



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram – D. K. Kemei - J

CRIMINAL (MURDER) CASE NO. 24 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

COSMAS MUTINDA MUIA.....ACCUSED

RULING

1. The accused herein **COSMAS MUTINDA MUIA** 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 night of 9th and 10th November, 2017 he murdered **MARIA MWELU MUOKI**.
2. The accused person is represented by Langa Langa Chisero whilst the State is represented by Mr Machogu.
3. The prosecution in order to sustain a conviction must prove all the ingredients of the offence of murder. The elements of the offence as provided for under Section 203 as read with section 204 of the Penal Code are:
 - i. That the deceased is dead;
 - 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.
4. The prosecution called a total of nine (9) witnesses in support of its case. **Pw1** was **Ibrahim Mutiso** who testified that he ferried the deceased who was in the company of the accused on 10.11.2017 to her home. He told the court that he learnt on 10.11.2017 that the deceased had been killed.
5. **Pw2** was **Joshua Mumo Kivula** who testified that he saw the accused in the company of the deceased and later learnt that his brother was arrested on allegation of having killed the deceased.
6. **Pw3** was **Nicholas Wambua** who testified that on 10.11.2017 he spotted a dead body near a farm and he alerted the authorities.
7. **Pw4** was **Leonard Maingi** who testified that on 10.11.2017 he was alerted by Pw3 that he had discovered a dead body.
8. **Pw.5** was **Peter Kivuva Mutuku** who testified that he attended the post mortem that was conducted on the body of the deceased.
9. **Pw6** was **Dr Joyce Kalekye** who testified of the post mortem examination carried out on the deceased on 17.11.2017. The lungs were dark due to absence of oxygen and she formed the opinion that the cause of death was asphyxia due to manual strangulation. The post mortem report was tendered in court.
10. **Pw7** was **Pc Fredrick Kosen** who testified that on 10.11.2017 he received instructions to investigate the instant matter but he did not visit the scene. He testified that he took witness statements and established that Pw1 had ferried the accused and the deceased and after Pw1 was arrested, the accused fled to Matuu however but was arrested through the help of Pw2.
11. **Pw8** was **Margaret Wahu Maina**, an analyst at the government chemist who testified that she worked with Lawrence Kinyua Muthuri who had prepared a report in respect of samples received at the government chemist on 11.12.2017. She testified that the DNA profile

obtained from the spermatozoa obtained from the vaginal swab from the deceased matched the DNA profile generated from the buccal swab of the deceased and the buccal swab of the accused.

12. **Pw9** was **Cpl Martha Mutinda** who testified that on 10.11.2017 she received information that there was a dead body that had been discovered. She went to the scene together with the scene of crimes officer and after investigations, she established that the accused was the last person in the company of the deceased.

13. Thereafter, prosecution closed its case and parties were directed to file submissions. Learned counsel for the accused person submitted that even though the accused was a suspect, there was no direct evidence connecting the accused with the offence. Learned counsel in placing reliance on the case of **Erick Odhiambo Okumu v R (2015) eKLR** submitted that the accused was charged because he was the last person seen with the deceased. Learned counsel submitted that the prosecution failed to prove beyond reasonable doubt that the accused caused the death of the deceased and urged the court to acquit the accused under Section 210 of the Criminal Procedure Code. The prosecution's evidence is not on record

14. It is trite law that prior to placing an accused on his/her defence, the prosecution is required to have established a *prima facie* case against such accused. 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 by the Defence. *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.

15. Also, in the case of **State v. 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 v 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...”

16. 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 the three (3) ingredients of the offence of murder. It is not in dispute that there was death and the cause could 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 and Pw2 as corroborated by Pw9 does establish that the accused had an opportunity to meet the deceased and as such it would be necessary for him to explain what occurred after that meeting. It was established that he was last in the company of the deceased as he ferried her to her home on the night in question. 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.

17. For those reasons, I find that there is some evidence adduced against the accused to establish a *prima facie* case against him, the same is sufficient to require him to be put on his defence. Consequently I find that he has a case to answer and is called upon to elect to conduct his defence in line with the provisions of section 306(2) of the Criminal Procedure Code.

Orders accordingly.

Dated and delivered at Machakos this 13th of May, 2020.

D. K. Kemei

Judge