

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 48 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JACOB OUMA MUNGA.....ACCUSED

RULING

Jacob Ouma Munga is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are that on 9th May 2015 at Kabiria in Riruta within Dagoretti District in Nairobi County he murdered Wycliff Achesa. The case for the prosecution has concluded after receiving evidence of eight witnesses. This court will now analyze and consider this evidence to determine whether it establishes a prima facie case against the accused to warrant placing the accused on his defence.

Section 306 of the Criminal Procedure Code mandates the trial court to consider the evidence adduced by the witnesses for the prosecution and determine whether the evidence adduced is sufficient to support a prima facie case against the accused to warrant calling upon the accused to his defence. If the determination does not disclose a strong case against the accused, then the trial court must enter an acquittal. Specifically Section 306 (1) of the Code provides that:

When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

I have carefully read all the evidence of the eight prosecution witnesses and have understood the same. The evidence shows that the accused and the deceased lived in rental houses located at Kabiria in Riruta, Dagoretti Nairobi. The houses were made of iron sheets. They belonged to Lucy Wangui (PW5). According to Lucy, the accused lived in House No. 4 and the deceased lived in House No. 13. Lucy told the court that when the accused and another man approached her to rent a house she did not agree because they looked like people who could cause problems. However, when she was away on her evangelical duties, she told the court that she is also a preacher, her daughter who had no idea that Lucy did not want the accused as her tenant rented the house to him. It is stated that on the evening of 9th May 2015 residences of these houses belonging to Lucy heard someone outside shouting 'thief' 'thief'. The person was also banging on the iron sheets and scratching them. Neighbours went out to find out what was happening. The deceased, who lived with his wife Elizabeth Mugiri (PW7), also went out. He was stabbed on the left side of the neck and the assailant escaped. Lucy who lived nearby was informed. She called the police and reported. In the meantime the deceased was taken to a nearby clinic known as Central Park but he died before he was attended to. The matter was also reported at Riruta Police Station.

CPL John Silunda (PW1) who was on patrol that evening in the company of other police officers was recalled to return to the Station to attend to this incident. He found five people including one Rogers and Mandela reporting the matter. CPL Silunda visited the clinic and confirmed that the deceased had died. This officer testified that he spotted a man walking in a suspicious manner, looking scared and checking side to side. The man was walking towards where the police officers were. He asked the man what the problem was and the man told him that he had been chased away by neighbours. He testified that the five persons who had reported the matter saw the man and identified him as the man who had stabbed the deceased. He was arrested by the police and held in custody. That man is the accused in this case.

CPL Silunda told the court further that he visited the scene and recovered a blood stained knife about 20 metres from the plot where the accused and the deceased lived. The knife was subjected to forensic examination. The DNA profiles generated from it were compared with those generated from a sample of blood drawn from the deceased. Mr. Lawrence Kinyua Muthuri (PW2), a Government Analyst, told the court that after examination he found that the DNA profiles from the blood stains on the knife and the blood sample from the deceased matched.

Of the eight witnesses, it is only Elizabeth Mugiri who was at the scene. She was however inside her house when the incident occurred. Lucy, the landlady, lived outside the plot and arrived after the stabbing incident. She was informed of the stabbing and on arrival found the deceased already injured and bleeding. Elizabeth told the court that she did not witness the stabbing. Her evidence is that while inside her house with her husband, the deceased, they heard someone shouting 'thief', 'thief'. She said she also heard someone banging on the iron sheets and scratching them. Her husband went out to help the neighbour shouting 'thief', 'thief'. According to her the neighbour raising the distress call lived in House No. 1. She told the court that her husband was stabbed by the accused. When she was cross examined she told the court that she had not seen the accused before that day but she knew it was him shouting 'thief', 'thief'. She further told the court on cross examination that she was inside their house when her husband was stabbed and that she did not witness it. She said that she was informed by a neighbour called Laura that the accused is the one who had stabbed the deceased.

