



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 26 OF 2017

FORMERLY MACHAKOS HCCRC 44 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

ALPHONCE KIOKO MBINDYO.....ACCUSED

RULING

1. **Alphonce Kioko Mbindyo** the accused herein, stands charged with the offence of murder contrary to Section 203 as read with Section 204 Penal code. The particulars being that the accused on the night of 21st and 22nd day of November, 2016 at Nganwa trading centre, Kinze sub-location, Athi location in Mbooni east sub-county within Makueni county, murdered **David Mutuku Kisavi**.

2. He denied the charge and the case proceeded to hearing with the prosecution calling seven (7) witnesses after which the prosecution case was closed.

3. Mr. Hassan for the defence filed written submissions contending that the prosecution had not established a prima facie case to warrant the accused being placed on his defence. He set out the case of the prosecution through the witnesses who had testified. He cited the cases of **R – vs- Martin Oluoch Okwako & 2 others (2015) eKLR**, **R –vs-Morris Karani Alando (2012) eKLR** to support his submission.

4. Counsel submitted that the prosecution case is full of inconsistencies. He argued that Pw8 claims to have been informed by the deceased that he was attacked by the accused which evidence is rebutted by that of Pw6 who stated that the deceased never mentioned the accused. Further that Pw3 testified of having called Pw5 and informed him of the incident at around 2:00 am while Pw5 said he only got the information when Pw2 the brother of the deceased informed him that morning.

5. He further submitted that no single individual witnessed the incident and from the evidence of Pw6 the deceased was too drunk when he left the bar. He submitted that there is no evidence showing that the deceased died owing to any commission or omission on the part of the accused. Finally, that no intention to commit the alleged crime had been demonstrated as against the accused person.

6. The State through the learned prosecuting counsel Mrs. Owenga relied on the evidence adduced by the seven (7) witnesses, to support its case.

7. **Pw1 Dr. Timothy Kimollo Mwonga** is the doctor who conducted the post mortem on the deceased David Mutuku Kisavi on 1st December, 2016 noon. He found several injuries on the deceased's body, among them bruises on head, neck and trunk; deep cut wound on face below the nose; deformity/fracture on right leg with a protruding bone; bleeding on chest and abdomen; clotted blood in cavity; swollen and bruised urinary system swollen head; bleeding in the brain. He found the cause of death to be massive bleeding. The postmortem report was produced as EXB1. In cross examination, he said these injuries can be inflicted when one is attacked by several people.

8. **Pw2 Nicholas Mutua Kisavi** had been with the accused and deceased at Ten Ten club at Ngawa Market on 21st November 2016 at 9:00 pm, taking alcohol, and he left them there at 9:30 pm. He was called at 5:00 am by **Mutinda Mbindyo** and asked to dress up and join him which he did. The said Mutinda informed him they were to go and see his brother **David Kisavi (deceased)** who had been injured. The deceased worked at club Ten Ten as a watchman. Mutinda did not tell him who had injured the deceased.

9. At the club, he found the deceased lying down soaked in blood. The deceased asked him to tie his left leg whose bone was protruding. He further told him that the accused injured him using a piece of wood when he refused to wake up a bar maid to sell him alcohol. He was in a bad shape, and died within minutes after Pw2 went to call the assistant chief, who came and notified the police at Kalawa.

10. Pw2 and the assistant chief (Pw5) went for the accused whom they found herding cattle and they came with him to the centre. In cross examination he said when the accused was explaining what had happened Mutinda was present.

11. **Pw3 Nicholas Makumi Nyanzui** was the deceased's employer who stated that while at Wamunyu, he received a call from the deceased at 2:00 am, on the night of 21st November and 22nd November 2016. The deceased informed him that he had met a thug and the thug was **Kioko Mbindyo** who had injured him. Pw3 called the other watchmen at the Ngawa market but he could not get them.

12. He later called the assistant chief and informed him of the incident. The assistant chief confirmed the report that the deceased had met with thugs, and he had arrested the culprit. He went to the scene at 10:00 am.

13. **Pw4 Nicholas Mulumba Kiema** a neighbor to the deceased witnessed the postmortem. **Pw5 Fredrick Mulee Mukua** the assistant chief of Kinze sub-location stated that on 22nd November, 2016, at 7:00 am he received a report from Pw2 to the effect that the deceased had been injured by the accused. Together they went to the scene at the market and he saw the injuries on the deceased's body. He went to the accused's home accompanied by two people and they brought the accused to the scene from where he was arrested.

14. **Pw6 Damaris Mueni Kiemi** used to work at Ten Ten bar Ngawa market. She confirmed having closed the bar on 21st November, 2016 at 11:00 pm. When she reported on 22nd November, 2016 at 6:00 am, she found the deceased (*a worker*) lying outside the bar gate with injuries on the face and left leg, and he was bleeding. She called him but he never responded, and he told her nothing.

15. She further testified that the accused's brother called Mutinda came and asked the deceased what the problem was and he said he had been injured all over the body. She added that when she found the deceased lying down, Mutinda was present and he called the police who went for the killer who is the accused.

16. Later in her evidence she said indeed the deceased had talked to her and told her it was the accused who beat him and she told the police. In cross examination, she said she found Mutinda where the deceased was lying. She also stated that the deceased never responded to Mutinda's calls and he never uttered anything. She confirmed that the accused had been at the bar and left while very drunk at 11:00 pm when the bar closed. In re-examination she said the deceased talked to Mutinda.

