had been found stealing avocado fruits and so he rushed the deceased to Kathiani District Hospital where he was pronounced dead on arrival.

10. **Pw7** was **ACP George Kipkoros** who testified that he received a call on 11.6.2017 that a person had been attacked and so he dispatched officers to the scene and he later went to Kathiani District Hospital where he learnt that the deceased had passed on.

11. **Pw8** was **CIP Paul Njuguna** who testified that he noted that the prosecution of the matter had delayed for a year hence he swung into action and forwarded the file to the ODPP whereupon the accused persons were processed and later charged.

12. **Pw9** was **Dr Waithera Githendu** who testified of the post mortem examination carried out on the body of the deceased on 15.6.2017. She stated that body had multiple superficial injuries on the upper back with a wound on the scalp. There was internal bleeding in the brain and that she formed the opinion that the cause of death was head injury, secondary to blunt trauma. The post mortem report was tendered and marked Exh 1.

13. Thereafter the prosecution closed its case and parties were directed to file written submissions on whether a case to answer had been made out. Learned counsel for the accused persons submitted that there was only one witness to the incident; that the prosecution did not discharge their burden of proof. Reliance was placed on the case of **R v Alex Mwanzia Mutangili**. The court was urged to acquit the accused persons. In response, counsel for the state submitted that the accused persons were seen inflicting injury on the deceased; that malice aforethought was proven by the injury inflicted on the deceased and that the 1<sup>st</sup> and 3<sup>rd</sup> accused were identified by Pw2 and Pw3 as the last persons to view the deceased alive. It was submitted that the cause of death was indicated in the post mortem report that was presented by Pw9 and in placing reliance on the case of **Ramanlal Trambaklal Bhatt v R (1957) EA 332**, it was submitted that the accused persons ought to be placed on their defence.

14. It is trite law that prior to placing an accused person on his/her defence, the prosecution is required to have established a *prima facie* case against such accused person. It is now a well-established law that a *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence would convict the accused person, if no evidence or explanation was set up by the defence to the contrary. See **Ramanlal .T. Bhatt v R [1957]E.A 332**, where the East African Court of Appeal held that a *prima facie* case could not be established by a mere *scintilla* of evidence or by any amount of worthless, discredited prosecution evidence.

15. Also, in the case of **State v. Rajhnath Ramdhan, Amoy Chin Shue, Sunil Ramdhan and Rabindranath Dhanpaul. H.C.A No. S. 104/1997**, J.P. Moosali while quoting Lord Parker C.J. in **Sanjit Chaittal v The State (1985). 39. WLR. 925** stated that:

“A submission that there is no case to answer may properly be made and upheld:

(a) when there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence;

(b) when the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it...”

16. Also in the case of **R Vs Jagjiwan M. Patel and Others (1) T.L.R.(R) 85** the court held as follows:

“...all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. 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 borderline case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

17. I have carefully evaluated the prosecution evidence. I find that, in the absence of any explanation to the contrary from the defence, the prosecution evidence does establish the three (3) ingredients of the offence of murder. It is not in dispute that there was death and that the cause could be established. On the question of the accuseds' participation, this court finds that, in the absence of any evidence to the contrary, the evidence of Pw1 and Pw3 does establish participation of the accused persons. In arriving at the above conclusions, I do recognize that at this stage, the standard of proof is not proof beyond reasonable doubt as required for a fully-fledged criminal trial. Rather, what is essential is such evidence which if taken literally or on the face of it would establish the essential ingredients of the offence of murder, as well as the accuseds' participation therein. Indeed, the evidence of the two key witnesses placed the accused persons at the scene of crime thereby warranting them to give an explanation by making a defence.

18. For those reasons, I find that there is some evidence adduced against the accused persons to establish a *prima facie* case against them and hence I find each accused to have a case to answer. They are now called upon to elect to give their defence in line with the provisions of

section 306(2) of the Criminal Procedure Code.

It is so ordered.

**Dated and delivered at Machakos this 3<sup>rd</sup> day of February, 2021.**

**D. K. Kemei**

**Judge**