



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO.16 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JANET NDUNGE MAINGA *alias* JANET NDUNGE MBAL..ACCUSED

RULING

1. The Accused person **JANET NDUNGE MAINGA *alias* JANET NDUNGE MBAL** was charged with the offence of murder contrary to sections 203 as read with section 204 of the Penal Code. It is alleged that on the 22nd Day of February, 2015, at Nthiluni Village, Ngamba Sub-location in Mwala Sub-county within Machakos County she murdered **JOHN MAINGA MUTUA**. The accused person denied having committed the offence and the burden now fell upon the prosecution to prove her guilt.

2. The accused person was represented by Mr Kituku whilst the State was represented by Mrs Saoli and later Mr Machogu.

3. Regarding the standard of proof, the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. **See: Woolmington vs. DPP [1935] AC 462.** However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the accused, it should be resolved in the favour of the accused person. Therefore, the accused person must not be convicted because she has put a weak defence but rather that the prosecution's case strongly incriminates her and that there is no other reasonable hypothesis than the fact that the accused person committed the alleged crime.

4. Prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. As per the elements provided for under section 203 as read with section 204 of the Penal Code, prosecution must prove the following ingredients beyond reasonable doubt:-

i. That the deceased died;

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.

5. The Prosecution called a total of twelve (12) witnesses in support of its case. Pw1 was Peter Ngila who testified that on 22nd February, 2015, he was notified of the death of his brother and that he identified the body in the mortuary.

6. Pw2 was Patricia John Mutisya who testified that on 22.2.2015 she saw two dogs carrying a human leg and upon tracing the source she saw a body wrapped in a sack near a river. She told the court that she later learnt that the body was of the deceased who was a brother to Pw1.

7. Pw3 was Pauline Ndeto who testified that on 22.2.2015 she received information that a human leg that was traced to a body that was in a nylon sack had been found. She found out that the body was that of the deceased.

8. Pw4 was Kiasyo Mainga who testified that in February, 2015 she saw dogs feeding on human flesh and traced the same to a body that she later discovered was that of the deceased.

9. PW5 was Mercy Kavuli Mainga who testified that on 22.2.2015 she saw people chasing dogs and she rushed to the place and saw a body that she learnt was that of her father.

10. Pw6 was Bernard Nzeki Mutua who told the court that on 18.2.2015 he saw the deceased drinking and later learnt that his body had been spotted in a ditch but did not know how the deceased met his death.

11. Pw7 was Geoffrey Wambua who testified that on 3.3.2015 he witnessed a post mortem that was conducted on the body of the deceased.

12. Pw8 was Stephen Mulyunga who testified that on 24.2.2015 he noted that there was a large crowd at the deceased's home and he assisted to retrieve items that were buried in a ditch near where the body of the deceased was found.

13. Pw9 was CIP Moses Kirong who testified that on 24.2.2015 he learnt that members of the public were buying for the blood of the accused who was a wife of the deceased and that he went to the scene and recovered items from the deceased's house as well as from a nearby toilet. He told the court that he forwarded the items to the Government Chemist.

14. Pw10 was Elizabeth Waithera Oyiengo who testified that she conducted DNA profiling on items that were forwarded to her and she formed an opinion that the blood that was found on the mattress, bed-sheet and mattress cover matched the profile of the deceased.

15. Pw11 was PC Dan Onyango Ndura who testified that on 22.2.2015 he recorded a report to the effect that a dead body had been found. He rushed to the scene and found the body in a sack in a ditch and he organized the same to be taken to Machakos Level 5 Hospital. It was his testimony that on 24.2.2015 the body was identified and a post mortem conducted and on 27.2.2015 he accompanied the accused to her home where a blood stained mattress was recovered and he handed it to the government chemist.

16. Pw11 was Dr Waithera Githendu who testified of the post mortem examination carried out on the deceased on 3.3.15. The body was decomposing however there were fractures on the skull and she formed an opinion that the cause of death was multiple deep cut wounds.

17. Thereafter prosecution closed its case and parties were directed to file submissions but there are none on record.

18. 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. It is now a well-established principle that 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 would convict the accused person, if no evidence or explanation was set up by the defence to the contrary. *See Ramanlal .T. Bhatt vs. R [1957]E.A 332*, where the East African Court of Appeal held that a *prima facie* case could not be established by a mere *scintilla* of evidence or by any amount of worthless, discredited prosecution evidence.

19. Also, in the case of **State Vs Rajhnath Ramdhan, Amoy Chin Shue, Sunil Ramdhan and Rabindranath Dhanpaul. H.C.A No. S. 104/1997**, J.P. Moosali while quoting Lord Parker C.J.in **Sanjit Chaittal Vs. The State (1985). 39. WLR. 925** stated that:

“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...”

20. I have carefully evaluated the Prosecution evidence. I find that, in the absence of any explanation to the contrary from the defence, the prosecution evidence does establish two of the three (3) ingredients of the offence of murder. It is not in dispute that there was death and the cause was established. On the question of the accused's participation, this court finds that, in the absence of any evidence to the contrary, the evidence of Pw1 to Pw9 does establish participation of the accused person to some extent. The evidence that the accused is the wife to the deceased is a circumstance that was used to point towards her participation. It is not in dispute that the accused led police to her matrimonial home where a blood stained mattress was recovered from her bed and that the blood was found to belong to the deceased. In arriving at the above conclusions, I do recognize that at this stage, the standard of proof is not proof beyond reasonable doubt as required for a fully-fledged criminal trial. Rather, what is essential is such evidence which 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.

21. For those reasons, I find that there is some evidence adduced against the accused person to establish a *prima facie* case against her which is sufficient to require her to be put on her own defence for the offence of murder contrary to Sections 203 and 204 of the Penal Code.

22. In the result I find that a *prima facie* case has been made out against the accused to require her to make a defence. Consequently I find the accused has a case to answer and is now called upon to make her defence in line with section 306(2) of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at Machakos this 16th day of January, 2020.

D. K. Kemei

Judge