



**REPUBLIC OF KENYA**

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

**CRIMINAL (MURDER) CASE NO.1 OF 2013**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**JOHN MUTINDA KYALO.....1<sup>ST</sup> ACCUSED**

**JULIUS NDOLO MATHENGE.....2<sup>ND</sup> ACCUSED**

**RULING**

1. The Accused persons, **JOHN MUTINDA KYALO** and **JULIUS NDOLO MATHENGE** were charged with the Offence of Murder contrary to Sections 203 as read with Section and 204 of the Penal Code Act, Cap 63. It is alleged that the Accused persons on the 24<sup>th</sup> Day of December, 2012, at Kathemboni Estate, Machakos Town in Machakos District within Machakos County jointly with others not before court murdered **SAMUEL MWANGI KARANJA**. The accused persons denied having committed this Offence and as such, a plea of not guilty was entered thereby setting in issue all the ingredients of the offence charged to be established by the prosecution. The prosecution had to prove each and every element of the offence charged in order to secure a conviction against the accused persons.

2. Regarding the standard of proof, the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. **See: Woolmington vs. DPP [1935] AC 462**. However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the accused, it should be resolved in the favour of the accused persons. Therefore, the accused persons must not be convicted because they have put a weak defence but rather that the prosecution's case strongly incriminates them and that there is no other reasonable hypothesis than the fact that the accused persons committed the alleged crime.

3. Prosecution must prove all the ingredients of the offence of murder in order to sustain a conviction thereof. As per the elements provided for under section 203 as read with Section 204 of the Penal Code, prosecution must prove the following ingredients beyond reasonable doubt:-

***i. That the deceased died;***

***ii. That the death was caused unlawfully;***

***iii. That there was malice aforethought; and***

***iv. That the accused person directly or indirectly participated in the commission of the alleged offence.***

4. The Prosecution called a total of eight (8) witnesses in an attempt to prove its case. Pw1 was Sharon Mwikali Maingi who testified that on 24<sup>th</sup> December, 2012 she was at home and heard her boyfriend who was outside shouting that he did not have money and she went outside and found that the 1<sup>st</sup> accused was holding up the deceased and then the moonlight enabled her see her neighbour, the 2<sup>nd</sup> accused. She told the court that the deceased was already down after having been beaten by the accused persons and she and a Masai carried the deceased to his house whereupon she noticed that the deceased had been knifed. She told the court that the deceased died before he could be taken to the hospital. On cross-examination, she testified that she was woken by the noise and recognized the voice of the deceased and when she went outside she saw the deceased being held up by three persons. She did not see the deceased being knifed.

5. Pw2 was Gabriel Wambua Kyalo who testified that on 24<sup>th</sup> December, 2012 at 2.00 am he was at his house and heard some noise on the roadside and Pw1 came to call him, whereupon they went to the place where the noise was coming from and she saw three people one called Mutinda or Makanga. He told the court that the deceased was apparently injured thus she and Masai carried the deceased to his house and noticed that he had blood on his shirt near the chest. He went to call the police and on return found that the deceased had died. On cross-examination, he testified that there was moonlight thus he could see the 2<sup>nd</sup> accused but did not see what he was wearing.

6. Pw3 was Bernard Mutuku Muli who told the court that on the material day, his boss called him that his cousin was injured and he went to

the scene and found the deceased had been injured whereupon the deceased mentioned a name "Makanga". It was his testimony that the deceased was knifed. On cross-examination, he testified that when he arrived at the scene, he found the deceased lying by the roadside and had died by the roadside but told him that he had been stabbed by Makanga. He recognized the said Makanga since he had met him at his club and he told the court that he met Makanga carrying something.

7. Pw4 was Felista Nduku Karanja who attended the post mortem and identified the deceased as her son.

8. PW5 was Maryann Karanja who testified that she attended the post mortem and confirmed that the deceased was her brother.

9. Pw6 was Joyce Ngui who told the court that on the material day the deceased came to escort her to her house and on arrival they found the gate locked and she had to spend the night at his house and in the morning she received a report that the deceased had been knifed. On cross-examination, she stated that she did not witness the deceased being knifed.

10. Pw7, Cpl Wycliff Ashiundu told the court that on the material day the OCS told him to go to Kathemboni area because there was a report that someone had been knifed and on arrival he found that the deceased was lying on the bed and had already died and he had three stab wounds. He took the body to the mortuary and after investigations he recovered the murder weapon which was a knife. He recovered a blood stained knife from the house of the 1<sup>st</sup> accused after being directed there by the area chief and he arrested him. He told the court that he visited Kathemboni Market in the company of the area chief and arrested the 2<sup>nd</sup> accused. On cross examination, he told the court that he arrested the 1<sup>st</sup> accused on 24.12.2012 and he did not prepare an inventory of recovered items. On re-examination, he told the court that the knife was recovered from under the 1<sup>st</sup> accused's mattress and that the deceased's girlfriend called Sharon witnessed the recovery.

