



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 15 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

KIBUTHA MAKWALU.....1ST ACCUSED PERSON

BERNARD MUGAMBI.....ND ACCUSED PERSON

RULING

Case to answer

1. The accused persons herein have been charged 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.
2. The particulars of the charge are that Kibutha M'Akwalu and Benard Mugambi on 25th December 2015 at Mweronkoro area of Ngaremara Location in Tigania East Subcounty within Meru County jointly with others not before the court murdered Josphat Kobia Muriira.
3. The prosecution called four (4) witnesses to support its case against the accused persons. The Investigating Officer PW3 said that the reason her preferred the charge against the accused person was because the body of the deceased was found lying 50 and 60 Metres from their respective homes.
4. **Pw3 Kipkirui Serema** police officer testified that he went to the scene of the crime with the Assistant chief. That they found the body of the deceased placed on a path facing the only 4 families in the sparsely populated area. That he asked who was the first to view his body and the 1st Accused informed him that he had been informed of the same by herders. He also said that he would inform Pw3 the name of the herders. That the 2nd accused informed him that he was informed of the deceased by school going children. That there were visible signs of injuries on the hands of the deceased. There were signs of a struggle. There was vomit at the scene that led to the conclusion that the deceased must have been murdered at the scene. It was his testimony that he later proceeded to establish and ascertain the identity of the herders and pupil who first saw the deceased but the 2 accused persons would later on recant their testimonies.
5. Vide a sketch map marked as Exh 1 a 7 b he informed that court that the accused persons resided at a fair distance from the deceased herein and that given the distance and the fact that the deceased had been strangled the accused persons sought to have heard the struggle between the deceased and his attackers/ assailants.
6. In cross examination he conceded that the motive for killing the deceased was not clear. There were no witnesses who gave him probable motive for killing the deceased. He also testified that he ruled out dumping of the body at the scene since it was difficult to access that particular area. That the body bore no soil or mud although it had rained.
7. He lastly conceded that no weapon used to kill the deceased was recovered from the accused persons.
8. **Pw1, Joshua Nkariche the Assistant Chief Ntunguri Sublocation** testified that he received a call from **Joseph Lenana, avillage elder** informing him that he had found a dead body lying in the bush. He informed him to find other elders to guard the body from being eaten by hyenas. That the following morning they proceeded to the scene where they met elders together with the accused persons. That the information they got was to the effect that the elders and the accused persons did not know the killers. They later took the body to the mortuary. He also testified that the neck of the deceased had been twisted. In cross-examination he testified that he could not find anything that implicated the accused persons.
9. A *Prima facie* case has been said to be;

“...one which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence”. See RAMANLAL BHATT vs. R (1957) EA 332(CA)

Prosecution Case

10. **Pw2 Anne Nkatha** was a **sister to the deceased**. She testified that on 24th December 2015 his brother, the deceased went to his work place and informed him that he was going back to Wambei where he stayed with his family. That he escorted his brother up to Isiolo-Muthara stage. That in the evening his brother’s wife called and asked if the deceased was at home as he had not arrived and his phone was off. That the following day i.e. 25th December 2015 they looked for him at the hospital and the police station but they did not find him. That on the next day i.e. 26th December 2015 they received a call from Charles Mungania who informed her that her brothers body had been recovered in the bush. That she proceeded to report the matter at the police station. That her brothers body was later brought she identified the same. She was also given his brothers phone and identity card by the police.

11. Taken to task during cross examination whether her brother had problem with anyone she stated that she could not be aware of the same and that she did not establish if there was any reason why he was killed. She lastly stated that she had left the investigations to the police and was not aware whether anyone was arrested in connection with the death of his brother.

12. **Pw4 Dr. Mohammed Abdikadir** testified that he is a medical officer attached at Isiolo County Referral Hospital. He presented the post mortem report on behalf of Dr. Mageke, being well familiar to his handwriting and signature. He testified that the Post Mortem was done on 26th February 2015 and estimated the number of days since the deceased demised as five (5) days. He stated that the cause of death was established as strangulation with a rope that led to suffocation and cardio pulmonary arrest.

Submissions

13. The prosecution relied on the evidence on record. The accused persons filed joint written submissions on 15th July 2019 contesting the following issues;

(i) That the prosecution failed to prove motive

(ii) That the theory and assumptions of the investigations officer fail to prove beyond reasonable doubt that the act of killing was done by the 2 accused persons.

(iii) That the prosecution failed to call some of the witnesses including the area Chief Joshua Ngarichia whose name kept coming up in both Pw1 and Pw2s, testimony and one Daniel MutethiaMuriira who also identified the body.

14. The accused persons also submitted that failure to prove *mens rea* removed the case from the area of murder to manslaughter which offence the accused persons were never charged with. That in this case apart from the assumptions of the investigating officer there is nothing to link the accused persons to the death of the deceased herein and in such a case the outcome ought to be an acquittal of the accused persons. That even if the two issues were backed by law the prosecuting adduced evidence selectively by not calling crucial witnesses who had recorded statements a scenario that results in prejudice for the accused persons. He relied on the following authorities in support of their submissions i.e. **Republic v Stanley MuthiikeTiire [2018] eKLR**, **Republic v Job OchiengOtieno [2018] eKLR**, **GalgalloBoruDulacha v Republic [2016] eKLR**.

