



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRC NO. 66 OF 2017

FORMERLY MACHAKOS HCCRC 12 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

KYALO KIMULI..... ACCUSED

RULING

1. **Kyalo Kimuli** the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the 24th day of February 2016 at Kyang'onde village, Usalala location Waia location in Mbooni East sub-county within Makueni county murdered **Ali Malila**.

2. The prosecution closed its case after calling seven (7) witnesses to prove its case. Mr. Hassan for the accused filed written submissions arguing that the prosecution had not established a prima facie case against the accused.

3. In the instant case there is evidence that indeed the accused died. The cause of death has been confirmed through the evidence of **Pw5 Dr. Patrick Mutinda** who produced the postmortem report as EXB1. The cause of death was:

“Massive intra – abdominal hemorrhage secondary to multiple liver lacerations. / Blunt abdominal injuries.

4. **Pw1 Teresia Mweni Mutua** confirmed that on 24th February, 2016 7:30 pm the deceased had passed by her house to say

“hallo” but he did not stay. After leaving Pw1's home he passed by the home of the accused and his wife (Pw3). Pw1 was called by **Pw3 Kanini Kyalo** as the deceased was leaving.

5. Pw1 ran to the place and found the deceased bleeding from his face but was talking. He told them he could not do to the accused what the accused had done to him. On asking the accused what had happened he informed her that the deceased wanted to enter his children's study room and so he beat him. They parted ways after Pw3 lifted up the deceased.

6. She confirmed that her son Mutisya Mutua had been arrested in respect to this incident. It was her evidence that both the accused and deceased were drunk on that day.

7. **Pw2 Malira Ilumbe** only received a report from the police about the injury of the deceased who had been taken to hospital by the accused. He confirms going to the hospital and finding there the accused and his wife. Further that the accused and deceased are related.

8. **Pw3 Kanini Kyalo** who is the accused's wife says the deceased came to their house and found their children reading in the sitting room. Her husband (the accused) had gone to take care of the animals. She went to continue with her cooking, and while there she heard the children making noise.

9. On going to check, she found when the deceased had fallen next to the door to the children's room and was bleeding. She lifted the deceased and asked him to leave. It's her evidence that the accused only came to the house after the deceased had left. That the deceased was hit by the door frame.

10. **Pw4 Alexander Mbwika No. 3773** is a police officer attached to Kalawa police station but formerly of Kiang'onde police post. He explains how he received a call from the accused telling him of prisoners he had. He found the deceased injured and the accused was there. He confirms that Mutisya alias Kariuki and the accused were arrested over the deceased's murder. **Pw6 Titus Mbatha Mutuku** did not witness the fight, and the deceased did not say anything about his injury in his hearing.

11. **Pw7 No. 65987 CPL Solomon Koome** is the investigating officer. Upon receiving the murder report he visited the scene which was at the accused's home. He found blood stains on the walls of the main house. In cross examination he said he took no blood samples. He said he charged the accused because of the evidence of Pw3, neighbor and corporal incharge of Kiang' Ondu.

12. With this evidence, this court has to determine whether the accused has been linked to the murder of the deceased. i.e. the ingredient of *actus reus*. The investigating officer (Pw7) said he relied on the evidence on Pw1, Pw3 and Pw4.

13. Pw1 did not witness the incident since the deceased had already left her home when the incident took place. She tried to tell the court what the accused and Pw3 told her but it did not just add up because at one point she testifies as if she was at the scene. Pw3 (accused's wife) whom Pw7 appears to have relied on her word, gave evidence exonerating her husband. It is therefore not clear what she may have told Pw1 and Pw7.

14. Pw4 the corporal in charge of Kiang' Ondu police post did not carry out any investigations. He was directed to arrest Mutisya alias Kariuki which he did. It is not clear if the said Mutisya alias Kariuki is the same as Mutisya Mutua who is the son of Pw1. He was arrested but where is he? He was never charged and was not called as a prosecution witness.

15. It has also emerged from the evidence of the deceased's father (Pw2) that the deceased and accused were close relatives, and that the deceased was like a son to the accused. The accused is the one who took the deceased to hospital and was with him there while he died. He never ran away. He was arrested while in hospital with the deceased. His wife (Pw3) was also present.

16. Being close relatives appears to have interfered with the investigations and/or the selective evidence given in court by the witnesses. That can clearly be seen from the evidence of Pw1-Pw4 and failure to avail Mutisya Mutua alias Kariuki as a suspect or witness.

17. The evidence which was adduced by design is not sufficient to link the accused person to the murder of the deceased person. Placing him on his defence would amount to asking him to prove his innocence which is not the law. Were he to be placed on his defence and he elected to remain silent as of right this court would not have sufficient evidence to convict him.

18. For my part, I find the accused not guilty and acquit him forthwith under section 306(1) Criminal Procedure Code. He shall be released unless otherwise lawfully held under a separate warrant.

Order accordingly.

Delivered, signed & dated this 11th day of December 2019, in open Court at Makueni.

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H. I. Ong'udi

Judge