11. Pw8 was Dr Mutunga who testified of the post mortem examination carried out on the deceased by Dr Okinyi and the form was filled on 27.12.2012. The report that was given was that the deceased fell down after being assaulted by persons known to him. The body had a stab wound on the chest and the knife had entered into the muscles of the heart which bled. No other injuries were noted and the opinion was that the deceased died of cardiac arrest due to a stab wound to the heart and that the object must have been a sharp object. There were DNA samples taken of the blood that was on the knife. On cross-examination, he testified that the body of the deceased had a stab wound.

12. Thereafter, Prosecution closed its case. Upon closure of the Prosecution's case, the learned defence counsel, Mr. LangaLanga indicated his readiness to file submissions relating to a 'no case to answer'. It was his submission that no one witnessed any of the accused persons stabbing the deceased and that the exhibits identified by the prosecution witnesses were not produced in court. He submitted that there was no evidence linking the accused persons with the offence and therefore they be acquitted under Section 306(1) of the Criminal Procedure Code. The state did not file any submissions.

13. It is trite law that prior to placing an Accused person to his/her defence, the Prosecution is required to have established a *prima facie* case against such accused person. It is now a well-established law that 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 vs. R [1957]E.A 332*, where the East African Court of Appeal held that a *prima facie* case could not be established by a mere *scintilla* of evidence or by any amount of worthless, discredited evidence.

14. Also, in the case of **State Vs. Rajhnath Ramdhan, Amoy Chin Shue, Sunil Ramdhan and Rabindranath Dhanpaul. H.C.A No. S. 104/1997**, J.P. Moosali while quoting Lord Parker C.J. in **Sanjit Chaittal Vs. The State (1985). 39. WLR. 925** stated that:

*"A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence adduced by the Prosecution to prove an essential element in the alleged offence; b) when the evidence adduced by the Prosecution has been so discredited that no reasonable tribunal could safely convict on it..."*

15. I have carefully evaluated the Prosecution evidence. I find that, in the absence of any explanation to the contrary from the defence, the Prosecution evidence does not establish the three (3) ingredients of the offence of murder. It is not in dispute that there was death as a result of stabbing. On the question of the accused's participation, this court finds that, in the absence of any evidence to the contrary, the evidence of PW1, Pw2, Pw4, Pw5 and Pw6 does not fully establish participation of the accused persons. However the evidence of Pw1, Pw2, Pw3 and Pw7 implicated the 1<sup>st</sup> accused who was referred to as Makanga as per Pw2 and that Pw3 saw him at the scene. The investigating officer confirmed that he recovered a blood stained kitchen knife from under 1<sup>st</sup> accused's mattress and which was produced as an exhibit. Pw1 who was a girlfriend to the deceased was present during the recovery of the weapon. In arriving at the above conclusions, I do recognize that at this stage, the standard of proof is not proof beyond reasonable doubt as required for a fully-fledged criminal trial since the court is yet to receive the evidence of the defence. Rather, what is essential is such evidence which if taken literally or on the face of it would establish the essential ingredients of the offence of murder, as well as the accused's participation therein. From the evidence it is clear that the 1<sup>st</sup> accused was placed at the scene of crime and hence a *prima facie* case has been made out against him to warrant him to make a defence in line with the provisions of section 306(2) of the Criminal Procedure Code.

16. For those reasons, I find that there is some evidence adduced against the 1<sup>st</sup> accused persons to establish a *prima facie* case against him. Categorically, the Prosecution evidence is insufficient to require the 2<sup>nd</sup> accused person to be put on his own defence for the offence of murder contrary to sections 203 and 204 of the Penal Code Cap 63.

17. Accordingly in terms of Section 306(1) of the Criminal Procedure Code find the 2<sup>nd</sup> accused has no case to answer and is hereby acquitted of the offence of murder and he is ordered to be set free unless otherwise lawfully held.

18. I find that the Prosecution evidence is sufficient to require the 1<sup>st</sup> accused person to be put on his own defence for the offence of murder

contrary to sections 203 and 204 of the Penal Code.

It is so ordered.

Dated and delivered at **Machakos** this **3<sup>rd</sup>** day of **October, 2019**.

**D. K. Kemei**

**Judge**