



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CRIMINAL CASE NO. 39 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

NELSON MULWA MWEKE.....1ST ACCUSED

VINCENT MUTISO DAUDI.....2ND ACCUSED

RULING

1. The accused persons, **NELSON MULWA MWEKE** and **VINCENT MUTISO DAUDI** are jointly charged with the offence of murder contrary to **sections 203** as read with section and **204** of the **Penal Code**. It was alleged that on **19th October, 2016** at Ivovoani Village, Mitaboni Location within Machakos County they jointly murdered **PETER MUSYOKA MULI**.

2. From the onset 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, the 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.

3. The Prosecution called a total of eight (8) witnesses in support of its case. Pw1 was **Zacharia Musyimi Nzoka** who testified that on **19th October, 2018** he ferried the deceased, who was well known to him, to his home but while on the way another motor cyclist blocked them and that the two accused persons herein alighted (he knew them before). The accused persons attacked the deceased by raining blows and kicks on him and then taking him to the 2nd accused's bar. He testified that the 1st accused person was a bodaboda operator whilst the 2nd accused person worked with his mother at a certain bar. On cross examination, he admitted to knowing the two accused persons and giving out their names to the police. He admitted to witnessing the attack on the deceased by the two accused persons. He further noted that he knew the motor bike registration number of the 1st accused person and that the 2nd accused person used to work at the counter which is owned by his mother. On re-examination, he testified that he recorded his statement on 18th October, 2016 at 9pm.

4. Pw2 **Nicholas Kilonzo** testified that on the material day, **18th October, 2016** at **10.00pm** he was at a bus stage in the company of a friend, Lucas Wambua, when the 2nd accused informed him that there was a customer who was at a certain bar and who needed to be ferried. He proceeded to the said bar and the 2nd accused person brought the customer and placed him on the motorbike and took him to the police station. The customer was one Peter whom he managed to recognize the following day. All four of them proceed to Kenol Police Station being led there by the accused herein. He further testified that the said Peter looked drunk and further added that he didn't know what had happened to the said Peter. On cross-examination, he testified that he was arrested and spent two days in custody and that Peter was placed in the cells. He maintained that he did not see Pw1.

5. Pw3 **Lucas Wambua** testified that on 18th October, 2016 at 10pm he was at the bus stage in the company of one Kilonzo waiting for passengers when one Vincent Mutiso came and requested them to go to a certain bar and fetch some customer. They picked up the customer and all four of them proceeded to the Kenol Police station. The passenger, he came to know as Peter was placed in the cells. He learnt of the death of Peter the following date. He was arrested but later released. On cross-examination, he testified that he did not know Zacharia Musyimi and that he did not witness any assault on Peter. On re-examination, he testified that Peter was drunk.

6. Pw4 **Robert Mutua** testified that on **19th October, 2016** he was informed that his brother, the deceased, had been apprehended by authorities from a bar and that on **25th October, 2016** he was at the mortuary to witness the postmortem on the deceased. On cross-examination, he testified that the deceased had been arrested due to drunkenness.

7. Pw5 **PC. Christine Mwiti** testified that on **18th October, 2016** at 2200hrs she was on duty at the report office, Kenol Police post within Kathiani Police Division when four members of the public, including the two accused persons turned up with the deceased claiming that he had drunk alcohol at the bar and refused to pay, and attempted to run away. She placed the deceased in the cells as she booked the report from the accused persons. She further testified that the deceased could not talk as he only nodded when spoken to. The condition of the deceased worsened and she contacted her colleagues who drove him to hospital at Mitamboni where he was referred to Kathiani District Hospital. On cross-examination, she testified that she did not see any injuries on the deceased as he did not complain of anything and that his clothes were clean though he was drunk.

8. Pw6 **PC. Josephat Kageche Njomo** testified that on **18th October, 2016** Pw5 briefed him of a suspect who had been brought on allegation of creating disturbance and failing to pay for alcohol consumed. He found the deceased in the company of four other including the two accused herein and that the deceased was seated on the ground and looked drunk. The deceased had no signs of injuries as his clothes had no blood stains. The deceased was placed in the cell alone and he died at the hospital. On cross-examination, he testified that the deceased died outside the police post and that he did not see any visible injuries. On re-examination, he testified that the deceased could not talk.

