



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. E29 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

JAFRED MABONGA WANYUNDO.....ACCUSED

RULING

1. The accused herein **Jafred Mabonga Wanyundo** has been charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 22nd and 23rd day of July, 2021 at Makutano village in Bumula Sub County within Bungoma Sub County, he murdered Elizabeth Nafula Makhanu.

2. The accused denied the charge. The hearing kicked off in earnest on the 14.10.2021. The prosecution called eight witnesses in support of its case. CM (PWI) a minor aged 11 years old stated that his father (accused) woke him up at 11.00 p.m. and he started assaulting the deceased who was his mother. He stated that accused hit her with a huge stick and then chased him away. He stated that he sought refuge at the home of a neighbour. He stated that he came back home the following morning to find his mother lying on the bed while his father lay on the floor and that none of them could speak. He rushed to the neighbours and alerted them of the unfolding events and that the villagers rushed to the scene to see for themselves.

3. **Barasa Mulati Kisuya** (PW2) a cousin to the accused herein testified that on 21.7.21 he was alerted by PW1 of the assault on the deceased by the accused and that he accompanied the minor to his home only for the accused to order him to go away. He left the place after warning the accused to desist from assaulting his wife. He added that on the 23.7.21 he found the accused's house loosely locked from outside and upon opening it, he was met with a serious stench and that there were flies hovering around the body of the deceased which lay on a bed. He also noticed the accused lying under the bed. He alerted the villagers. He finally added that the accused used to assault the deceased and which forced the children to be staying with relatives.

4. **Hellen Navangala Sikuku** (PW3) the Assistant Chief of Mukwa sub location testified that she was alerted of the incident and rushed to the scene where she found the body of the deceased lying on a bed while the accused lay beside the bed. She added that the accused appeared to be unconscious as he could not speak. She alerted the police who came and picked up the deceased as well as the accused. On cross-examination, she confirmed that there were no signs of disturbance inside the house as items were intact.

5. **Wenslaus Wafula Mukhamba** (PW4) the village elder for Makutano village, stated that he had known both the deceased and accused for twenty years and who used to have frequent squabbles and fights and who had never lived in harmony. He visited the scene and found the deceased lying on a bed while accused lay on the floor near the bed. He alerted the Assistant Chief who came with police officers and that the police took away both deceased and accused. He finally added that the accused could not stand and he had to drag himself using his buttocks.

6. **Vincent Waiti Kisala** (PW5) a cousin to the deceased, testified that he witnessed the postmortem examination conducted on the body of the deceased on the 3.8.21. He identified the postmortem report dated 3.8.21 which was marked as MFI.1.

7. **No.220826 Sergeant John Korir** (PW6) testified that he rushed to the scene and organized for the removal of the body of the deceased to the morgue while the accused was escorted to the police station for interrogation. On cross-examination, he stated that the body of the deceased had decomposed while the accused lay beside the bed and who could not speak.

8. **No.42672 Sergeant Harrison Mugumo** (PW7) was the investigating officer. He stated that he rushed to the scene and found the body of the deceased on top of a bed and already decomposed while the accused lay underneath and who had injuries on the legs and a cut wound on the neck. He organized for the removal of the body to the mortuary while the accused admitted in hospital under police guard. He testified that upon recovering, the accused was escorted to the police station for interrogation. He stated that he established that the accused and deceased often squabbled and fought due to alcohol related issues. On cross-examination, he stated that he suspected that some other person might have attacked the accused.

9. **Dr. Kosgei Eric** (PW8) testified that he conducted the postmortem examination at Bungoma County Referral Hospital on the 3.8.21 and noted a bruise on the right temporal region. He also noted blood on the right chest due to fracture of the 4th – 8th ribs. He also confirmed that there was a bilateral haemothorax which collapsed the lungs. He also noted a ruptured spleen. He formed the opinion that the cause of death was haemothoragic shock with cardio respiratory arrest. He produced the report as exhibit No.1. On cross-examination, he stated that the rupture of the spleen could have been caused by a blunt trauma on the stomach. He also confirmed that rupture of spleen could be caused by a violent fall. On re-examination, he stated that there must have been a lot of force to the stomach to cause a rupture of spleen and that a fall could not have been likely unless the height was substantial.

10. That marked the end of the prosecution's case at this stage. Both learned counsels for prosecution and the defence opted not to tender submissions on whether a case to answer has been made by the prosecution at this stage of the proceedings. They indicated that they rely on the evidence adduced and urged the court to proceed and reserve the matter for a ruling on a case to answer.

11. As per the nature of the offence herein, the prosecution was under a duty to prove the essential ingredients of the offence as provided for under section 206 of the Penal Code namely: that there was death; that there was malice aforethought and finally that the accused is the assailant.

Hence, this court must now proceed to put the evidence adduced at this stage of the proceedings on the prism as to whether a case to answer has been made out by the prosecution. 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. 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 placed before it could convict the accused, if no evidence or explanation was set up by the defence to the contrary. (See **Ramanlal T. Bhatt vs Republic {1957} EA 332** where the Court of Appeal for Eastern African held that a prima facie case could not be established by a mere scintilla of evidence or that any amount of worthless discredited prosecution evidence. The same line of thought was taken up by **Lord Parker C. J. in Sanjit Chaittal vs The state {1985} KLR 925** when he held thus:

“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...”

12. I have carefully evaluated the prosecution's evidence. I find that, in the absence of any explanation to the contrary from the defence, the prosecution's evidence does establish, at this stage at least the essential ingredients of the offence namely; that there is no dispute that there was death of the deceased which cause was established to be hemorrhagic shock with cardio respiratory arrest by Dr. Kosgei Eric (PW8) who produced the post mortem report dated 3/8/21 as exhibit No.1; that on the accused's participation, this court finds that in the absence of any evidence to the contrary, the evidence of PW1, PW2 does point to the participation of the accused in the alleged crime and that the accused herein was placed at the scene of crime.

Again, the evidence of PW4 was to the effect that the accused and deceased had been known to have frequent squabbles and fights and had never lived in harmony.

I am alive to the fact that at this stage the standard of proof is not one of beyond any reasonable doubt as is required in a fully fledged criminal trial but rather what is essential in such evidence, 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.

13. The evidence of Pw1 is that he left the accused and the deceased at home as he sought refuge in a nearby home until the following day only to find the deceased lying dead on her bed while the accused lay underneath. It is obvious that the accused was the last person to be with the deceased as PW1 left them on the night in question. As the accused has been placed at the scene of the crime, I find that he is obliged to give an explanation of how the deceased met her death. Looking at the evidence in totality, I am satisfied that were the accused to elect to remain silent in defence, then the evidence adduced at this stage would be sufficient to sustain a conviction against him.

14. In the result, it is my finding that there is some evidence adduced against the accused which has established a prima facie case sufficient to put him on his own defence for the offence of murder. Consequently, I find the accused has a case to answer and is now called upon to elect to conduct his defence in line with the provisions of section 306(2) of the Criminal Procedure Code.

Dated and delivered at Bungoma this 9th day of December, 2021.

D. Kemei

Judge

In the presence of:

Jafred Mabonga Wanyundo Accused

Wanjala for accused

Mukanga for prosecution

Wilkister Court Assistant