



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL (MURDER) CASE NO. 1 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK MUTUKU WAMBUA.....ACCUSED

RULING

1. **Patrick Mutuku Wambua** hereinafter referred to as the accused was charged before this court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the charge brought against the accused is that the accused on the night of 25th and 26th December, 2014 at Kivani village, Katheka Kai Location in Machakos sub-county within Machakos County murdered Ken Mutie Musau alias Mutinda Musyoka (hereinafter referred to as the deceased).

2. The accused pleaded not guilty to the charge. He was represented at the trial by Miss Gichuki while the prosecution was conducted by Mrs Saoli Prosecution Counsel. The prosecution called a total of eleven (11) witnesses to prove the ingredients of the offence constituting the following:

(1) The death of the deceased.

(2) The death of the deceased was unlawful.

(3) That in causing death there was malice aforethought on the part of the accused.

(4) That the accused was positively identified as the one who caused or participated in the killing of the deceased.

3. At the close of the prosecution case, the court directed parties to file submissions on whether or not the accused has a case to answer. The evidence adduced by the prosecution witnesses can be summarized as follows: Pw1 was **Boniface Kisilu Muturi**. He testified that he used to live with the deceased and on 25.12.2014 he left him in the house and on return he found the deceased was not there and he was informed that the deceased was spotted at the home of the accused person and when he went to the accused's home he found the deceased there already dead. On cross examination, he testified that he did not know how the deceased died.

4. **PW.2** was **James Kioko Mutiso** who testified that on 25.12.2014 the deceased visited his bar together with the accused and they began chewing Miraa then the following day he heard the deceased was dead.

5. **PW.3** was **Musau Kyenzi** who testified that the deceased was his son and that he received a call on 26.12.2014 that the deceased was dead.

6. **PW.4** was **Ruth Mueni Kivuvo** who testified that the accused was her brother in law and that on 25.12.2014 she heard the accused quarrelling with his wife and another voice pleading with the accused not to beat him. She testified that the other voice was that of the accused and armed with a lantern she rushed to the accused's house together with her mother in law and found the accused and the deceased scuffling and heard the accused saying that the deceased had snatched his Kshs 5,000/- and that the deceased claimed that he only took Kshs 200/-. She testified that they went out to look for the money and didn't find it and when they went back they found the deceased lying on the ground outside the deceased's house. The following day they found out that the deceased had died. On cross-examination, she testified that both the deceased and the accused were drunk.

7. **PW.5** was **Beth Wambua**. She testified that on the night of 25.12.2014 she heard noises within the compound and realized that the deceased and the accused were brawling over money and the following day found the deceased lying near a tree. She recalled that the previous night she tried to intervene and advised the deceased to go to his home. The accused was arrested and the body of the deceased was taken away.

8. Pw6 was Harun Galana Ali who testified that on 26.12.2014 he was at the AP Camp when Patrick Wambua was brought and who reported that two persons fought at his home and one of the combatants was tied to a tree and in the morning he failed to wake up. He testified that he visited the scene together with Patrick and found the body of the deceased that had bruises on the left side of the hip. He also found a Kshs 1,000/- note and a 100/- note that was torn in pieces together with an ID card in the names of Mutinda Musyoki.

9. Pw7 was CPL Mohammed Abdihakim who testified that on 26.12.2014, Patrick Wambua reported to him that a colleague had died and he went to the scene and found the body of the deceased lying next to a tree and the body had bruises. He also found a Kshs 100/- and 1000/- note. On cross-examination, he testified that the accused told him that he and the deceased scuffled after a drinking spree.

10. Pw8 was Dr. Waithera who testified on an autopsy that was carried out on 30.12.2014 on the deceased. The body had strangulation marks and formed the opinion that the cause of death was asphyxia due to hanging or strangulation. She tendered the report as evidence and the same was marked Exh. 12.