9. Pw7 **CIP Osman Mohamed Adan** testified that on 19th October, 2016 at 6.00 am he was alerted by one of the officers, Pw6, that a suspect in the cells was seriously sick and on rushing there he saw the deceased who was foaming in the mouth. He decided to rush him to Mitamboni health center in the company of Pw6 and the driver. The deceased was referred to Kathiani District Hospital and on arrival the doctors confirmed that the patient was already dead. On cross-examination, he testified that he was the investigating officer and recorded the statement from the key witness one Nzioka Zacharia Musyimi. He noted that there was whitish foam with no blood and that the deceased's body was swollen but that there were no bruises. On re-examination, he testified that the part of the body of the deceased around the neck was swollen and that his clothes were dirty.

10. Pw8 **DR. Gatua Daniel** testified that a post mortem was conducted on the deceased on 25th October, 2016 by Kalekye Ndeto who is currently pursuing post graduate studies. He proceeded to produce the report on behalf of Dr. Kalekye. The post mortem was conducted at 3.30 pm and external appearance revealed a bruise on lower back. The cause of death was opined as severe haemorrhage due to chest injuries from blunt trauma. On cross-examination, he testified that he has not availed documents to show that he is a doctor and that the deceased had a bruise on lower back that had been made forcefully. He added that loss of blood caused the death of the deceased.

11. Thereafter the prosecution closed its case. Learned counsels filed submissions. Counsel for the prosecution submitted that as per the evidence of Pw1 the accused persons were placed at the scene of crime. It was submitted that the accused persons had malice aforethought and that they were properly identified as the ones who removed the deceased from the 2nd accused person bar and placed him on Pw2's motorcycle. It was submitted that the cause of death was indicated in the post mortem report as per the testimony of Pw8. 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 their defence.

12. The 2nd accused person through his counsel submitted that they have no case to answer because in their view the prosecution's case hangs on material inconsistencies and contradictions. Counsel further submitted that the prosecution has not adduced sufficient evidence to support its charges against the accused person.

13. The 1st accused person through his counsel submitted that the deceased appeared to have been assaulted at the police station as he was not injured at the time of being booked into the police station. According to learned counsel, the mystery which is left to this court to unravel is what may have happened to the deceased between the time that he was booked in at the police station and when he was found sick in the cells. The only reasonable presumption therefore is that this assault must have happened somewhere within the police station but away from the persons who were in custody.

14. I have considered the evidence adduced and the submissions presented. The evidence herein points strongly to the doctrine of circumstantial evidence.

15. In **Sawe V Republic [2003] eKLR** the Court of Appeal had this to say:-

"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis that that of his guilt. There must be no other coexisting circumstances weakening the chain of circumstances relied upon."

16. The analysis of evidence adduced herein is clear that the deceased was arrested while in good health and that he had no complaints to make about his health up until Pw5 went to check up on him to notice that he was not doing well. It is also clear from the evidence of those who testified did not speak about any visible injuries or ill health with the exception of Pw8 who from the post mortem report noted the deceased had a lower back injury and experienced severe haemorrhage.

17. It follows therefore that the circumstances only point to the accused person as the persons who handled the deceased the night in question. The evidence of Pw1 left no doubt that it was the accused persons who intercepted Pw1 who was then carrying the deceased and that the accused persons removed the deceased from the motorcycle and then hit him with blows and kicks and then took him to 2nd accused's bar. The injuries noted by the pathologist appear to have been internal and that there was internal bleeding. It is therefore clear that the two accused persons were placed at the scene of crime and must be held responsible for the death of the deceased.

18. In this case, the accused persons throughout the cross examination have attempted to defer to theories such as that the deceased had died out of excessive ingestion of alcohol. On the other hand, they indicate that the deceased had sustained his injuries in the hands of the police. Even if the deceased received more injuries after being placed in the cells that alone does not absolve the accused from blame as they had been seen by Pw1 earlier attacking the deceased. I find that the prosecution has made out a prima facie case against both accused to require them to be placed on their defence. What constitutes prima facie case and the standard of proof thereon is now well settled in Kenya. See **Republic V Jagjivan M. Patel & Others (1) TLR 85**.

"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 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 border line case where the court, though not satisfied as to 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 conclusion."

19. I wish to associate myself with the decision of **Justice J.B. Ojwang**, as he then was, in the case of **R v Samuel Karanja Kiria Cr. case No.13 OF 2004 Nairobi [2009] eKLR** had this to say on prima facie case: -

"The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . ."

20. For those reasons, I find that the evidence adduced by the prosecution at this stage of the proceedings has established a prima facie case against the two accused persons to require them to be called upon to make a defence. Consequently, I find each accused person has a case to answer and are called upon to elect to conduct their defence in accordance with the provisions of section **306(2)** of the **Criminal Procedure Code**.

It is so ordered.

Dated and delivered at **Machakos** this **21st** day of **September, 2021**.

D. K. Kemei

Judge