



**REPUBLIC OF KENYA**

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

**HCCR NO. 119 OF 2017**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**PATRICK MUTUA MUEMA.....ACCUSED**

**RULING**

1. **Patrick Mutua Muema** the accused herein, is charged with the offence of murder contrary with Section 203 as read with Section 204 of the Penal Code. The particulars being that on the night between the 20<sup>th</sup> and 21<sup>st</sup> day of September, 2013 at an unknown time at Mikuyuni Sub location in Kwa-Vonza location within Kitui County jointly with others before court murdered **James Kakuti Mbuvi**.
2. The prosecution presented the evidence of three (3) witnesses to prove its case. It entirely relied on circumstantial evidence to support its case since there was no eye witnesses to the killing.
3. Those who testified were the deceased's daughter in-law (PW1) Mary Martha Muema, the assistant chief Mikuyuni Kwa vonza location Kitui County and a villager Anselm Masila Tumbo (PW3). It was PW1's evidence that the deceased who lived alone in his home but on the same compound with them did a number of chores for himself. He however relied on his grandsons (Kennedy and Patrick (accused) and Penina (Patrick's wife) to do for him M-Pesa transactions).
4. On 14<sup>th</sup> September 2013, a meeting had been held at the deceased's home, where he had complained about his money from M-Pesa having been stolen by Kennedy, the accused and Penina. However, investigations did not come up with any conclusive findings.
5. On 1<sup>st</sup> October 2013, PW1 became suspicious when she did not see the cattle out of the boma by 11.00 am. She went with her late husband to the deceased's house. He opened the metallic door and that's when they found the deceased's body hanging with a stool under it. The late Muema Kakuti (PW1's husband) reported the matter to the police.
6. The body was taken to the mortuary. It was PW1's evidence that her two sons who were suspects in the murder were not at home during that time due to the nature of their work.
7. Mr. Muia filed written submissions contending that the prosecution had not proved any case to warrant the accused being placed on his defence. He submitted that there was no proof of the cause of death of the deceased. He cited the case of **R –Vs- Irene Chebet Korir (2017) eKLR** where the court ruled thus:

*“Having so proved the fact of death the prosecution is under an obligation to tender proof of the cause of that death. Proof of the cause of death is normally by way of the evidence of a pathologist who conducted an autopsy on the body and by the production of a post-mortem report. In **Ndung'u –Vs- Republic (1985) KLR 487** the court held: -*

*“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution”.*

*In other words, even in cases where there is testimony to the effect that the deceased suffered serious and grave injuries the prosecution is still under an obligation to call evidence to prove the effect of such injuries on the mortality of the deceased. This flows from the duty placed on the prosecution to prove each element (ingredient) of the charge beyond reasonable doubt.*

*In more recent case of **Chengo Nickson Kalama –Vs- republic (2015) eKLR**, the Court of Appeal sitting in Malindi held as follows:*

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“.....The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post-mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt .....

In this present case the hearing commenced in May, 2014 the prosecution eventually closed its case in May, 2015 without calling onto the stand the pathologist who conducted the autopsy on the body of the deceased and without producing as an exhibit a post-mortem report.

There was no suggestion of any particular difficulty in availing this crucial witnesses. As such the cause of the death of the deceased remains unproven. Failure to adduce evidence on the cause of death is a fatal omission in a murder charge.”

8. He further submitted that there was no evidence to show that it is the accused person who killed the deceased. To buttress this, he cited the case of **Roba Galma Wario –Vs- R (2015) eKLR** where the court held that:

“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the Appellant; and that he had the required malice aforethought. Without malice aforethought, the Appellant would be guilty of manslaughter as it would mean the death of the deceased during the brawl was not intentional.”

9. Counsel gave a definition of a prima facie case by the **Mozley and Whiteley’s law dictionary 11<sup>th</sup> Edition**. It provides as follows:

“A litigation party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.”

Counsel also cited Section 206 Penal Code, Section 107(1) Evidence Act and the case of **Bhatt –Vs- R (1957) E.A 332 – 334 and 335** to support his submission that the prosecution has not established a prima facie case.

10. There is no dispute that the lifeless body of the deceased James Kakuti Mbuvi was found by PW1 and her husband hanging on a rope in his bedroom. The body was allegedly taken away by the police. PW3 testified that he attended the post mortem but he did not know the cause of death as they were not told anything.

11. In this case the pathologist did not testify and neither was the post mortem report produced after numerous promises by the prosecution. It follows that the cause of death of the deceased remains unknown and whatever has been stated by the witnesses is purely speculative.

12. Again on the perpetration of the deceased’s death the evidence is speculative. No evidence has been placed before this court to place the accused at the scene of the murder. There is the issue of the deceased’s money having been stolen from his M-Pesa by his grandchildren. PW3 was very categorical that the deceased never mentioned the accused as the person who had stolen his money. Secondly, PW2 testified that investigations were done but no one was arrested over the deceased’s complainant over his M-Pesa money.

13. The evidence before this court is so weak. The cause of death is unknown; the accused person has not been placed at the scene of murder by any single witness. All we have here is mere suspicion. in the case of **Sawe –Vs- R Criminal Appeal No. 2 of 2002 (2003) eKLR** the Court of Appeal stated thus:-

“In own judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the Appellant on the basis of the evidence on the record. We are therefore unable to uphold the conviction entered by the learned judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the Appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused person beyond any reasonable doubt. As this court made clear in the case of **Mary Wanjiku Gichira –Vs- R (Criminal Appeal No. 17 of 1998) (UR)**, suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.”

14. I am duly guided by this finding by the Court of Appeal. The accused was arrested and charged on the basis of mere suspicion. There is no other evidence to support the prosecution case.

15. **I find the prosecution case not proved to the standard required for a prima facie case. For any fact, I find the accused not guilty and acquit him under Section 306(1) Criminal Procedure code. He shall be released unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

**DELIVERED, SIGNED & DATED THIS 9<sup>TH</sup> DAY OF JULY 2019, IN OPEN COURT AT MAKUENI.**

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**HON. H. I. ONG’UDI**

**JUDGE**