



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 89 OF 2017

REPUBLIC.....PROSECUTION

-VERSUS-

JOSEPH MWANZIA KAVITI.....ACCUSED

RULING

1. **Joseph Mwanzia Kaviti** the accused herein faces a charge of murder contrary to Section 203 as read with Section 204 Penal Code. The particulars are that the accused on the night of 29th/30th October 2016 at Athi Village Syotuvali Sub-location Kathulumbi Location in Mbooni East Sub-county within Makueni County, murdered **Jackson Katundu Maviti**.

2. The prosecution called four (4) witnesses and closed its case. This ruling will determine whether the accused has a case to answer or not.

3. PW1 **Mary Kaviti** is the mother to the accused and a sister in-law to the deceased. She testified that on 29th October 2016 night she was asleep when the deceased came to her house. He was so drunk that he could not go to his home. She gave him a sack to sleep on in the sitting room of her house and she went and slept. The accused came later and she heard him talking loudly to the deceased. He was asking her why he had come there from his home. She became scared and took off. She did not therefore witness anything between them. When she returned the next morning she learnt of the fight between the accused and the deceased and the latter's death. She does not say who told her about it.

4. PW2 **Mbatha Kaviti** is the accused's blood brother. He testified that on 29th/30th October 2016 night he was woken up by the deceased's wife who requested him to go and see what was happening to the deceased at PW1's home. He left with the deceased's wife (PW3) for PW1's home. They met the deceased being carried by two men whose names he did not disclose. The deceased told them he was unwell and had been injured. They took him to his home.

5. PW3 **Kavili Katundu** is the deceased's wife. She stated that she was asleep on 29th/30th October 2016 night when Musyoki called her, and informed her that the deceased was being beaten at Kaviti's home. She left with Musyoki and they met the deceased on the way lying by the roadside and they carried him assisted by PW2. The deceased was bleeding on the shoulder, hand and neck and thigh. He died before they reached his home.

6. PW4 **Kamuti Kaviti** a younger brother to the accused said the accused called him on 29th/30th October 2016 at 1.00 a.m. and informed him that he had got the person who killed their father. He was not able to talk to him further. He called his uncle Musyoki Kimeu who told him he was headed to their home. He later heard the deceased had died.

7. Counsel for the accused Mr. Jackson Muia filed written submissions while the prosecution relied on the evidence on record. Mr. Muia submitted that the cause of the deceased's death had not been proved. Secondly no one witnessed the alleged fight between the accused and the deceased. He referred the court to the case of **Republic –Vs- Edward Mburu, Kamau & Anor [2017] eKLR** where the court was faced with similar facts.

8. He argued that the failure to produce a postmortem report to confirm the cause of death was fatal to the prosecution case. He cited the case of **Republic –Vs- Irene Chebet Korir [2017] eKLR**, and **Ndung'u –Vs- Republic 1985 KLR 487** and **Chengo Nickson Kalama – Vs- Republic [2015] eKLR**.

9. Counsel also submitted that none of the prosecution witnesses testified to have seen the accused person murder the deceased. That no act or omission has been attributed on the part of the accused to have caused the death of the deceased.

10. It is counsel's submission that nothing on record shows that the accused person committed the alleged offence. Therefore, it cannot be said that he had any malice aforethought. He referred to **Mozley & Whiteley's Law dictionary 11th edition** and the case of **PP –Vs- Datoeseni Ann and Bin Ibrahim No. 3 of 1999 2 CLJ 215** at page 274-275 for a definition of "prima facie case." He therefore prays for the

acquittal of the accused person.

11. Section 203 of the Penal Code defines murder as follows;

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

On such a charge the prosecution has a duty to establish the following ingredients;

- (i) The fact and cause of death.
- (ii) The *actus reus* i.e. the killing of the deceased by the accused.
- (iii) The *mens rea* which is the intention to kill or malice aforethought.

Fact and Cause of Death of the Deceased.

12. PW1, PW2, PW3 and PW4 who are all family members and close relatives of the deceased and accused have confirmed the death of the deceased. Next issue is what caused the death. PW2 said the deceased was complaining of pain and said he had been injured. He did not identify any injury on the deceased. PW3 who is the deceased's wife said she saw him oozing blood on the leg and shoulder. During postmortem which she witnessed she saw injuries on the following parts; shoulder, hand, neck and thigh.

