



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL (MURDER) CASE NO.3 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**KENNEDY MUENDO MUSYOKA.....ACCUSED**

**RULING**

1. The Accused person, **KENNEDY MUENDO MUSYOKA** was charged with the offence of murder contrary to sections 203 as read with section 204 of the Penal Code. It is alleged that on the 25<sup>th</sup> Day of December, 2012 he murdered **ELIZABETH KALUNDE NDUNGE**.

2. The accused person was represented by several advocates at different stages in the proceedings namely Miss Amala, Mulyungi, Wambua Kilonzo and later Janet Jackson and Susan Advocates whilst the State was 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 **eight (8) witnesses** in support of its case. **Pw1** was **Dr Fredrick Otieno Okinyi** who testified of the post mortem examination carried out on the deceased on 7.1.2013. The body had a stab wound on the neck and left chest wall and he formed an opinion that the cause of death was haemorrhagic shock due to stab wound to the heart and lungs.

5. **Pw2** was **Peter Muema Muthuku** who testified that on 25.12.2013 he heard some noise near the disco where he worked and when he went near, he found a lady lying near a tree with a stab wound on her neck.

6. **Pw3** was **APC Winfred Ndinda** who testified that on the material day while on patrol she was alerted by noise at Mwala market and she went to where the noise was emanating from and she saw a lady lying under a tree with a kitchen knife stuck on her neck. She testified that she learnt that the lady was called Elizabeth and who passed on.

7. **Pw4** was **IP Peter Musau** who testified that the deceased was his barmaid and that the accused was his neighbour. He testified that the accused used to frequent the bar to harass the deceased and issue threats against her. He testified that on the material day, the deceased told him that the accused had come into the bar and took drinks without paying for the same and later his wife called him and informed him that the deceased had been killed by the accused.

8. **Pw5** was **Peninah Nduku Peter** who testified that on the material day, she was informed that the deceased had been killed. She testified that she visited the scene and confirmed that indeed the deceased had died.

9. **Pw6** was **Pc Cornelius Busienei** who testified that on 26.12.2012, he received instructions to visit a scene of murder and he proceeded there where he saw the body of the deceased under a tree and that there was a knife stuck on her neck. He testified that he received information that the suspect had turned himself in and that the suspect was the accused.

10. **Pw7** was **Pc Elishper Mwikali** who testified that on 25.12.2012 at 4.30 am, somebody turned up and told her that he had stabbed a

person on his neck with a knife. She testified that the reportee was the accused

11. **Pw8** was **APC Barako Shongolo** who testified that on the material day while on patrol he was alerted by noise at Mwala market and he went to where the noise was emanating from and saw a lady lying under a tree with a kitchen knife stuck on her neck.

12. Thereafter, prosecution closed its case and parties were directed to file submissions. Learned counsel for the accused person submitted that none of the witnesses gave evidence that linked the accused with the offence. Learned counsel in placing reliance on the case of **R v Elly Waga Omondi (2015) eKLR** submitted that confessions are not admissible as evidence except where they are made under the law. Counsel cited Section 25 of the Evidence Act and Rule 4 of the Evidence (out of Court Confessions) Rules 2009 and submitted that no constitutional safeguards were made when the accused was said to have given the confession hence the evidence regarding his confession was not admissible. Learned counsel in placing reliance on the case of **Bhatt v R (1957) EA** submitted that the prosecution failed to prove beyond reasonable doubt that the accused caused the death of the deceased. The prosecution's submissions are not 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 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 **Pw. 7** and **Pw.4** does establish that the accused had reason to want to harm the deceased and that there was reason to believe 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. It came out clearly from the evidence of **Pw4** who was the deceased's employer that the accused and deceased had been lovers and had had some differences prior to the incident. It had also been reported that the accused had issued death threats against the deceased in retaliation for her action in ending their affair and that he had been at the deceased's workplace harassing her prior to her demise.

16. For those reasons, I find that there is some evidence adduced against the accused person to establish a *prima facie* case against him which is sufficient to require him to be put on his defence for the offence of murder contrary to sections 203 and 204 of the Penal Code. Consequently, 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 11<sup>th</sup> day of May, 2020.**

**D. K. Kemei**

**Judge**