



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL (MURDER) CASE NO.1 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MUTINDA NZAU.....ACCUSED

RULING

1. The accused **JOHN MUTINDA NZAU** was on 22.1.2018 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 23.12.2017, at Usiuni Village, Mumbuni Sub-location in Kathiani Sub County within Machakos County murdered **MAUREEN WAYUA**.

2. The accused person is represented by Mr. Makundi whilst the prosecution was represented by Mr Machogu and currently by Mr Mwangera.

3. The prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. Under section 203 as read with section 204 of the Penal Code, prosecution must prove the following ingredients beyond reasonable doubt: -

i. That the deceased is dead;

ii. That the death was caused unlawfully;

iii. That there was malice aforethought; and

iv. That the accused person directly or indirectly participated in the commission of the alleged offence.

4. The prosecution called a total of seven (7) witnesses in support of its case. **Pw1** was **EM**, a minor. After a *voir dire* was conducted on her the court found that she was possessed with sufficient intelligence but however did not understand the nature of an oath and it was thus directed that she gives unsworn evidence. She testified that on 23.12.2017 she was at home when she witnessed the deceased and the accused who were her parents quarrel and that she saw the accused slapping the deceased. She told the court that she saw that the face of the deceased was swollen on one side. She testified that the following day her mother complained that she was feeling dizzy and that she was rushed to Mitaboni Hospital where she died afterwards.

5. **Pw2** was **Rose Mumbua Musyimi** who testified that the accused requested for her car to take the deceased to hospital as she was unwell. She testified that the accused later called her and informed her that the deceased had died.

6. **Pw3** was **Daniel Kiio Sila** who testified that on 23.12.2017 the accused informed him that the deceased had fallen seriously ill and so he accompanied the accused and the deceased to hospital. However, he was later informed by a doctor at the hospital that the deceased had died.

7. **Pw4** was **Ann Mwikali** who told the court that on 22.12.2017 Pw1 had informed her that the deceased had fallen down after the accused had opened the door. She rushed to the scene. She testified that at the scene she noted that the deceased had been helped up by the accused but however she had facial swellings. She told the court that the deceased was taken to hospital the following day and brought back but however she complained of stomach pains that seemed to be a recurrent condition for which she had been receiving treatment. She told the court that the deceased was taken to Mitaboni Hospital and on the way she passed on.

8. **PW5** was **Philip Muthusi Mailu** who testified that he visited Machakos Mortuary on 11.1.2018 to identify the body of the deceased to the doctor who was conducting the post mortem. On cross examination, he stated that the accused had informed him that his wife who had been ailing for some time had died. He also confirmed that he did not see any visible injuries on the body of the deceased.

9. **Pw6, Pc Binti Hamadi** testified that on 23.9.2017 she was informed that a body of a dead person had been brought to the station and also that the accused informed her that the deceased was his wife who had been ailing. She told the court that the accused informed him that the deceased had a kidney problem and that he furnished her with medical notes. She testified that she received a call from the family of the deceased that was to the effect that the accused had in fact killed the deceased and on 26.1.2018 the accused was charged with murder. She confirmed on cross examination that she did not see any visible injuries on the body of the deceased and further added that she did establish that the deceased had been ailing for 7 years due to kidney related complications.

10. **Pw7** was **Dr Kamotho Watenga** who testified in respect of an autopsy that had been carried out on the deceased by Dr Waithera Githendu whose handwriting he was familiar with. He sought to tender the post mortem report on behalf of Dr Waithera and which was produced as an exhibit there being no objection from the accused's counsel. The report revealed that the body of the deceased had haematoma of the spleen, liver cirrhosis and that the doctor had formed the opinion that the cause of death was haemorrhagic shock due to haemorrhage of the spleen as a result of blunt force trauma. It was reported that the deceased's spleen was large due to liver cirrhosis. The report was produced as Exh 1.

11. Thereafter the prosecution closed its case. Learned counsels filed submissions on whether there was a case to answer. Defence Counsel submitted that there is no case to answer as the accused had not been identified. Reliance was placed on the case of **Kennedy Ochieng Ongindo (2019) eKLR**. It was submitted that the investigations were shoddy and that the weight of evidence was not sufficient to place the accused on his defence as the evidence of Pw2, 3, 4 and 5 as well as the treatment notes speak to the fact that the deceased had been ailing for some time. Learned counsel prayed that the court finds that the prosecution failed to establish a prima facie case against the accused.

12. The state in response submitted that as per the evidence of Pw1 and Pw4, the accused was at the scene of crime; that he was seen assaulting the deceased. It was submitted that the accused had malice aforethought and that he was properly identified as the one who assaulted the deceased. It was submitted that the cause of death was indicated in the post mortem report as per the testimony of Pw7. In placing reliance on the case of **Ramanlal Trambaklal Bhatt v R (1957) EA 332**, it was submitted that the accused ought to be placed on his defence.

13. 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.

14. 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...”

15. 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 as a result of haemorrhagic shock due to haemorrhage of the spleen as a result of blunt force trauma. On the question of the accused's participation, this court finds that, in the absence of any evidence to the contrary, the evidence of Pw1 does point to participation of the accused person. 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 accused's' participation therein. Pw1 who is daughter to both accused and deceased confirmed that the accused upon arrival home slapped the deceased and that she went to alert her grandmother and when she came back she found the deceased's eye swollen. She also confirmed hearing her parents quarrel but did not know the cause of the said quarrels. It is therefore clear that the accused was placed at the scene of the crime and hence the need for him to offer an explanation regarding the death of the deceased.

16. For those reasons, I find that there is some evidence adduced against the accused person to establish a *prima facie* case against him and sufficient to put him on his own defence for the offence of murder contrary to sections 203 and 204 of the Penal Code. Consequently, I find that the accused has a case to answer and is now called upon to make his 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 2nd day of February, 2021.

D. K. Kemei

Judge