REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL (MURDER) CASE NO.45 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL NZIOKA MULWA *alias* MATIMBO.....ACCUSED

RULING

1. The Accused person, **DANIEL NZIOKA MULWA alias MATIMBO** was charged with the offence of murder contrary to sections 203 as read with section 204 of the Penal Code. It is alleged that the accused, on the 28th Day of August, 2013, at Mango Location in Mwala District within Machakos County murdered **JUSTUS MUINDE**. The accused denied committing the offence.

2. The accused person was represented by O.N. Makau & Mulei Advocates whilst the State was represented by 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 he has put a weak defence but rather that the prosecution's case strongly incriminates him 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 seven **(7)** witnesses in an attempt to prove its case. Pw1 was Elizabeth Kasiva Nzuma who testified that she came to learn of the injury of the deceased and did not witness the same. She told the court that the deceased died whilst in hospital.

6. Pw2 was Caleb Nzuki Nzuma who testified that on 16.6.13 he received a call that the deceased had been injured and that he took him to hospital but who later died at Kenyatta National Hospital. He told the court that the deceased complained of back pains and that the deceased's friends had claimed that the accused was responsible.

7. Pw3 was Charles Mwaniki who told the court that on 17.6.2013 he received a report that the deceased had been injured. It was reported that the accused was one of the assailants and on 27.7.2013 he received information on the whereabouts of the accused hence he had him arrested and thereafter handed him over to Masii Police Station.

8. Pw4 was William Bosire who told the court that he received a report that the deceased had been injured and that the accused was the assailant. He stated that he visited the scene and learnt that the deceased and the accused had disagreed over money that the deceased owed him and while at Kosovo Bar the deceased fell on a stone that injured his back. He established that the accused had disappeared from the scene and was later apprehended and brought to him. He stated that he organized for a post mortem to be conducted on the deceased which established that the deceased had died of an injury on the spinal cord.

9. PW5 was Daniel Muthama who testified that he attended the post mortem and identified the body of the deceased who had been his cousin.

10. Pw6 was Sgt Paul Opondo Wagai who told the court that an assault case had been booked at the police station and that the accused was identified as the assailant.

11. Pw7 was Dr Bernard Owino who testified of the post mortem examination carried out on the deceased on 29.8.13. The examination revealed an infected wound on the lower back and dissection revealed a fracture of the cervical spine and that he formed an opinion that the cause of death was septicaemia and it was hard to tell the cause of injury as the patient was in hospital for long. On cross examination, he told the court that there was a possibility that the deceased could not have been managed well and that he was paralyzed and bedridden.

12. Thereafter the prosecution closed its case. Learned defence counsel submitted that the deceased died of an infection of the blood and this was a case of medical negligence. It was counsel's submission that the accused was not placed at the scene of crime and that this was a case of grievous harm that was badly managed. He submitted that there was no circumstantial evidence that warrants a presumption that the accused caused the death of the deceased. It was counsel's submission that the elements of murder have not been established and no prima facie case had been established against the accused. The state did not file any submissions.

13. 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 and offered 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.

14. 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..."*

15. From the above principles, it was incumbent upon the prosecution to establish a prima facie case against the accused to warrant him to be put on his defence. A prima facie case is made out when the evidence of the prosecution at this stage of the proceedings is sufficient to sustain a conviction against the accused even if he elects to remain silent in defence.

16. 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 not establish the three (3) ingredients of the offence of murder. It is not in dispute that there was death and the cause could not be 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, Pw2 and Pw3 does not establish participation of the accused person. However the evidence of Pw4 was hearsay evidence that implicated the accused who was said to have scuffled with the deceased over money. There was no evidence of anyone who saw him at the scene. 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. It transpired from the evidence of the investigating officer that the key witnesses avoided coming to court to testify and it became obvious that the evidence of those who testified required corroboration. The investigating officer expressed his frustrations in tracing the elusive witnesses. There were unverified information that the families had earlier entered into negotiations on compensation and there were fears that going against the same would incur the wrath of the ancestors who would visit them with a curse. In the absence of those key witnesses I find that the prosecution has not managed to meet the threshold so as to require this court to put the accused on his defence. If the accused elects to remain silent in defence then the evidence adduced at this stage is not sufficient to sustain a conviction against him.

17. In the result it is my finding that the prosecution has not established a prima facie case against the accused person to require him to be placed on his defence. Consequently I find the accused has no case to answer and is acquitted of the offence of murder under section 306(1) of the Criminal Procedure Code. He is ordered to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 15th day of January, 2020.

D. K. Kemei

Judge