



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NUMBER 1 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

PAUL MUNIU KAMAU.....ACCUSED

RULING

1. The accused person **Paul Muniu Kamau** faces the charge of **Murder contrary to section 203 as read with section 204 of the Penal Code**.
2. It is alleged that on the 26th of October 2014 at Kiamchanjo Village in Nyandarua West District within Nyandarua County, he murdered **Harrison Kimani Masheri**.
3. On 14th of January, 2015 the accused took plea and he pleaded not guilty.
4. On 10th March 2016, the trial started. The record shows that the prosecution called ten (10) witnesses.
5. **PW1, Jane Wangui Waititu**, an MPESA agent, testified that on 29th October, 2014, the deceased went to her shop to withdraw money. That after some time police officers came to check the MPESA withdrawal records which they took away. The following day she learnt that the deceased had been killed. She did not know how he met his death.
6. **PW2, Alex Kariuki**, a neighbor to the accused, recalled that on 27th October, 2014 at about 7.00am, two children came to his house while crying and informed him that they had gone to the deceased's house to ask him to make a call for them only to find him lying dead on his bed with a rope tied around his neck. He called the deceased's sister and her husband and together they went to the deceased's home. They found the door open and indeed witnessed his lifeless body on the bed with a belt tied tightly around the neck. He said the deceased had worn a white shirt and a grey trouser which he identified before court. He also identified a small radio and solar light he had seen on the table in the deceased's house. He called the police officers from HUHOINI station who came to the scene. He did not know who killed the deceased.
7. On cross examination, he stated that the deceased and the accused were friends and he was not aware of any disagreement between them. That the deceased's house was not disturbed. He said the deceased was strangled but he did not know who did it. He said that it was not a suicide case.
8. **PW3, John Nderitu Kamutie** testified how PW2 went to call him to inform him about the deceased who was his brother in law. He said he entered the deceased house and did not see any evidence of a commotion. He said he did not know how the deceased died.
9. **PW4 Philip Wanaina Matheri**, brother to deceased was called by PW3 and informed about the death of his brother. He went to the scene and found the deceased already dead. The Police had arrived and the body was taken to the mortuary. He confirmed he did not know who killed the deceased or how he met his death.
10. **PW5, Dominic Kiburu Nderitu**, a nephew to the deceased, testified on 29th September 2016 that on 27th October 2014, he woke up and found a message in his phone from his uncle, the deceased. He tried to call him but he was mteja. Later his brother called him and told him that his uncle had been found by some children lying dead in his bed. He said he saw the body of his uncle at the mortuary where he noticed rope marks around the neck. He identified the body of the deceased when he witnessed the post mortem examination.
11. He testified that two weeks before the death, his uncle had sold land at Kshs. 660,000/= . That he was a drunkard and when he sold the land he went to Subukia. That the family sent him (PW5) to collect the money from the deceased. That he took Kshs. 560,000/= from the

deceased and gave some money to his mother to build a house for the deceased. That he sent the deceased Kshs. 50,000/= out of the money. He said he knew that the accused had killed the deceased because it was him who had spent the whole day with the deceased.

12. **PW6 Jane Wangari Waititu** was the same one who had testified as PW1 and stood down.

13. **PW7, Pauline Nyambura Mureithi**, neighbor to the accused, recalled that on 26th October 2014 at around 9.30 p.m., while working as a barmaid, she saw the deceased and the accused walking into the bar together. That the deceased who appeared drunk ordered for alcohol and left in company of the accused at around 10.00 p.m. The next day she heard the deceased had been killed. She could not say that it was the accused who killed him

14. **PW8, Dr. Karimo Joseph Kinyua**, produced the postmortem report prepared by his colleague Dr. Pauline Wambui. He stated that on 30th October, 2014, a postmortem examination was conducted on the body of the deceased in the presence of Philip Wanaina Matheri and John Nderitu. He said externally it was noted the deceased's body had marks on the neck above the clavicle bone and the finger tips were cyanosed. That upon internal examination it was noted that the deceased's lungs had collapsed, there was a smell of ethanol in stomach contents, evidence he had taken alcohol. There was hematoma on anterior aspect of the neck and trachea cartridges were cut. He said the cause of death was asphyxia secondary to strangulation.

15. I took over the matter on 23rd September 2019. The accused who was on bond was absent until he was arrested on a warrant on 21st July 2021. On 20th October 2021 the prosecution said they had three more witnesses.

16. **Pauline Nyambura Muriithi** testified as **PW8**. Looking at her testimony she is the same person who testified as PW7.

17. Again **PW9, PC Dominic Nderitu**, a nephew to the deceased, was the same person who testified as **PW7**. Only this time round he attempted to embellish his story.

18. **PW10, No. 73367 PC George Nyachiro**, testified that on 27th October, 2014 at around 9.30 a.m. he was at Huhoini, Ngano Police station when his colleague Cpl Opondo received a phone call from one Alex Kimani Kariuki a village elder that the deceased had been found dead in his house. PW10 proceeded to the scene and found many people. He called the village elder and a few other people aside to interrogate them. The village elder told him they had no suspects. He said the scene had been tampered with and he took photographs with his phone before calling for transport to move the deceased's body to the mortuary.

19. He stated that he asked the relatives of the deceased and the village elder to record statements. He said that Dominic Kabiru who testified as PW7 and PW 9 told him that on 27th October 2014 he received a text sent from the deceased's phone asking whether money had arrived. The person who sent the text identified himself as Paulo. That when he Dominic tried to call the phone, he alleged that Paulo '*realised he had sent the message to the wrong number and put off the phone immediately*'.