CPL John Silunda told the court that Rogers and Mandela are the ones who told him that the accused was the man who had stabbed the deceased and that he was the person who had been banging and scratching iron sheets. I have stated above that Rogers and Mandela and three other people who had gone to report this matter to the police are the same people who identified the accused to the police as the man who had stabbed the deceased leading to his arrest.

The rest of the evidence was given by Sebastian Monde (PW4) and Godfrey Lupia Otunga (PW6) both brothers of the deceased. They learned of the stabbing after it had happened and did not witness it happening. The Investigating Officer PC James Wanjohi Mwangi (PW8) told the court that investigations showed that Rogers and Mandela witnessed the accused stabbing the deceased.

What this evidence shows is that the deceased was stabbed on the left side of the neck. This has been confirmed by the evidence of Dr. Dorothy Njeru who examined the body of the deceased on 14th May 2015. Her findings are that the deceased died as a result of neck injury due to penetrating force trauma (stabbing). These findings are contained in the Post Mortem Report produced in court as Ex. 2. The knife exhibited in court, a long kitchen knife with a twisted blade (Ex. 4) has forensically been confirmed to contain bloodstains of the deceased. This court makes a finding, based on that report, that this knife is the murder weapon. It was recovered outside the plot about 20 metres from the scene.

This evidence proves without doubt that the deceased died as a result of a stab wound to the neck and the weapon that caused that injury has been identified as Ex. 4, the knife produced in court. This knife was not found in possession of the accused. It was not dusted for fingerprints to determine whether the accused may have handled it. The circumstances surrounding his arrest and his identity as the person who stabbed the deceased have not been proved. None of the witnesses who testified saw the stabbing or who did the stabbing. There is mention of Rogers, Mandela and Laura. These were neighbours who are mentioned in evidence as having information regarding the identity of the person who stabbed the deceased. They did not testify. The Investigating Officer told the court that his efforts to trace these witnesses were not successful. Indeed the Prosecution Counsel was at pains to produce the OB record showing the report made implicating the accused. The production of this report was objected to by the defence because the officer was not the maker of that record. Even if the court were to allow this report to be produced, this would not have cured the defects in the prosecution case. There are fatal gaps in evidence. While the fact of death and the nature of that death have been proved beyond reasonable doubt, the identity of the accused as the person who stabbed the deceased has not been proved. The evidence of the identity of the assailant is very weak and to the very least non-existent. To make a finding that the prosecution has established a prima facie case against the accused and call on him to make his defence would be an affront to justice. In my view, this would amount to expecting the accused to fill in the gaps left out by the prosecution.

It is clear from the evidence that no one witnessed the stabbing. Elizabeth told the court that her neighbour Laura informed her that the accused had stabbed the deceased. Laura is not a witness before this court to confirm that evidence. This information by Elizabeth therefore remains hearsay and of no value to the prosecution case. Rogers and Mandela who are said to have identified the accused to CPL John Silunda who arrested the accused did not testify to inform this court how they identified the accused. The Investigating Officer relied on the information given to him by witnesses who have not testified. These weaknesses in prosecution case are fatal. While the fact of death and the nature of that death have been proved to the required standard, the identity of the assailant has not been proved. Had the identity of the accused been established, this court would not have hesitated to make a finding that the accused must be placed on his defence.

The evidence before this court therefore is not one that this court could rely on to convict if the accused were to remain silent. It falls short of the principle laid down in various authorities including Ramanlal Trambaklal Bhatt v. Republic [1957] E.A 332. It is my finding therefore that the evidence adduced by the prosecution falls short of establishing a prima facie case against the accused. I therefore find that the accused in this has no case to answer and in compliance with section 306 (1) of the Criminal Procedure Code I hereby enter an acquittal and order the immediate release from custody of Jacob Ouma Munga unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Delivered, dated and signed this 14th day of February 2019.

S. N. Mutuku

Judge