



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL CASE NO. E003 OF 2020

THE REPUBLIC.....PROSECUTOR

=VRS=

ZIPPORAH KWAMBOKA KOBIRO.....ACCUSED

RULING

The accused person is charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. It is alleged that on the night of 12th and 13th December 2020 at Nyambiri village, Nyambiri sub-location in Nyamira County she murdered Robert Nyandieka Ndubi, deceased.

She pleaded not guilty to the charge and in the ensuing trial in which the prosecution called five witnesses she was represented by Mr. Ondigo Advocate while the prosecution was led by Senior Prosecution Counsel Desmond Majale.

The star witness in the case was Davis Ndubi (Pw1), a Pre-unit learner who did not know his age. He made an unsworn statement as he did not understand the nature of an oath. He told this court that the accused was his mother and the deceased his father and that on the material day they were all at home when the deceased asked to be given some milk but the accused would not hear of it; that this resulted in an altercation which soon degenerated into his parents physically assaulting each other. He stated that he however sought his aunt's (one Hellena) help and the two were reconciled after which he went and slept in one house with the deceased while his mother retired to sleep in a different house. He stated that the following morning he was awakened by his mother who told him to go to see the state his father was in only to go and see his father hanging on the rafter of their house. He stated that there was a green rope around his father's neck.

The other prosecution witness was Evans Oyaro (Pw2), a brother of the deceased, who was called to the scene by the accused in the morning and who stated that when he saw the deceased he had one leg on a stone and the other on the floor and he was dead. He testified that the deceased had bite marks on his arms and one eye had a cut and was bleeding. He stated that the deceased also had a small cut wound on the top of the head and the cut was also bleeding. He stated that he opined that the accused had hit the deceased with something and then put a rope around his neck to make it appear that the deceased had committed suicide. This opinion/theory found support from the investigating officer Chief Inspector Mursoy (Pw5) who stated that his investigations revealed that the accused and the deceased had fought with crude weapons hence the injuries on the body of the deceased but he did not commit suicide. Pw5 stated that he also established that the accused and the deceased had domestic problems which culminated in irreconcilable differences the cause of the squabbles being that the accused had come into the union with a child. He stated further that other than Pw1 and the deceased's sister one Hellen Kwamboka the accused was the last person to be seen with the deceased. Pw5 testified that the autopsy's finding was that death was as a result of intracranial haemorrhage following blunt head trauma and the manner and position the body of the deceased was hoisted from the ground established beyond reasonable doubt that he was killed and did not commit suicide.

Wilfred Nyakangi Ndugu (Pw3) identified the body of the deceased to the doctor who conducted a post mortem on 15th December 2020 and his evidence was that the body had a cut on the left eye, on top of the head and had a bite mark on the right forearm near the shoulder. Dr. Fredrick Goga (Pw4) told the court that he performed the post mortem on the body of the deceased. He confirmed that there were human bites on the upper limbs, bruises on the left supraorbital region of the neck, cut wound on the occipital region of the head, ligature marks around the neck and a linear skull fracture on the occipital region of the head leading to intracranial haemorrhage. He stated that he formed the opinion that the cause of death was intracranial haemorrhage following blunt trauma on the head and that the rope may have been tied around the deceased's neck after he had died. A post mortem form was produced in evidence.

The prosecution intimated that they would have wanted to call Hellen Kwamboka as a witness but could not do so as she had fled the country.

At this stage I am enjoined to determine whether or not there is evidence that the accused person committed this offence. This is as provided in **Section 306 (1)** of the **Criminal Procedure Code** which states: -

“(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.”

To succeed in a case of murder the prosecution is required to prove that the death of the deceased was the result of an unlawful act of the accused and that it was caused with malice aforethought. The burden to prove the above is upon the prosecution and as in other criminal cases the standard of proof is beyond reasonable doubt. Before a court can put the accused person on his/her defence therefore it must be satisfied that the prosecution has established a prima facie case against him/her. In the case of **Bhatt v Republic [1957] EA 332** the court defined a *prima facie* case 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 be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the prosecution’s case.”

In the same case it was held: -

“... (ii) The question whether there is a case to answer cannot depend 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 also said that a prima facie case is one where a reasonable tribunal properly directing its mind would convict even were the accused to be put on their defence and they elect to remain silent.

Having carefully considered the evidence in support of the charge it is my finding that the evidence in this case has not established a prima facie case against the accused to warrant her to be put on her defence. The key witness in this case was a child less than seven years old. His evidence therefore required corroboration yet the prosecution did not call the witness who would have corroborated this evidence. My finding finds support from **Section 124** of the **Evidence Act** which states: -

“124. Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

The prosecution elected to close its case without calling the witness one Hellen Kwamboka who it was alleged also witnessed the happenings of the fateful night. It was said that the witness fled the country but in my view that was not reason enough not to call her given that her possible whereabouts were known and a warrant of arrest had been issued to apprehend her and bring her to this court to testify. It is my finding that this being a case where the evidence is barely sufficient this is an appropriate case to draw an inference that had Hellen been called her evidence would have been adverse to the prosecution’s case hence the reason she was not brought to testify. Without her evidence this leaves us with the unsworn evidence of Pw1 and we cannot convict on the uncorroborated evidence. This is more so because Pw1 did not offer any evidence as to what transpired between the time he and his father went to sleep and the time he saw his father hanging on a rope. The investigating officer (Pw5) would have done well to investigate whether the accused left her bed that night and how the deceased left his but he did not do this and so the case is bereft of any evidence that the deceased did not commit suicide but was killed by the accused who then stage managed the scene to make it look like suicide. To set the record straight, it cannot be ruled out that the deceased may have been killed but in my considered opinion there is no cogent evidence direct or circumstantial that points to the accused as the killer. To the contrary there is very strong suspicion that having been involved in a violent altercation with the deceased she may have killed him. It is however trite that suspicion however strong cannot form the basis for a conviction. It is my finding that there is no evidence direct or circumstantial to connect the accused person to the state in which the deceased was found that fateful morning or even to the injuries that are said to have caused his death. As was held in the case of **Bhatt v Republic (supra)** a mere scintilla of evidence can never be enough and to put the accused on her defence would be tantamount to asking her to disprove the prosecution’s case and to prove her innocence a thing which is not permitted by the law.

I accordingly find that there is no evidence that the accused person of malice aforethought caused the death of the deceased by an unlawful act. In the premises **I enter a finding of not guilty to the charge of murder and acquit the accused under Section 306 (1) of the Criminal Procedure Code.** She shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

RULING SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS ON THIS 23RD DAY OF SEPTEMBER 2021.

E. N. MAINA

JUDGE