



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Hon. Justice D. K. Kemei)**

**CRIMINAL (MURDER) CASE NO.9 OF 2017**

**REPUBLIC.....PROSECUTOR**

**EVERLYNE MARTHA OPICHO.....ACCUSED**

**RULING**

1. The accused herein **EVERLYNE MARTHA OPICHO** was charged with the offence of murder contrary to sections 203 as read with section and 204 of the Penal Code. It is alleged on the 8<sup>th</sup> day of December, 2016 she murdered **JACTON WANDABWA**.

2. The accused is represented by Mr Kituku 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 herein. 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 directly or indirectly participated in the commission of the alleged offence.*

4. The prosecution called a total of eight (8) witnesses in an attempt to prove its case. Pw1 was John Karani who testified that the accused is his girlfriend to whom he had sent money on 7.2.2016 to enable her travel from Kakamega to Nairobi to visit him. He told the court that she came and stayed with him and that on 8.12.2016, he received information that an infant had been burnt. It was his testimony that the accused went missing and later sent him a text that she had committed a sin. He told the court that he learnt that the burnt infant was the deceased.

5. Pw2 was **Innocent Otieno Ochieng** who testified that on 8.12.2016 his wife informed him that she had seen a burnt child at the rubbish dump.

6. Pw3 was **Joseph Ekesa** who testified that on 7.12.2016 he saw a lady burning something at the dumping site and that the lady was the accused.

7. Pw4 was **Ochanda Emily Atieno** who testified that on 8.12.2016 she saw something at the dumping site that looked like a burnt human being.

8. Pw5 was **Cpl Rayton Mbinji Omutere** who testified that on 8.12.2016 he received a report that residents of Kenchick area had discovered a burnt body and he went to the scene and confirmed it.

9. Pw6 was **Dr Waithera Githendu** who testified of the post mortem examination she had carried out on the body of the deceased on 23.5.2017. The body was completely burnt beyond recognition and it had a missing leg hence identification was done via DNA analysis.

10. Pw7 was **Henry Kiptoo Sang** who testified that he conducted DNA analysis on items that were presented to him that were collected from the deceased and the accused and that he came up with the conclusion that there were 99.99% chances that the accused was the biological mother of the deceased.

11. Pw8 was **Chepchirchir Rael** who testified that on 15.12.2016 she forwarded samples that were collected from the accused and the deceased to the Government Chemist.

12. Thereafter, prosecution closed its case and parties were directed to file written submissions. There are no submissions on record.

13. It is trite law that prior to placing an accused person to 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 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.

14. 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...”*

15. 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 that 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 Pw3 does establish that the accused had an opportunity to harm the deceased and that there was reason to believe she 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.

16. For those reasons, I find that there is some evidence adduced against the accused person to establish a *prima facie* case against her. According to Pw1 who was the accused's boyfriend he last saw her with the deceased who was her child. Again Pw3 had seen the accused at the rubbish heap burning some things a few hours before the body was discovered. The same is sufficient to require her to be put on her defence for the offence herein.

17. In the result it is my finding that the prosecution has established a *prima facie* case against the accused herein. She has a case to answer and is now called upon to conduct her defence in line with the provisions of section 306(2) of the Criminal Procedure Code.

Orders accordingly.

Dated and delivered at **Machakos** this **12<sup>th</sup>** day of **May, 2020**.

**D.K. Kemei**

**Judge**