



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 35 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MARTIN MUTHINI MWENGA.....ACCUSED**

**RULING**

1. The accused in this case is charged with one count of Murder c/s 203 as read with section 204 of the *Penal Code Act*. It is alleged that the accused on the 17<sup>th</sup> Day of April, 2015 at about 12.20 pm at Kitunduni Village, Kathiani sub-location within Machakos County murdered **Mitchell Mbula Muthini** (hereinafter referred to as the deceased). The accused pleaded not guilty to the charge.
2. In a bid to prove the charge against the accused, the prosecution called 10 (ten) witnesses then closed its case.
3. **PW1 Pauline Mwenga** testified that the accused is her grandson and who had a daughter, the deceased and that on 17.4.15 the accused was left home with the deceased and later she received a call that there was a problem at home and when she went home she found out that the deceased had died.
4. **PW2** was Alloys Mwenga Wambua who testified that the deceased is his grandchild and that he witnessed the post mortem conducted in respect of the deceased.
5. **PW3 Patrick Mutuku Mbithi and PW4 Francis Kikoma Mutula** testified that on 17.4.2015 they received a call that the deceased had died and they went to the scene and found the deceased had indeed died.
6. **PW5 Anastacia Nduku John** testified that on 17.4.2015 she received a call that the accused gave the deceased poison and she rushed to the scene and found the deceased dead.
7. **PW6 PC Josephat Kiprono** told the court that on 17.4.2015 he received instructions to go to the crime scene and found the deceased who was an infant had died and that there was a bottle as well as a sharp panga at the scene.
8. **PW7 James Michael Welimo** told the court that he was a government analyst and on 23.4.2015 he received exhibits as well as an exhibit memo and he prepared a report in respect of the same after establishing the presence of a pesticide in the bottle submitted and which he opined that an ingestion of the same could lead to death.
9. **PW8 IP Joseph Kariuki** testified that on 17.4.2015 he received a call that the deceased had been killed and he went to the scene and found the deceased was dead and also he found a bottle of pesticide and a panga. He then had the bottle forwarded to the government chemist for analysis.
10. **PW.9 Jackline Moraa** told the court that she conducted a post mortem on the deceased and made her findings as per the report. She established that the deceased had been stabbed and also had ingested organophosphate.
11. **PW.10** was **Cecilia Kavesu Kioko**. It was her testimony that the accused was her husband and that on 17.4.15 she was with the accused and had left him at home with the deceased and had taken the deceased to his grandmother. She recalled that a few days before he had threatened to kill himself and the deceased. She told the court that on 17.4.2015 she received information that the accused had killed the deceased and she went to the scene at the accused's grandmother's house and found the deceased had died.
12. The prosecution closed their case and counsel for the accused made submissions and sought to have the accused acquitted under section 316 of the Criminal Procedure Code. Counsel for the state did not file submissions.
13. Learned counsel for the accused submitted that there is no evidence that the accused committed murder because none of the 10

prosecution witnesses witnessed the act; lack of corroborative evidence or direct evidence that the accused caused the deceased to ingest the pesticide makes it difficult to make a finding that a prima facie case was established hence he urged the court to acquit the accused.

14. At the close of the prosecution case, this court has to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his defence. Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (Section 316(1) of the Criminal Procedure Code).

15. A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See **Ramanlal T. Bhatt v. R. [1957] EA 332**). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

16. There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in [1962] ALL E.R 448 as follows:-

**a) When there has been no evidence to prove an essential ingredient in the alleged offence, or**

**b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.**

17. It was the submission of the learned defence counsel, Mr. Muema that the prosecution failed to adduce sufficient evidence that the accused caused the deceased to ingest the poison and therefore failed to establish a prima facie case against him. Consequently, he argued that the accused should be acquitted.

18. At this stage, I have to determine whether the prosecution has led sufficient evidence capable of proving each of the ingredients of the offence of murder, if the accused chose not to say anything in his defence, and whether such evidence has not been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it. For the accused to be required to defend himself, the prosecution must have led evidence of such a quality or standard on each of the following essential ingredients;

**a) Death of a human being occurred.**

**b) The death was caused by some unlawful act.**

**c) That the unlawful act was actuated by malice aforethought; and lastly**

**d) That it was the accused who caused the unlawful death.**

19. Death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. There is the post mortem report prepared by Pw9. The body was identified to her by Pw2. Pw10 left the deceased with accused and in the circumstances I find that the prosecution has led sufficient evidence capable of supporting a finding that, the deceased, was **Mitchell Mbula Muthini** who died even if the accused chose not to say anything in his defence.

20. The second ingredient requires evidence that the death was unlawfully caused. It is the law that any homicide is presumed to have been caused unlawfully unless it was accidental or it was authorized by law. Pw9 who conducted the autopsy established the cause of death as "internal bleeding due to trauma." Her other observations as stated in exhibit P.Ex.3 indicate injuries that are consistent with a homicide rather than a suicide. I therefore find that the prosecution led sufficient evidence capable of supporting a finding that, the deceased's death was unlawfully caused even if the accused chose not to say anything in his defence.

21. Malice aforethought is defined by section 203 of the *Penal Code* as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. Any person who stabs another in the lungs clearly has the knowledge that the act will probably cause the death of the victim. I therefore find that the prosecution led sufficient evidence capable of supporting a finding that, the deceased's death was caused with malice aforethought even if the accused chose not to say anything in his defence.

22. Lastly, there should be credible direct or circumstantial evidence placing the accused at the scene of the crime as an active participant in the commission of the offence. In the instant case, the only evidence adduced is circumstantial comprising the following strands; the accused at the time ordinarily oscillated between two homes, his and his grandmother's. The day of the death of the deceased, the accused was left with the deceased. He was found lying unconscious next to the body of the deceased.

23. In the circumstances, I find that if the accused considering the reasonable hypotheses that can be raised in light of the circumstantial evidence adduced in this case, if the accused chose to remain silent, this court would have evidence sufficient to convict him for the murder of the victim. I therefore find that a prima facie case has been made out requiring the accused to be put on his defence.

24. In the result, I find that the prosecution has made out a prima facie case against the accused herein. He has a case to answer and is now required to make a defence in line with the provisions of section 306(2) of the Criminal Procedure Code.

It is so ordered.

**Dated and delivered at Machakos this 17<sup>th</sup> day of October, 2019.**

**D. K. Kemei**

**Judge**