20. He said he preferred the charge against the accused based on the information from Dominic Kabiru that the accused had the deceased's phone, and had used the phone to transfer money from the deceased's mobile phone to his (accused's) brother's phone. that the accused knew the deceased had money and was receiving more on his phone, and that he was the last one to be seen with the with the deceased. On cross examination he testified that the deceased's phone was never recovered, that he was told by Dominic that the accused had sent money from the deceased's phone to his own brother's phone, that this brother was known as John. However, this Investigating Officer told the court that he never found this John or his phone number to confirm the allegation from Dominic. He said he never investigated the other persons in the bar where the accused and the deceased were that night and could not explain why. Neither could he explain why he never looked for the said John. He said the accused was identified by one Paul Wainaina for arrest.

ISSUE FOR DETERMINATION

Two issues arise for determination.

- **Whether the Evidence of PW 8 and 9 ought to be considered?**
- **Whether or not the prosecution has made out a prima facie case against the accused that would warrant this court to call upon the accused to give his defence.**

ANALYSIS & DETERMINATION

21. The first issue turns on whether the prosecution had the right to recall the two witnesses to testify afresh.

22. On 26th October 2021 the court did explain **Section 200 of the Criminal Procedure Code** to the accused. He opted that the matter do proceed from where it had stopped. This had also been done by the *Hon. Prof J M Ngugi J* on the 30th May 2017 when the matter was scheduled to be heard before him. Even then the accused opted to proceed from where the matter had stopped before *Odero J*. Seven (7) witnesses including PW8 and PW9 had testified. By calling these witnesses in the guise that they were new witnesses, the prosecution appears to have been looking to cover the gaps left by their previous testimonies. Even though they did testify and were cross examined, the record shows that they had already testified, were cross examined before *Odero J*. There was no application to recall them by the accused person and hence their 2nd round evidence was taken down unprocedurally and cannot be held against the accused person.

23. On the second issue **Section 306(1) of the Criminal Procedure Code** provides as hereunder:

“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.”

24. Section 306 (1) (2) of the Criminal Procedure Code explains the procedure the court has to follow at the close of the prosecution case as follows;

“(1) When the case for the prosecution has been concluded, the court if it considers that there is no evidence that the accused or any of the accused committed the offence after hearing arguments by the advocate for the prosecution and defence may desire to submit, record a finding of no guilty.

(2) It when the evidence of the witnesses has been concluded the court if it considers that there is evidence that the accused person or persons committed the offence shall inform each such accused person of his right to address the court either personally or by his advocate, by giving sworn or unsworn evidence and or call witnesses.”

25. In **Republic vs Abdi Ibrahim Owl** [2013] eKLR a *prima facie* case was defined as follows: -

“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated 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 not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends 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 may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

26. In the present case, there is no direct evidence linking the accused to the injuries leading to the death of the deceased or the commission of the offence and all the prosecution is relying on is circumstantial evidence without any evidence of a single eye witness.

27. In the case of **Sawe vs Republic** [2003] KLR 302 the court stated the following: -

“(a) 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 than that of his guilt.

(b) There must be no other co-existing circumstances weakening the chain of circumstances relied on.

(c) The burden of proving facts to justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused.

(d) The evidence must irresistibly point to the accused to the exclusion of all others.

(e) Suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.”

28. In the case of **Mwangi and Another vs Republic** [2004] eKLR the Court of Appeal held as follows: -

“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge.”

29. What is the circumstantial evidence relied on by the prosecution to connect the Accused with the murder of the deceased? This is based on the evidence of PW7 whom the prosecution called again as PW9 as No. 39675 PC Dominic Kibiru Nderitu. Going through his testimony I found it full of accusations and allegations against the accused person that were not investigated to warrant consideration. The allegation that the accused sent money from the deceased’s phone to the phone of his brother one John could easily have been established but the Investigating Officer never investigated the same. There was no effort to trace the deceased’s phone to confirm this allegation or even the MPESA transactions that would have established these accusations. The rest is mere suspicion.

30. In the case of **Musili Tulo vs Republic [2014]**, eKLR the court of Appeal stated that circumstantial evidence can positively link an accused person to the offence where;

“(i) The circumstances from which an inference of guilt is sought to be drawn must be cogent and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the Accused.

(iii) The circumstances taken cumulatively so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and no one else.”

31. What is evident from the record is that Dominic Kibiru is the person who had the deceased’s money of over Kshs. 500,000/=, money that he took from the deceased and which he claimed the deceased could have wasted because he was a drunkard. He provides the scenario of another suspect as it was he who was straining himself to press a finger on the accused person. He ought to have been investigated as well as he too had a motive. There is no good reason placed before the court as to why the Investigating Officer believed him when he pointed a finger at the accused person yet, there was no evidence he produced to tie the accused to the offence.

32. The failure by the police to investigate the case left so many gaps. The inference of culpability herein points at more than one person, one the accused person, alleged to have been the last to be seen with the deceased and PW7 the deceased’s nephew who had a motive: to keep the deceased’s money. That does not make a good case for reliance on circumstantial evidence. It is my view that no reasonable court properly directing its mind to the law and evidence could convict should the accused opt to exercise his Constitutional right under **Article 50** of the **Constitution** of remaining silent.

33. I find that the prosecution has not discharged its duty to establish a prima facie case against the accused person to warrant this court to place him on his defence. I proceed under **Section 306 (1)** of the **Criminal Prosecution Code** to record a finding of not guilty, dismiss the murder charge against the Accused Person, and acquit him accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST DAY OF DECEMBER, 2021

MUMBUA T MATHEKA

Judge

In the presence of:

Court Assistant Edna

Ms Murunga for state

Accused

Mr. SM Nyagaka for accused: N/A