



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MURDER NO. 12 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

JAMES MACHARIA GATWIKU.....ACCUSED

RULING

1. The accused persons James Macharia Gatwiku is charged with murder contrary to section 203 as read with Section 204 of the Penal Code in that on the night of 11/2/2015 at Kamuigua Village along Ahiti Ndoba Road within Kirinyaga County, jointly with others not before court unlawfully murdered Francis Kariuki Mwangi.
2. The accused person denied the charge. The prosecution called Eight(8) witnesses in an attempt to prove the charge against the accused. This is a ruling as to whether the accused has a case to answer on the charge.
3. The procedure for trials before the High Court are under part IX of the Criminal Procedure Code. Under **Section 306 of the Criminal Procedure Code** the Court considers the evidence tendered and if it finds that there is evidence that the accused person committed the offence it shall inform the accused of his right to give evidence in his defence and call witnesses.
4. Where the court considers that there is no evidence to prove that the accused committed the offence it shall record a finding that the accused is not guilty. Section **306(1) & 2 of the Criminal Procedure Code** provides:-

“(1) 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, record 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, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.”

Summary of the Evidence;

5. PW-1- Carline Wairimu Gicharu told the court that on 27/5/15 she received a phone call from a number 0718391333. She said she knew the person who had been using the line who was Martin Mwendwa. Police went and she identified Martin Mwendwa who said he was given the line by the accused. Though she said accused had a phone, she could not tell ow it was connected to the deceased. Her evidence does not implicate the accused in the murder.
6. PW-2- Paul Mwangi Kariuki is the father of the deceased. He testified that the deceased went missing and they looked for him. The body was later found at Ndomba on the way to Kutus. The witness did not implicate the accused to the murder.
7. PW-3- Phylis Wangui Murimi is the mother of the deceased. She did not adduce any evidence to implicate the accused to the murder.
8. PW-4- James Waweru Kinyua. He had employed the deceased as a motor cycle rider. He told the court that he did not know who caused the injury on the deceased.

9. PW-5- Martin Mwenda Gitonga is a friend to the accused. He was arrested by police. He testified that the accused gave him a sim card and he started using it in a phone which Carlo (PW-1-) gave her. Police arrested him over the sim card which accused gave him. The accused was arrested.

10. The PW-5- said he had not memorized the number. He did not identify the sim card in court. The sim card was not connected to the deceased as the witness did not give the mobile number.

11. PW-6- Doctor Gachuri Raphael conducted the post mortem on the body of deceased. He testified that the cause of death was head injury secondary to blunt trauma. The postmortem form is Exhibit 1.

12. PW-7- Dr. Joseph Thuo is a Psychiatrist at Embu Hospital. He examined the accused and found that he was fit to stand trial. He produced the request for examination and the report as Exhibit 2a & b.

13. PW-8- P. C Thomas Wangengi is the Investigating Officer. He testified that he received a report the phone number of the deceased was still active. He summoned PW-1- who led him to Martin Mwendwa (PW-5-) who was using the line and on being asked he said he was given the sim card by the accused. The accused was arrested and informed that he was connected to the murder of deceased as he had his line. He was then charged.

14. From the foregoing, it is clear that the accused was implicated on allegation that he has the phone number of the deceased in this case. The evidence is insufficient for the following reasons.

a. No evidence was tendered to prove that the line 0718 391333 was registered in the name of the deceased.

b. The sim card was not produced in court. It was therefore not proved that the line was ever recovered. PW-8- was categorical that the only evidence connecting the accused was the sim card. The fact that the sim card was not produced means that there was no evidence tendered to prove the charge.

c. No mobile phone Data was tendered in court.

d. No receipts were produced to prove that the deceased had a phone where he used the line.

15. The test of a prima facie case was laid down in the case of Ramanlal Frambakkal Bhatt –v- Republic (1975) E.A 332 where it was stated that a prima facie case is one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

16. This does not mean that the accused assumes a duty to prove his innocence. The prosecution bears the burden to prove the case against the accused beyond any reasonable. This burden must be discharged at the time they close their case. So when the court finds that the accused has a case to answer it is stating that it can convict the accused even where he opts to keep quiet when put on his defence. The accused offers an explanation which the court has to consider and give a Judgment.

17. In the case of Anthony Njue Njeru –v- R, Court of Appeal at Nairobi Cr. Appeal No. 77/2006 it was stated:-

“It is a cardinal Principle of our law that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution case it is merely one which on full consideration might possibly be thought sufficient to sustain a conviction -----“

The court quoted the case of Bhatt where it was stated:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond any reasonable doubts we cannot agree that a prima facie case is made out if at the close of the prosecution case is merely one:-

Which on full 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 evidence ----- prima facie must mean one on which a reasonable tribunal properly directing its mind to law and the evidence could convict if no explanation is offered by the defence.”

18. The court has to consider whether the accused has a prima facie case. He may not be put on his defence to fill gaps in the prosecution case.

19. The accused is charged with murder contrary to Section 203 & 204 of the Penal Code which provides:-

“ Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

“Any person convicted of murder shall be sentenced to death.”

20. The ingredients of murder are actus reus and mensrea. There was no eye witness account on how the deceased met his death. The prosecution relied on circumstantial evidence. There was no evidence that the accused had the necessary mensrea. The prosecution relied on a sim card which was never produced. My view is that the offence does not point to the offence of murder but possibly an offence of robbery with violence. There was no explanation offered as to why a charge of murder and not of robbery with violence when they advanced evidence that deceased was suspected of having properties which were stolen from the deceased. All in all the evidence is wanting.

21. According to PW-8- the accused stated that he had collected a Samsung Phone on the road and it had that line. No charge and cautionary statement was recorded from the accused. That evidence not admissible as confessions are not admissible unless they are obtained in compliance with the **Evidence Act** which at **Section 25A** provides:-

“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

There are two dimensions on this evidence.

Firstly, it is evidence which is inadmissible and the court can therefore not rely on such evidence to convict.

Secondly, if the accused advances that as his defence the court cannot convict as PW-8- did not tender any evidence to prove that the accused obtained the sim card in any other manner. PW-8- did not recover the sim card from the accused. He recovered it from PW-5- who then must be an accomplice whose evidence requires corroboration.

22. What I am trying to say is that applying the test in **Bhatt –v- R ‘Supra’**, the evidence tendered is insufficient and does not meet the threshold of a prima facie. If the accused opts to keep quiet, no conviction can stand with the evidence on record. I must therefore find that the accused has no case to answer and is therefore not guilty. I acquit him under Section 306 (1) of the Criminal Procedure Code.

Dated at Kerugoya this 16TH day of July 2019.

L. W. GITARI

JUDGE