



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 20 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

GEDION WAMBUA KOKO ALIAS KAKA.....1ST ACCUSED

RAPHAEL MBITHI KIMELI ALIAS MUSEMBI.....2ND ACCUSED

BENSON NDONYE MUTUA ALIAS BEN.....3RD ACCUSED

R U L I N G

A. Introduction

1. The accused persons are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 30th August 2016, at Ndune market in Makima location of Mbeere South sub-county within Embu County murdered Nzuki Kamau to which offence they pleaded not-guilty.
2. The prosecution called 11 witnesses in support of their case which will be briefly stated.

B. Prosecution Case

3. PW1 testified that on 30/08/2016, the 1st accused found her in the grazing fields tying her goats. It was PW1's testimony that the 1st accused was looking for his son (PW2) and was clearly in a rage. PW1 was able to identify the 1st and 2nd accused as father and son respectively. PW1's testimony to the effect that the 1st accused was looking for the 2nd accused who had stolen a radio. PW2 further testified that on the following day he learnt of the deceased's death as a result of the theft of the same radio the 1st accused had stated had been stolen by the 2nd accused.
4. PW3, a businessman at Ndune market testified that on the material date he witnessed someone being beaten by a group of people about 100-150 metres from his bar. He further testified that he did not go near the scene and as such could not identify who was the recipient of the beating and who was handing out the beating. PW4, a patron of PW3's bar testified that on the material date PW3 informed him and other patrons at the bar that someone was being beaten. PW4 and a friend, Peter Mutua, went to the scene and found a man being beaten by a mob which included a man called Komu and the 3rd accused.
5. PW5 another bar owner in Ndune market testified that on the material day at around 7.00pm she witnessed the deceased being beaten by the 1st 2nd and 3rd accused persons for allegedly stealing a radio from one Gideon Wambua. PW5 testified that the 1st accused was armed with a stick of about 1 metre long.
6. PW6, a father to the 2nd and 3rd accused testified that he interacted with the deceased at around 8.00am in the morning when the deceased came to borrow a pen from him. PW6 further testified that later on in the day, he intervened when the 1st accused wanted to beat the deceased and took the deceased with him to his house where the deceased stayed for a while before leaving to go buy miraa. PW6 did not see the deceased again.
7. PW8 corroborated PW4's testimony. He further testified that the deceased had been beaten and was lying on his stomach, bleeding from the nose and mouth. He further testified that the 3rd accused was armed with a whip and the 1st accused with a stick.
8. PW9 testified that he examined the accused persons with instructions from the DCIO Mbeere South and found them mentally fit to stand trial. PW10 carried out the post-mortem on the deceased and concluded that the deceased died as a result of a raised intracranial pressure due

to subdural haematoma sustained due to blunt force trauma to the head consistent with fatal assault.

9. PW1, the investigation officer testified that on the 31/08/2016, he accompanied the OCS Kiritiri to Ndune market where they found the deceased's body on the ground. PW11 later formed part of the investigation team which he led and on the 17/09/2016 to arrest 4 suspects of whom 3 were brought before court. He further testified that he did not investigate the element that the deceased was killed by a mob.

C. Defence Submissions

10. It was submitted that there was no evidence that the 1st, 2nd and 3rd accused hit the deceased on the head causing his death. Further that there was no evidence, forensic or otherwise that connected the 1st, 2nd and 3rd accused to the injuries that caused the deceased's death.

11. The accused through their advocates further submitted that the ingredients of murder and culpability of the accused had not been proven as there were major inconsistencies in the testimonies adduced which thus touched on the credibility of the witnesses. It was further submitted that PW11, the investigations officer did not conduct credible investigations.

12. It was also submitted that none of the prosecution witnesses heard the accused herein threatening to kill the deceased and as such the prosecution had failed to prove that there was no malice aforethought on the accused part.

D. Analysis of the Law

13. The issue for determination is whether at the conclusion of the State's case the prosecution has produced sufficient evidence to establish a prima facie case.

14. It is the law in Kenya as entrenched in the constitution under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved.

15. The **Evidence Act Cap 80 of the Laws of Kenya at Section 107 (1)** provides thus:

“whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”

16. It is worth noting that at this stage of the proceedings the standards applicable on whether a prima facie case has been made out is lower than that of “beyond reasonable” doubt which applies at the conclusion of the full trial after the accused person has been heard. The strength of the evidence establishing a prima facie case must be the sort of evidence upon whose strength the court could convict if the defence says nothing to rebut such evidence.

17. The **Criminal Procedure Code Section 306 (1)** provides as follows:

“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 one 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 recording a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.....”

18. In making a finding on a *prima facie* case the court ought to bear in mind the cardinal principle, on the burden of proof, that it is the duty of the prosecution to establish the guilt of the accused for the offence charged beyond reasonable doubt. See Woolmington v DPP [1935] EA 462 at 481.

19. In criminal trials that burden of proof is always on the prosecution. A trial court is therefore enjoined by law to determine whether at the conclusion of the prosecution case there exists a case discharging that burden of proof. In discussing the issue further **Lord Parder C.J** in the case of Sanjil Chattai v The State [1985] 39 WLR 925 stated thus:

“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.”

20. The Kenyan courts have heavily relied on the legal principles in the celebrated case of R.T. Bhatt v Republic [1957] EA 332 – 334 & 335 to define what constitutes a prima facie case. The court of Appeal of Eastern Africa stated thus:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one which on fully consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence

is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence.”

21. It is trite law that at this stage, the court is not required to evaluate the evidence in details or deal with its weight and credibility unless it is of the view that there is no case to answer.

22. I am of the view that the evidence on record is sufficient to make a *prima facie* case against the three accused persons.

23. I find tht the accused persons have a case to answer and are hereby called upon to make their defence.

24. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Ms Muriuki for 2nd and 3 accused and holding brief

for Guantai for 3rd 1st accused

Accused persons present