Analysis and Determination

15. Pursuant to section 203 the prosecution has a duty to prove that the deceased died as a result of the unlawful omission or commission of the accused. Secondly, that in killing the deceased the accused did so actuated by either express or implied malice aforethought. Thirdly, it is incumbent upon the prosecution to place the accused at the scene of the murder.

16. **In Republic v Silas MagongoOnzere alias Fredrick Namema [2017] eKLR** the court held that the question under section 306 of the Criminal Procedure Code is whether on objective consideration of the situation the state has presented a prima facie evidence implicating the accused with the death of the deceased. The scope and ambit of the prosecution case must fall within any of the defined circumstances under section 206 of the Penal Code on what constitutes malice aforethought.

17. Section 206 of the Penal Code defines malice aforethought is deemed to be established by evidence when any of the following circumstances are proved by evidence adduced against any defendant:

(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(c) An intention to commit a felony.

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

Death of the deceased

18. The testimony of Pw1 to Pw3 and Pw4 all confirm that the deceased died out of strangulation using a rope. Daniel Mutethia and Pw2 were present to identify the body during the post mortem report. Pw4 presented the post mortem report as Pexh 1.

19. The Cause of death was therefore proved by the prosecution

The unlawful cause of death by either acts of omission or commission:

20. As highlighted above the cause of death of the deceased was due to strangulation. There is however no clear evidence that links the accused persons to the death of the deceased. The evidence presented by the prosecution was merely circumstantial and heavily placed on the proximity of the residence of the accused persons and the scene of the crime and/or where the deceased also resided. In **Joan Chebichii Sawe v Republic [2003] eKLR** the court held that;

“before a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution. These principles articulate the position in law that the question as to the cause of death may either be answered by way of medical or circumstantial evidence.”

21. I wholly agree with the submission by the accused persons that the theory and assumptions of the investigations officer fail to prove beyond reasonable doubt that the act of killing was done by the 2 accused persons. The evidence of the investigations officer was only based on the proximity of the residence of the accused persons to the scene of the crime. This cannot solely create an inference of guilt incompatible with the innocence of the accused persons. Pw1 and Pw2 actually conceded that they were not aware that the investigations by Pw3 led to the conclusion that the accused persons were capable of the offence.

22. In hindsight Pw1 testified that the information they got from the scene was to the effect that the elders and the accused persons did not know the killers. It is also peculiar that the accused persons were at the scene of the crime on the day the Assistant Chief and the investigation officer visited the scene and equally statements with the investigations officer. The fact that they recanted their statements was not proved by the prosecution. None of the initial statements nor the recanted statements were produced to prove this anomaly. It can therefore be gainsaid that the accused persons were merely onlookers who happened to be at the scene at the time the investigating officer visited the scene.

23. Lastly the murder weapon was never recovered. There was no tracing of the footprints that may have been made by the culprits who caused the death of the deceased.

24. It is therefore my finding that the prosecution has failed to prove the element that the unlawful cause of death of the deceased was caused by either acts of omission or commission by the accused.

Malice Aforethought

25. In **Republic v Tubere S/O Ochen [1945] 12 EACA 63**. The court held and acknowledged that in determining whether malice aforethought has been established the following elements should be considered:

(1) The nature of the weapon used.

(2) The manner in which it was used.

(3) The part of the body targeted.

(4) The nature of the injuries inflicted either a single stab/wound or multiple injuries.

(5) The conduct of the accused before, during and after the incident.

26. In this case the murder weapon was never recovered. Pw1 and Pw3 testified that there were no witnesses who could give probable motive for the killing of the. Going by the conduct of the accused persons after the incident it is clear to this court that they were present at the scene so that they can assist in the investigations. Pw1 testified that he had directed herders to guard the body from hyenas.

27. I am therefore of the conceded view that malice aforethought was not established to warrant the accused person to be called upon to answer. Upon evaluation of the whole evidence am satisfied that there is lack of sufficient evidence to establish a prima facie case against the accused. It is clearly a case if the accused is put on his defence and elects to remain silent or call no evidence this court would have nothing to go by to render an adverse conviction against the accused.

28. As a result I hereby find in favour of the defence by entering a verdict of not guilty and do acquit both the accused persons under section 306 (1) of the Criminal Procedure Code. The charge of murder contrary to section 203 of the Penal Code remains unproven. The accused persons are set at liberty unless otherwise lawfully held.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 09TH DAY OF OCTOBER 2019.

In the presence of :

C/A: Mwenda

State:-

Accused 1:- Present in person

Accused 2:- Present in person

Mr Ojiambo Advocate for Accused persons – Mr Abubakar holding brief for.

Order: Copy of ruling to be supplied to state and defence counsel, sureties discharged and securities to be released to them.

HON A. ONG'INJO

JUDGE