



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL (MURDER) CASE NO.9 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

WAMBUA KIMEU.....ACCUSED

RULING

1. The accused herein **WAMBUA KIMEU** was charged with the offence of murder contrary to sections 203 as read with Section and 204 of the Penal Code. It is alleged that on the 9th Day of September, 2014, at Ngaatini Village, Mbaani Sub-location in Mwala sub-county within Machakos County murdered **MBITHI MULI**. The accused person denied having committed the offence.

2. The accused person was represented by J.A. Makau and Co 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 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 six (6) witnesses in an attempt to prove its case. Pw1 was Alex Mweu Mbithi who testified that the deceased was his father and that on 9.9.14 he saw the accused assaulting the deceased. It was his testimony that the deceased was admitted at Machakos Level 5 Hospital for a week and later transferred to Kenyatta National Hospital where he died.

6. Pw2 was Bernard Kiilu Mulei who testified that on 9.9.14 while in the company of Pw1 they found the accused having assaulted the deceased at his gate and who was lying on the floor bleeding profusely and on confronting the accused he claimed that the he had found the deceased applying witchcraft near his (accused's) home. He testified that he heard that the deceased died. On cross examination, he told the court that he saw the accused stand over the injured deceased who was lying on the ground.

7. Pw3 was Peter Muthini Muli who testified that he was at the mortuary on 30.9.14 to identify the body of the deceased for the post mortem.

8. Pw4 was Job Muli Mbithi who told the court that on 9.9.14 he received a call from Pw1 instructing him to go and join him near the gate of the accused and on arrival he found the deceased on the ground while the accused stood nearby. It was his testimony that he took the deceased to Machakos level 5 Hospital where he was admitted for five days and later took him to Kenyatta National Hospital where he died.

9. PW5 was PC David Mbugua who testified that he was assigned to investigate the instant case and that he received information that the accused had been spotted in Masii area and he later arrested and charged him with the holding charge of assault. It was his testimony that the deceased died when the accused had been released on bond and was at large and was arrested in Masii while playing at the casino. He

testified that a post mortem was conducted on the deceased and established that it had been alleged that the deceased was trying to bewitch the accused. He stated that he later withdrew the assault charges and preferred murder charges against the accused.

10. Pw6 was Dr Grace Midigo who testified in respect of an autopsy that was carried out on the deceased which revealed that the deceased had mid frontal skull bruise cranial haemorrhage and mild flattened gyri and she formed the opinion that the deceased died due to head injury and that the weapon must have been a blunt object. She told the court that the body had started to decompose.

11. Thereafter the prosecution closed its case. Upon closure of the prosecution's case, the learned defence counsel submitted that there is no case to answer as there is no independent evidence linking the accused with the murder of the deceased person. Further that the prosecution's evidence is shaky and contradictory and placed reliance on the case of **Sawe v R (2003) KLR** and prayed that the court finds that the prosecution failed to establish a prima facie case against the accused and the he be acquitted. The state did not file any submissions.

12. 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 law 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.

13. Also, in the case of the **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...”

14. 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 the three (3) ingredients of the offence of murder. It is not in dispute that there was death as a result of head injury caused by a blunt object. 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 and Pw2 does point to participation of the accused person. 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. The deceased was found outside the accused's family gate and lying down and bleeding profusely near the accused and on being confronted he claimed that he had found the deceased trying to plant witchcraft near the gate. The accused was thus placed at the scene of the crime and that were he to elect to remain silent in defence then the evidence so far tendered even if by circumstantial grounds will be sufficient to sustain a conviction against him.

15. In the result I find the prosecution has established a prima facie case against the accused to require him to conduct his defence. I find the accused has a case to answer and is now called upon to make his defence in accordance with section 306(2) of the Criminal Procedure Code.

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

D. K. Kemei

Judge