



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**MURDER CASE NO.1 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KELVIN MUKUHA WAMBU.....ACCUSED**

**RULING**

The accused, Kelvin Mukuha Wambui faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on 16/12/2018 at Kia-Maina slums, Nyahururu, within Laikipia County, jointly with others not before the court, murdered Margaret Wanjeri Mutune.

The accused denied committing the offence and the prosecution called a total of 7 witnesses in support of their case. Upon the prosecution closing its case this court has to determine whether or not the prosecution has established a prima facie case against the accused to warrant him to be called upon to enter his defence.

A prima facie case was defined in the case of Republic v Jag Jwan Patel & others I TLR85.

The court held as follows:

“All the court was to decide at the close of evidence of the charge is whether a case is made out against accused just sufficiently to require him to make a defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether if believed, it is weighty enough to prove the case conclusively beyond reasonable doubt. A ruling that there is a case to answer would be justified in my opinion in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, if yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

In the celebrated case of Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335 the East African Court of Appeal 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 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.”**

Accused faces a charge of murder under Section 203 and 204 of the Penal Code. The prosecution has the duty to prove its case beyond reasonable doubt in order to secure a conviction. In doing so, the prosecution has to prove three ingredients which are as follows:

1. Proof of the fact of death of the deceased;
2. Proof that the death of the deceased was caused by an unlawful act or omission on the part of the accused;

3. Proof that the accused possessed malice aforethought.

In this case, the brief facts adduced by the prosecution are as follows:

PW2 Hannah Wanjiru Mutune, the deceased's daughter was in her house at Maina Village on 16/12/2018 when she received a call from her mother's phone but on answering, the person who spoke was a man and claimed to be in love with her. She did not know who it was. Her sister-in-law also called to inform her that somebody was calling them from the mother's phone but not speaking. PW2 proceeded to the mother's house which was nearby. PW2 found the door to the house closed but not locked. On entering, found the house disturbed and the window broken and sensing trouble, sought help from the chief who came, entered the house and found, the mother dead and on her bed with injuries. PW2 said the unknown person continued to call her on the mother's phone.

PW3 Hiram Mureu Mutune, PW2's brother recalled that on 16/12/2018, about 3.00 p.m. he received a call from the mother but the person on the other side did not speak. He called back but there was no response. Next day when he called the mother's phone, someone answered and said that was his phone. Later the person did not respond to PW2's call so he called her sister Hannah PW2 who informed him what she found at her mother's house and he proceeded there and confirmed that indeed the mother had died and house broken into.

PW4 Ernest Mwangi Mutune, another son to the deceased recalled 16/12/2018 when PW3 called him about 8.00 p.m. asking if he knew where the mother was but he did not. Soon after that, PW2 called him and asked him to proceed home where on arrival found people gathered and the mother had died. Police arrived, took photographs and removed the mother's body. PW2, 3 & 4 all identified a Nokia phone that was recovered and produced as being their mother's phone. PW4 also identified the body before postmortem was done.

PW5 Steven Thuku Mwangi, Assistant Chief Maina Sub-Location was called by members of public on 16/12/2018 and informed that the deceased's house had been broken into, he proceeded to the scene where he found the chief. He entered the house and confirmed that the door and timber at the back had been removed. He found the deceased's body on the bed, uncovered with injuries to the head and he called police who came to collect the body.

On 19/12/2018, he got information that some people were living in the store of the Redeemed Gospel Church. He found people at the scene who had arrested Kevin, the accused who offered to show where a radio was hidden at the Golf Club but ongoing there nothing was found. When they went back to the store, where he used to sleep, they recovered three phones and one was identified by the deceased's children as hers; that accused claimed to have been with 2 others including Benson Muraguri who was also arrested but later released. PW4 did not pay much attention to the phones that were recovered.

PW5 CPI Patrick Mutua went to the scene of crime with the Scenes of Crime Officer who took photographs of the scene. The wooden house had been broken into from the rear. The deceased was injured and seemed to have been raped. He later witnessed the postmortem.