17. **Pw7 No. 67026 Corporal John Ateka** was the investigating officer. He said the station received a report and they went to the scene. They found the body lying in a pool of blood and there was a broken piece of wood covered with blood. The deceased had a broken left leg. The accused had already been arrested and he was taken to his house by officers. Some blood stained trouser (EXB 3a) and shirt (EXB 3b) and blood stained broken stick (EXB2) were recovered and kept by the police.

18. In cross examination, he said the blood stained clothes and stick were never taken to the Government chemist for analysis. He agreed that Mutinda never testified. That the witnesses who saw him on the date of arrest are the ones who said the recovered clothes had blood stains.

19. The accused person is facing a charge of murder contrary to Section 203 as read with Section 204 Penal Code. Section 203 of the Penal Code defines murder as:

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

20. The main issue before this court is whether the prosecution has established a prima facie case against the accused. What then is a prima facie case? In the well-known case of **Ramanlal Tambaklal Bhatt –vs- R (1957) E.A 332, the Eastern Court of Appeal** explained what a prima facie case is in the following words:

“It may not be easy to determine what is meant by a ‘prima facie’ case but at the very least it must mean 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.”

21. In the case of **R-vs- Samuel Karanja Kiria Criminal Case No. 13 of 2004 Nairobi (2009) eKLR** Justice J.B Ojwang as he then was had this to say on what a prima facie case is:

“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing or the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled”

22. The three ingredients which must be established in a case of murder are as follows:

i. Fact of death.

ii. The actus reus – the act of killing of the deceased.

iii. Presence of the mens rea - intention to kill.

23. In this case, the evidence on record confirms that indeed David Mutuku Kisavi died on the night of 21st/ 22nd November of 2016 Pw1 attested to that. A post mortem report EXB1 was produced by Pw1 confirming the cause of death as massive bleeding.

24. The prosecution has tended to point at the accused as the person who is responsible for the said death. It has been confirmed by Pw2 (*deceased's brother*) and Pw3 (*deceased's employer*), that the deceased worked at Ten Ten bar at Ngawa market as a watchman. Pw2 was

on 21st November 2016 with the accused and deceased taking alcohol at the said bar and left them there at 9:30 pm. Pw6 confirmed that the bar closed on that night at 11:00 pm and it was only upon such closure that the accused left and he was very drunk. She does not however mention anything about the deceased who was their watchman.

25. There is no one who witnessed what happened to the deceased on this night. It is not clear if the deceased and accused left the Ten Ten bar together that night. So, why was the accused arrested? Pw3 testified that on the material night he had been called by the deceased who told him he had met thugs who had injured him. When pressed to specify he said it was the accused Kioko Mbindyo who was the thug. He called the assistant chief (Pw5) and explained to him and requested him to go to the market. I want to believe that he also told him that the deceased had mentioned Kioko Mbindyo (*the accused*) as the culprit.

26. When the assistant chief (Pw5) testified he never referred to having received a call from Pw3 that night. What he told this court is that on 22nd November, 2016 at 7:00 am he was at home when he received a report from Pw2 who told him the accused had been injured by the accused. Pw2 came to his home.

27. On the other hand, Pw6 who arrived at the scene at 6:00am on 22nd November 2016 said she found the deceased lying in a pool of blood and could not talk. Also present was Mutinda. She said it is Mutinda who called the assistant chief (Pw5) who in turn called the police, who then went for the accused. Pw5 never also mentioned having been called and informed by Mutinda about the incident.

28. Was the deceased able to talk when Pw2, Mutinda and Pw6 arrived at the scene? The evidence on this is contradictory. Pw6 in her evidence in chief contradicted herself on this. In cross examination, she denied that the deceased uttered any words. Further in re-examination she said the deceased spoke to Mutinda. I found the demeanor of this witness to be wanting, and recorded this in the proceedings. She evaded questions and kept changing her statements. She cannot be considered a truthful witness. The Court of Appeal in the case of **Kiilu & Anor (2005) IKLR 174** stated the following of such a witness.

“The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

I find Pw6 to be such a witness whose evidence cannot be relied on.

29. This is an incident that occurred at Nganwa market where the deceased worked as a watchman. None of the watchmen was interrogated to confirm if they witnessed what may have happened. One Mutinda Mbindyo was said to have called Pw2 and they were at the scene together. There is no evidence showing why he was not interrogated or presented as a witness before this court. Could there be something the prosecution was hiding from the court?

30. It is indicated that a blood stained broken stick, (EXB2), trouser (EXB 3a) and shirt (EXB 3b) were recovered from the accused's house. Pw7 said there are witnesses who identified EXB3a&b as the clothes the accused wore on the date of incident. None of the witnesses who testified here mentioned those clothes. Worse still the items EXB2, 3a&b were never taken to the Government chemist for analysis. One is left to wonder what their evidential value is.

31. The evidence relied on by the prosecution is purely circumstantial. The same does not irresistibly point out to the accused as the one and only person who could have committed the murder of the deceased. There were watchmen & others at the said market. Anyone of them could have done this. In the case of **Sawe –vs- R (2003)eKLR**, the Court of Appeal stated that:-

“In order to justify on circumstantial evidence, the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

32. Finally, upon analyzing the evidence herein, I find that if the accused were to be placed on his defence and he elected to remain silent, this court would not have sufficient evidence to found a conviction.

33. The upshot is that the prosecution has failed to establish a prima facie case against the accused. He is found not guilty and acquitted 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 3RD DAY OF OCTOBER 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE