



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 118 OF 2017

REPUBLICPROSECUTION

VERSUS

SAMMY MUTUA MBATHAACCUSED

RULING

1. The accused was charged with offence of murder contrary to section 203 as read with Section 204 LOK.
2. Particulars being that on 05/10/2010 at Maavuni Village, Kilungu Sub-location, Kitundu Location, Mbooni West District, Eastern Province murdered Nduu Mbatha Kioko.
3. The accused pleaded not guilty and matter went into trial. The prosecution called 7 witnesses and closed its case.
4. The court is called upon to make a ruling on whether accused has a case to answer.
5. The parties agreed to file and exchange written submissions but only accused had done so.
6. After going through evidence on record and the submission, I find the issue is whether there is a case to answer to warrant accused to be put on his defence.

ACCUSED SUBMISSIONS

7. The defence submits that the prosecution did not satisfy the ingredients of the preferred offences. The prosecution did not discharge their legal and evidential burden of proof. The prosecution did not prove its case on a balance of probability.
8. The accused is charged with the offence of murder contrary to section 203 and 204 of the penal code.
9. The evidence in support of the prosecution's case was presented by 7 witnesses.
10. PW1 testified he was helping the grandmother burning charcoal when he saw the accused heading towards her grandmother's house at around 7.30 p.m. from about 20 meters away. When PW1 tried to intervene he was chased by the accused with a bow and arrow and PW1 ran towards the neighbour's house though he did not scream.
11. PW2 testified that she saw the accused who is his uncle go to her grandmother house. That the accused pushed the door after the deceased refused to open it. PW2 was in the kitchen 30 meters away. PW2 ran towards her grandmothers when she heard her scream and found the accused cutting the grandmother with a panga in the sitting room area of the house and that the accused chased her away where she ran and locked herself in their house while screaming.
12. She claimed there was a hurricane lamp when the incident occurred. She further testified that her and the grandmother were the only two people at home.
13. PW3 testified that at around 7.30 p.m., she got home and found her children, PW1 and PW2 crying and upon enquiry was informed that the accused had killed the deceased. She said the deceased was down on the floor with her neck cut but there was no lamp where the deceased body was.
14. PW4 a brother to the accused was present at the post mortem. He also confirmed that he had a land dispute with the accused and he's the father to PW1 and PW2 and husband to PW3.

15. PW5 APC Elias Njiru testified he heard loud voices while on patrol and when at the scene they found the deceased. That they found a panga, a bow and pieces of arrows near the body of the deceased. That they used torches to illuminate the single room where the body lay.
16. PW6 testimony was hearsay and mostly of no probable value to this court. PW7 testified he the accused was arrested in Kangundo. That he was informed it is the accused who had killed the deceased. Further the body was in a one roomed house with no form of lighting and the exhibits i.e. the panga was never examined by the government chemist. No doctor or government chemist ever testified in this matter.
17. PW2 stated they were the only ones in the home i.e. herself and the deceased. PW2 further states there was lighting at the place of incidence. PW1 testified that the incidence occurred at 7.30 p.m. whereas PW2 states it was at 7.00 p.m. and PW3 states she got home at 7.30 p.m. and the room where the body of the deceased was lying, no form of lighting was on.
18. Further PW1 testified he saw 3 arrows next to the body of the deceased and 2 were found in the bush and that they were recovered in the presence of the officers at around 8.00 p.m. PW3 and PW4 all testified that all the arrows were found at the scene next to the body.
19. The evidence act, cap 80 of the laws of Kenya provides that section 107 in the case of **Pius Arap Maina –Vs- Republic [2013] eKLR (Criminal Appeal No. 247 of 2011)**, court noted that;

“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.”

20. The accused submits that there are too many glaring contradictions in the prosecution case and this casts doubt as to whether the accused person committed the alleged offence or indeed whether the said offence was committed at all.
21. The totally of the evidence on record is circumstantial which points the accused as the assailant at the material time thus he has to explain his position in his defence. This is buttressed by evidence of P2 thus;

..... she saw the accused who is his uncle go to her grandmother house. That the accused pushed the door after the deceased refused to open it. PW2 was in the kitchen 30 meters away. PW2 ran towards her grandmothers when she heard her scream and found the accused cutting the grandmother with a panga in the sitting room area of the house and that the accused chased her away where she ran and locked herself in their house while screaming.

22. The court thus finds that the accused has a case to answer and is hereby put on his defence.

SIGNED, DATED AND DELIVERED THIS 21ST DAY OF JANUARY, 2019 IN OPEN COURT.

.....

HON. C. KARIUKI

JUDGE