



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram – D. K. Kemei – J)

CRIMINAL (MURDER) CASE NO.9 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD MWALIA KALITI.....ACCUSED

R U L I N G

1. The accused person, **BERNARD MWALIA KALITI** 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 the on the 28th day of February, 2013 he murdered **FELISTUS MUNEE MWALIA**.
2. The accused person is represented by Ms Ngatia 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 six (6) witnesses in an attempt to prove its case. **Pw1** was **David Kaliti** who testified that he was at the mortuary when the post mortem was being conducted on the body of the deceased.
5. **Pw2** was **Kaliti Robinson** and after a voir dire was conducted, the court was satisfied that he was in possession of sufficient intelligence to justify the reception of his evidence. He gave unsworn evidence to the effect that he did not know how his mother died and that he did not know why his father was in court. He was declared a hostile witness upon application by the prosecution. On cross examination, he testified that on 28.2.2013 he saw his father arrive at home while armed with a stone and his mother had injuries on her head then he saw his parents lock themselves inside the house. He told the court that his father informed him that the deceased had hung herself and he later saw the deceased hung on a rope. He told the court that his father removed the deceased from the rope then the police came and took her body and arrested the accused.
6. **Pw3** was **SSgt Isaac Kimani** who testified that on 1.3.2013 he received a call from the accused that the deceased had committed suicide and so he went to the scene and saw the body of the deceased placed on the bed and covered with a blanket.
7. **Pw4** was **Dr Muli Simon** who testified of the post mortem examination carried out on the deceased on 14.3.2013. The body had bleeding in the brain and he formed the opinion that the cause of death was cardiopulmonary arrest due to intracranial haemorrhage leading to severe brain contusion. The post mortem report was tendered in court as an exhibit.
8. **Pw.5** was **Kipngetich Bernard**, the Government Chemist who testified that he received a piece of wood, a rope, a brown jacket, sand, blood sample of the deceased and the accused on 18.3.2013 that he analysed and came to the conclusion that the blood on the items matched that of the deceased.

9. Pw6 was Pc Edwin Metto who testified that on 2.3.2013 he received instructions to investigate the instant matter that was reported as a suicide. He told the court that he received items from the scene and was later led to the home of the accused whom he interrogated. He told the court that he forwarded the items that he received to the Government Chemist.

10. Thereafter, prosecution closed its case and parties were directed to file submissions. Learned counsel for the accused submitted that even though the accused was a suspect, there was no credible, cogent evidence against him. Learned counsel in placing reliance on the case of **Sawe v R (2015) eKLR** submitted that what is in this case were suspicions and the same could not form the basis of inferring guilt. 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.

11. It is trite law that prior to placing an accused to 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 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.

12. 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 Chaital 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..”

13. 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 Pw2 as corroborated by Pw4 and Pw3 does establish that the accused had an opportunity to harm the deceased and that there was reason to believe that he did so. 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.

14. In the result, I find that a *prima facie* case has been made out against the accused to warrant him being called upon to conduct his defence. I find that he has a case to answer and is now called upon to elect to conduct his defence in line with section 306(2) of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at Machakos this 12th day of May, 2020.

D. K. Kemei

Judge