



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 34 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ANTONY MUGENDI MBUNGU.....1ST ACCUSED

TIMOTHY KAMAU DUNCAN.....2ND ACCUSED

RULING

1. Each of the two accused persons herein face two counts of murder contrary to section 203 as read with section 204 of the Penal code. The particulars of the offence are that on 14.12.2015 at Kiaganari village, Kathari sub-location Kyeni North East location in Embu County murdered Duncan Mbungu Muragara (in count one) and Jane Njoki Mbungu (in count two).
2. The accused persons were arraigned in court on 6.01.2016 and each of them pleaded not guilty to both counts and pleas of not guilty entered against each of them in relation to each of the counts.
3. The matter proceeded to full trial and the prosecution called a total of six (6) witnesses in order to discharge its burden of proof after which the prosecution closed its case.
4. As it is law, upon the close of the prosecution's case, this court is obligated to make a ruling on whether an accused person has a case to answer or not. Under Section 306(1) of the Criminal Procedure Code, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is no evidence that the accused or any one of several accused committed the offence should, 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.
5. On the other hand, under Section 306(2) of the Criminal Procedure Code, where the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is evidence that the accused person or any one or more of several accused persons committed the offence, the court should proceed to put the accused to his/ their defence and whereby the accused is supposed to present evidence in defence.
6. As such, at this stage, this court's role is to consider the evidence on record and make a determination as to whether the same presents a *prima facie* case that would warrant this court to call upon the accused to give their defences.
7. Under 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 rebuttal is offered by an accused person. (See also **Ramanlal Trambaklal Bhatt –vs- R [1957] E.A 332 at 334 and 335**).
8. Each of the accused persons herein faces two counts of murder. For the prosecution to prove the charges of murder, the following elements need to be proved, that is; that the death of the deceased occurred; that the accused committed the unlawful act which caused the death of the deceased; and that the accused had malice aforethought (See **Anthony Ndegwa Ngarivs Republic [2014] eKLR**).
9. At this juncture therefore, this court is invited to determine as to whether the evidence by the prosecution is sufficient on its own to prove the above elements for this court to return a verdict if no other explanation in rebuttal is offered by the accused herein.
10. However, it is trite that, where the court is not acquitting the accused person at the close of prosecutions' case, there is no need for a reasoned ruling for a case to answer. Reasons should only be given where the submissions of a no case to answer by the accused are upheld and the accused is to be acquitted. (See **Festo Wandera Mukando –vs Republic [1980] KLR 103** and **Republic –vs- Samuel Karanja**

Kiria Cr. Case No.13 Of 2004 Nairobi [2009] eKLR).

11. I have considered the evidence tendered by the prosecution in this matter as required of this court and taken caution as not to do so much analysis if not acquitting at no case to answer stage. From the entirety of the said evidence, it is my view that the prosecution has made up a *prima facie* case against the 1st accused person. The prosecution placed adequate evidence before the court, to enable the court put the 1st accused on his defence.

12. From the evidence on record, the same is sufficient to prove that the two people are indeed dead. PW1 testified as having conducted autopsy on the two bodies and which were of dead persons. PW3 testified as having identified the said bodies at Consolata Kyeni Hospital's mortuary and identified the deceased persons herein. It was therefore proved that the deceased persons herein are indeed dead. The cause of the death as was testified by PW1 was head injury for Duncan Mbuku Muragara and head injury and massive loss of blood from deep cuts (for Jane Njuki). The law is very clear that every homicide is unlawful unless authorized by law or excusable under the law. (See **Sharm Pal Singh [1962] EA 13**, and also **Guzambizi Wesonga -vs- Republic [1948] 15 EACA 63** where the court held:-

“Every homicide is presumed to be unlawful except where circumstances make it excusable or where it has been authorized by law. For a homicide to be excusable, it must have been under justifiable circumstances, for example in self-defence or in defence of property.”

13. The right to life is guaranteed under the constitution and can only be taken away under the circumstances provided in the constitution. It is clear that the cause of the deceased's deaths were not, such as provided by the law. It was therefore unlawful.

14. However, I have perused the evidence before me and in my view, the same was not sufficient to enable me put the 2nd accused to his defence. PW4 testified that he was called by a person he could not remember and told that his father had been killed. That he went home and found people had gathered and that police had also come. That he entered the house and found his father's body lying inside there and also learned that his mother had also been found dead. However, he testified that he did not know how the accused persons herein were involved in the murder.

15. As I have already stated, 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 rebuttal is offered by an accused person.

16. To start with, the evidence by PW6 that he was told by a family member that the deceased had called the said family member and when he went he met the deceased talking with 1st accused. PW6 did not testify as to the said family member having told him that the 2nd accused was with the 1st accused at that time. There is no evidence either direct or otherwise placing the 2nd accused at the scene of the crime or linking him in any other way to the said offence.

17. I am alive to the fact that evidence can either be direct or circumstantial. Circumstantial evidence was appreciated by the Court of Appeal in **Ahamad Abolfathi Mohammed and Another -vs- Republic [2018] eKLR**. However, in this case, there was nothing to make this court invoke the circumstantial evidence in respect to the 2nd accused person.

18. In my view, where clearly the prosecution's case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognized and there is absolutely no evidence whether direct or circumstantial linking her to the offence, it would be foolhardy to put such an accused on her defence. A case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on her defence in the hope that she may prop up or give life to an otherwise hopeless case or a case that is dead on arrival.

19. In the premises, it would be completely unnecessary to place the 2nd accused person herein on his defence since the evidence before this court even if true cannot certainly lead to her conviction even if she decides not to say anything.

20. It follows that at the close of the prosecution case no *prima facie* case has been made out to warrant placing the 2nd accused person on his defence. As provided for under section 306(1) of the Criminal Procedure Code the only option this court has is to record a finding of not guilty in both counts. I find the 2nd accused person not guilty of the offence with which he has been charged. He is accordingly acquitted in both counts one and two and I direct that she be released forthwith unless otherwise lawfully held.

21. However, as for the 1st accused, the prosecution placed adequate evidence before the court, to enable the court place him on his defence. I therefore order that the 1st accused be placed on his defence.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Accused

.....for the Respondent