



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 30 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOHN NJOGU KIURA.....1ST ACCUSED

JUSTA MBANYA NGURU.....2ND ACCUSED

RULING

A. Introduction

1. This is a ruling on whether the accused persons have a case to answer and should consequently be put on their defence.
2. The accused persons are charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the 21/09/2015, at Kanyonga village at Makima location in Embu County, jointly with others not before court murdered Josephine Wanja Nguru. The two accused persons pleaded not-guilty to the charge.
3. The prosecution called nine (9) witnesses in support of their case which is summarised herein.

Prosecution Case

4. PW1 testified that on the 21/09/2015 at around 8pm heard screams coming from Kanyonga village and proceeded there. She found the deceased lying down burnt. PW1 and others at the scene including the 1st accused took the deceased to Embu Level 5 Hospital.
5. The accused persons were found fit to stand trial by PW2, Dr. Joseph Thuo. PW6 testified that while in hospital in Embu, the 1st accused who was married to the deceased told him that he knew who had burnt the deceased. However, the identity of the suspect was not disclosed.
6. PW7, a son to the deceased testified that two strangers had come to their home a day before the attack and asked to be shown where they could buy alcohol. He further testified that on the next day the two strangers came back carrying a jerrican tied with a piece of cloth before attacking PW1 and his brother and locking them in the kitchen. He said he saw the two strangers then dragged his mother to the back of the house. He further testified that when he regained consciousness, he heard the deceased calling for help and found her having been set on fire.
7. PW8 carried out investigations on the deceased's murder and came to the conclusion that the 1st accused had a motive for the murder of the deceased as she had a love affair with the husband of the 2nd accused. He further testified that though he did not carry out an identification parade he was aware that there was no identification by any of the witnesses. PW9, Dr. Andrew Kanyi Gachie carried out the post-mortem on the deceased and concluded that the deceased died as a result of complications of burns of the 3rd degree.

B. Prosecution Submissions

8. It was submitted that the state has made a *prima facie* case as there was sufficient direct evidence to link the 1st accused and circumstantial evidence to link the 2nd accused. Further it was submitted that the evidence of PW7 was sufficient to make up a *prima facie* case against the accused persons.

C. 1st Accused Submissions

9. It was submitted on behalf of the 1st accused that a *prima facie* case had not been established as none of the prosecution witnesses identified the 1st accused as the one who burnt the deceased.

10. It was also submitted that the testimonies of the prosecution witnesses did not prove the ingredients of murder and culpability of the 1st accused. In conclusion, it was submitted that no evidence against the 1st accused and as such he should be acquitted.

D. 2nd Accused Submissions

11. It was submitted on behalf of the 2nd accused that no malice aforethought on the part of the 2nd accused and further that no witness had placed the 2nd accused at the scene of the crime. Reliance was placed on the case of **Bonaya Tutu & Another [2015] eKLR** which described what constitutes malice aforethought.

12. It was further submitted that the circumstantial evidence against the accused does not meet the threshold as held in the case of **Sawe v Republic [2003] eKLR** which was clear on the circumstantial evidence which must constitute a conviction.

13. It was further submitted that for an accused person to be put on his defence, the evidence must pass the test of whether the accused remained silent, a conviction would be sustained as was held in the case of **Republic v Benard Obunga [2015] eKLR**.

E. Analysis of the Law

14. The burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. Similarly, at the close of the prosecution case under section 306 (1) of the Criminal Procedure Code the prosecution must satisfy by way of the evidence presented so far that a prima facie case exist to warrant the accused person to be called upon to answer.

15. The issue for determination is whether given the evidence and the ingredients of the offence under Section 203 as read together with Section 206 of the Penal Code the accused persons have a case to answer or not. The relevant provision to this question falls under the provisions of **Section 306 (1) and (2) of the Criminal Procedure Code** which provides inter alia that;

“when the evidence of the prosecution case is concluded the court shall consider the evidence and any arguments made by either the defence or prosecution case to determine whether a case against the accused has been made on the allegations/or charge. If the court finds that there is no evidence that the accused has committed the offence the court shall record a finding of not guilty and order for a discharge or acquittal.”

16. The legal principles to guide a trial court in making a determination on a prima facie case have clearly been stipulated in both the persuasive authorities and in the Eastern African case of **R.T. Bhatt v Republic EA 332 – 334 & 335**. The legal principles which run through the cases cited revolves around sufficiency of evidence capable of establishing the ingredients of the offence the accused is charge with. Secondly, a mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence. Thirdly it is evidence adduced by the prosecution such that a reasonable tribunal properly directing its mind would convict the accused in absence of any explanation when called upon to answer or put on his defence.

17. The burden of proof is on the prosecution to establish that the deceased death on 21st September 2015 was caused by the accused persons through an unlawful act.

18. In the offence of manslaughter, the prosecution is supposed to prove the primary ingredients of the offence, namely:

(1) The death of the deceased.

(2) The death of the deceased was unlawful.

(3) That in causing death there was malice aforethought on the part of the accused.

(4) That the accused was positively identified as the one who caused or participated in the killing of the deceased.

19. I have evaluated the entire evidence and in my view, there is no direct evidence to connect any of the two the accused persons with the death of the deceased. The evidence of PW7 which the prosecution heavily rely on is clear that a day before the attack on the deceased, two strangers came to their home inquiring on where they could drink alcohol and the distance thereto after which the 1st accused offered to take them to a bar at Kamunyaria.

20. PW7 proceeds to testify that the two strangers later returned without the 1st accused and started banging on the door but the deceased refused to open the door. PW5 testified that a day before the attack the 1st accused visited the aforementioned bar with two strangers who bought the 1st accused beer and left him drinking. PW7 further testified that the two strangers came back carrying a jerrican tied with a cloth, attacked them and locked him and his brother in the kitchen then proceeded to drag the deceased to the back of her house where PW7 would later find the deceased.

21. It is important to note that PW7 in his testimony was clear that neither the 1st accused nor the 2nd accused were in the company of the two strangers when they attacked the deceased. PW4, the area assistant chief, testified that the 2nd accused had complained to him that the deceased had an affair with her husband. PW4 did not witness the incident on the material day. The investigating officer seem to have based his investigations on the said motive and PW8 concluded that the accused murdered the deceased.

22. A case based on circumstantial evidence as this one, must satisfy the three test laid in the case of Abanga alias Onyango versus Republic Cr. Appeal number 32 of 1990(UR) That is: -

1. *The circumstances from which an interference of guilt is sought to be drawn, must be cogently and firmly established;*
2. *Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
3. *The circumstances taken circumstantively, should form a chain so complete that there is no escape form the conclusion that within all human probability the crime was committed by the accused and none else.*

23. In another case of Republic versus Kipkering Arap Koske and Another 16 EACA 135, regarding circumstantial evidence the court held that: -

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other hypothesis than that of his guilt.”

24. The prosecution case demonstrates that other than the accused persons, there are other persons who equally had the opportunity to kill the deceased. It does not point the guilty solely to the two accused persons. As such the evidence against the accused only raises suspicion against them, of which as was rightly pointed out in the case of Neema Mwandoro Ndurya versus Republic [2008] eKLR, suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.

25. I therefore, find that the circumstantial evidence falls short of the test laid down in the case of Sawe Vs Republic (supra) and does not establish a *prima facie* case against the two accused persons.

26. It is my finding tht the accused persons have no case to answer and are hereby acquitted under **Section 306 of the Criminal Procedure Code.**

27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Maina for Fatuma for 1st accused

Mr. Momanyi for Okwaro for 2nd Accused

Ms. Nandwa for State