13. Evidence by PW1, PW2 and PW3 is to the effect that the deceased used to drink alcohol quite a lot. Infact it has been confirmed by PW1 that on the material day the deceased was so drunk that he was unable to go to his own home which was not far from PW1's home. It is not known what drinks he had been taking.

14. In the case of **Ndungu –Vs- Republic (Supra)** the Court of Appeal held thus;

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution. In other words even in cases where there is testimony to the effect that the deceased suffered serious and grave injuries the prosecution is still under an obligation to call evidence to prove the effect of such injuries on the mortality of the deceased. This flows from the duty placed on the prosecution to prove each element (ingredient) of the charge beyond reasonable doubt.”

15. Further in **Chengo Nickson Kalama –Vs- Republic [2015] eKLR**, the Court of Appeal still stressed on the need for a postmortem report by stating as follows;

“.....The position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post-mortem examination report of the deceased. To the extent that the same was not done in this case, though available, death and its cause was therefore not proved beyond reasonable doubt..... In this present case the hearing commenced in May 2014 the prosecution eventually closed its case in May 2015 without calling onto the stand the pathologist who conducted the autopsy on the body of the deceased and without producing as an exhibit a post-mortem report. There was no suggestion of any particular difficulty in availing this crucial witness. As such the cause of the death of the deceased remains unproven. Failure to adduce evidence on the cause of death is a fatal omission in a murder charge.”

16. In the instant case there was real need for a postmortem report to confirm the actual cause of death. The prosecution did not avail the pathologist or doctor who performed the postmortem to testify and produce the postmortem report. My finding therefore is that the fact of death has been proved but not the cause of death.

The *actus reus* i.e. killing of the deceased by the accused.

17. None of the witnesses who testified witnessed the killing of the deceased. PW1 said she ran away from her house because of the quarrelling between the deceased and accused. She does not however state where she went to but was categorical that she did not witness the fight. PW2 testified that he was woken up by PW3 to go to PW1's home where there was a fight. They left and on the way they met two men carrying the deceased. He did not give any names.

18. On the other hand, PW3 denied ever going to PW2's place and waking him up. Infact she said it was PW2 and one Musyoki who woke her up. Further they found the deceased lying on the roadside and was not being carried by the two unidentified men. Musyoki who has been mentioned by PW3 and PW4 was not called to testify and tell the court what he knew about this matter.

19. The homes of PW1, PW2 and PW3 are not so much apart. PW2 and PW3 told the court they did not hear any noises from PW1's home that night. It is also on record that the father to PW2 and PW4 and accused had died long before this incident. The deceased's home was not far from that of PW1. It is therefore not clear why the deceased would come to PW1's home very drunk late in the night instead of going to his own home and his wife (PW3) was there.

20. Remember, Pw1 is a widow. No wonder she took off. It is also not clear whether the deceased was found lying on the roadside or was

being carried by two men. If he was on the roadside then how did he find himself there? And if he was being carried, then who are these two men who were carrying him?

21. These are answers that are lacking in the evidence adduced herein. PW2 stated that the deceased was simply complaining about the pain. He did not at any time state as to who had injured him. Infact PW2 did not appear to have noticed any injuries on the deceased. At no point did he tell his wife (PW3) the person who had injured him. PW3 denied telling the police that she had found the deceased outside PW1's house. She was categorical that she found the deceased on the roadside.

22. The issue now is whether the accused has a case to answer. Section 306 of the Criminal Procedure Code provides as follows;

(1) 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, record 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, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

23. The test of what constitutes a prima facie case was settled in the case of **Bhatt –Vs- Republic (1957) E.A 332 – 334 & 335** where the Court of Appeal held;

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one which on fully consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence.”

24. From the analysis of the evidence above, it has emerged that the prosecution has a number of gaping holes. First of all, the cause of the deceased's death is unknown to this court. Secondly the evidence of the witnesses is circumstantial. All of them in particular PW1 have denied witnessing any fight between the deceased and the accused person. Thirdly no witness who may have heard screams from PW1's home came up to testify. Fourthly the deceased did not tell anyone including his wife (PW3) what had happened to him, or who had injured him.

25. In a scenario of this kind if the accused were to be placed on his defence and he elected to remain silent which is his right the available evidence would not be sufficient to sustain a conviction.

26. The upshot is that the prosecution has failed to prove a *prima facie* case against the accused person.

27. For my part I find him **not guilty and acquit him under Section 306 (1) Criminal Procedure Code. He shall be released forthwith unless otherwise lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 20th day of November, 2019 in open Court at Makueni.

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Hon. H. I. Ong'udi

Judge