11. Pw9 was CIP Justin Mwaniki Nyagah who testified that on 3.1.2015 the accused was presented to him by the investigating officer and he recorded a statement from him and after cautioning him and inviting his mother as a witness, recorded what was a confession dated 3.1.2015. The accused person confessed that there were differences with him and the deceased and they scuffled and he tied the deceased to a tree using a rope. The accused signed the confession. On cross-examination, he testified that the accused told him that the scuffle was over the refusal of the deceased to handover Kshs 1,000/- and that the accused claimed that he tied the deceased on the hands and neck onto a tree.

12. Pw10 was CPL Peter Wafula who testified that on 26.12.14 he was instructed to accompany the DCIO and the OCPD to Kitanga and on arrival at the scene he found the body of the deceased and noticed that there were injuries on the neck, chest and pelvis regions and there was a sisal rope. Inside the accused's house, he recovered a mutilated KShs. 100/- and 1000/- note. He was informed that the accused and the deceased were together the previous night and they had a bottle of beer together and chewed Khat and later a disagreement arose between the accused and his wife that the deceased had tried to intervene. He testified that the accused recorded a confession and he organized for the post mortem.

13. It is against this background that the accused's counsel submitted that a prima facie case was not established and that the confession was lacking in material details. Therefore the accused person should be acquitted.

14. The state has not filed submissions.

15. 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.....”

16. The question on the prima facie case has been extensively considered by the courts and other legal texts by scholars. The *Oxford Companion of Law at pg 907* gives the definition as:

“A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive.”

17. In making a finding on a prima facie case one should 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, as was stated in *Woolmington v DPP [1935] EA 462 at 481*.

18. Section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya provides that:

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

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. I have considered the prosecution evidence and all these issues as canvassed by the submissions on record. The issue to be determined is whether the prosecution has established a prima facie case against the accused to warrant him to be called upon to make a defence.

20. The legal principles to guide a trial court in making a determination on a prima facie case have clearly been stipulated in the Eastern African case of *R.T. Bhatt v Republic (1957) EA 332*. The legal principles which run through the cases cited revolves around sufficiency of evidence capable of establishing the ingredients of the offence the accused is charge with. Secondly, a mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence. Thirdly it is evidence adduced by the prosecution such that a reasonable tribunal properly directing its mind would convict the accused in absence of any explanation when called upon to answer or put on his defence.

21. In the instant, I appreciate the submissions of the counsel by the accused and find that the testimony of each of the eleven (11) witnesses called by the prosecution as evaluated against the charge of murder facing the accused person together with the evidence placed before me, the testimonies of Pw2 confirms that the accused was in the company of the deceased and Pw4's evidence as corroborated by Pw5 confirms that there was a squabble between the two. The evidence of Pw6 and Pw7 as well as Pw10 confirm that the body of the deceased was found at the home of the accused and the evidence of Pw9 leads towards the accused implicating himself in the death of the deceased and the evidence of Pw8 confirms that the deceased was indeed dead. Besides that, it transpired from the evidence and the confession recorded from the accused that indeed he had tied up the deceased up a tree outside the compound and went to sleep only for the body to be found the following morning. In totality I find that the evidence placed before me has met the threshold of a prima facie case. This means that the prosecution has established a prima facie case against the accused to warrant him to be called upon to make a defence to the charges facing him. The test to be applied here is as elucidated under section 306 of the Criminal Procedure Code and buttressed by the legal principles in the cited authorities. In a nutshell the evidence tendered at this stage is sufficient to sustain a conviction were the accused to elect to remain silent in defence. Indeed the accused was placed at the scene of crime and that he had brawled with the deceased over some money and a tussle ensued leaving some torn bank notes which were recovered from the scene and produced as exhibits.

22. In the result it is my finding that the accused has a case to answer and is now called upon to make a defence in accordance to the provisions of section 306(2) of the Criminal Procedure Code.

It is so ordered.

Dated and delivered at Machakos this 9th day of July, 2019.

D.K. KEMEI

JUDGE