After the suspects were arrested, he called the deceased's children who identified one of the recovered phones as their mother's but it had no sim card nor did it have the IMEI number and hence they could not conduct any forensic investigations on the phones.

PW7 Sgt. Paul Kulei, produced the photographs he took at the scene of crime.

PW1 Dr. Boniface Miringu performed a postmortem on the deceased and found that she had blood clots to the mouth and nostrils, and deep cut wound on the temporal region of the head, right sided subscapular haemotome (blood clot) both scalp and right skull fracture. On opening the cranium, he found massive subdural haematoma. The doctor formed the opinion that cause of death was subdural haematoma felling blunt force to the head.

The fact of the deceased's death is not in dispute. PW2, 3 & 4, children of the deceased confirmed the death with PW4 attending the postmortem together with PW7 the Investigating Officer. PW1 confirmed the injuries that caused the death, a blunt force injury to the head.

The next question is who caused the said injuries? Nobody witnessed the incident that led to the deceased's death. The prosecution therefore relied on circumstantial evidence. For the court to rely entirely on circumstantial evidence, the prosecution has to establish the elements that were laid down in *Sawe v Republic (2003) KLR 364* where the Court of Appeal said:

"1. 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 hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ...

5. ...

6. ..

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable

doubt.”

The same principles were echoed in *Abang'a alias Onyango v Republic Cr.A.32/1990*:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii. These circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- iii. The circumstances taken cumulatively should form a complete chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.”

PW2, 3 and 4 claimed that the phone allegedly found with the accused belonged to the mother. However, apart from looking at it and saying that it was her phone because used to see her use it, there was no positive identification of the phone. There was not even a mark on it. The Sim Card was found in it nor was the IMEI number of the phone visible.

The phone was not subjected to forensic analysis because it did not have the International Mobile Manufactures Identity (IMEI). It could therefore not be established whether this is the same phone that was used to make calls to PW2 and 3. It remains mere suspicion.

PW2 and 3 told the court that calls were made from their mother’s number 0713-467053. However there was no expert evidence to determine whether or not Safaricom would be able to extract the calls.

Further to the above, it was not established beyond doubt where the phone P.Ex.No.2 was recovered from because the person who recovered it was never called as a witness. The Assistant Chief (PW5) told the court that the phones were found in a store where accused was arrested by members of public and that he later named three other people as a result of which one Benson Muraguri was arrested. If that is the case, then it is unclear how the said Benson became the owner of 2 of the phones while the accused was linked to only one phone. Later during cross-examination, PW5 admitted that he had recorded in his statement that the phones were recovered from accused and Benson while at the Administration Police Post. Indeed the Investigating Officer told the court that he received information that the phones were recovered from accused and one Benson while they were at Administration Police Post.

The best the Investigating Officer would have done was to call the Administration Officer who recovered the phones to confirm whether it is the accused who was found with the phone that PW2, 3 & 4 identified as belonging to their mother, but none was called. With the above contradictions, it was not proved to the required standard, who was arrested with the subject phone (P.Ex.no.2).

Having found as above, I come to the conclusion that the prosecution has not adduced any circumstantial evidence pointing to the accused as the one who inflicted the fatal injuries on the deceased.

The circumstantial evidence adduced is so weak that it does not unerringly point to the guilt of the accused. The accused is indeed a suspect but as held in the *Sawe case (Supra)* suspicion alone cannot be a basis for a conviction.

Having found that there was no evidence to link the accused to the unlawful act that caused the deceased’s death, malice aforethought cannot be imputed against him. In the end, the only order that commends itself is one of acquittal of the accused under Section 306(1) of the Criminal Procedure Code. The accused is set at liberty forthwith unless otherwise lawfully held.

**Dated, Signed and Delivered at NYAHURURU this 5th day of March, 2020.**

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**R.P.V. Wendoh**

**JUDGE**

PRESENT:

Ms. Rugut for State

Mr. Kaburu for accused

Eric – court assistant

Accused - present