



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 31 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JAMOCK KAMAKYA MBUVI.....1ST ACCUSED

FRANCIS NZIOKA PETER.....2ND ACCUSED

R U L I N G

1. The accused persons herein Jamock Kamakya Mbuvi and Francis Nzioka Peter are jointly 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 18th day of September 2011 at Simba market, Wolwa location in Makueni district within Makueni County jointly murdered Jackson Nzioka Mutuku.

2. The prosecution's case is that on the material date the deceased herein Jackson Nzioka Mutuku was having a chat with Purity Wayua Muli when the accused persons herein arrived and accosted the deceased and demanding to explain to them as to why he had insulted them and immediately started attacking him. The two accused persons overwhelmed the deceased when the 2nd accused used a stool nearby to hit him on the head. While the deceased was on the ground, the 1st accused used part of the broken stool to hit him. Both the accused persons thereafter hopped onto their motorcycle and drove away. The deceased's employer was alerted of the incident and rushed him to Makindu hospital for treatment but he died while undergoing treatment.

A postmortem was later conducted on the body of the deceased by Dr. Makau Douglas who noted that the occipital bone was depressed and he formed the opinion that the cause of death was cardio pulmonary arrest due to massive cerebral haemorrhage caused by blunt force trauma. The deceased's employer upon rushing him to hospital had also lodged a report at Sultan Hamud police station. The case was investigated by PC Michael Kilongogi who visited the scene and collected the broken pieces of a stool that had been used as the murder weapon. The said officer began investigations and upon the arrest of the accused persons, he charged them with the present offence.

3. At the close of the prosecution's case, the learned counsels for the defence and the prosecution filed written submissions on the issue of whether or not a *prima facie* case had been made against the accused persons. Learned counsel for the 1st accused filed his submission dated 27-4-2017 while counsel for the 2nd accused filed submissions dated 21-3-2017. Learned counsel for the prosecution filed submissions dated 11-5-2017. I have considered all the said submissions as well as the authorities cited. Indeed at this stage of the proceedings the prosecution was under a duty to establish a *prima facie* case against both accused so as to require them to be called upon to make a defence. The duty to prove the guilt of the accused persons is always upon the prosecution to discharge and the standard of proof is one of beyond any reasonable doubt.

There is no duty imposed upon the accused to prove their innocence. A *prima facie* case has been held in the case of **BHAT -VS- REPUBLIC [1957] 332** to be one on which a reasonable tribunal properly directing its mind to the law and evidence could convict if no explanation is offered by the defence. Hence from the evidence so far adduced by the six prosecution witnesses, the same should be sufficient to sustain a conviction against the accused persons were they to elect to remain silent in defence.

4. The charge of murder is contained in the information presented to court dated 25-7-2013 and which had been duly read to both accused who returned a plea of not guilty and which thereby necessitated a trial herein. I now need to analyze the evidence presented by the prosecution so as to establish whether or not the case meets the threshold set by the case of **BHAT-VS- REPUBLIC** (Supra).

PW1, PURITY WAYUA MULI testified and stated that she was having a chat with the deceased herein when the two accused persons who were well known to her turned up and accosted the deceased demanding an explanation as to why he (deceased) had insulted them and immediately attacked him using a wooden stool until the deceased lost consciousness. The accused persons then rode away in their motorcycle.

PW2, ANGELA KIOKO stated that the deceased had been his servant. She testified that upon being alerted of the incident, she rushed to the scene and found the deceased lying down bleeding from the nose and mouth and was unconscious. She then organised for transport and had him escorted to Makindu hospital where he was admitted but later died while undergoing treatment.

PW3, DANIEL MBOYA MUTUNGA and PW4, DAVID MAKAU MUTALA who were relatives of the deceased witnessed the postmortem examination.

PW5, PC MICHAEL KILONGOZI was the investigating officer. He testified that he visited the scene and recovered a broken piece of wooden stool that had been used to injure the deceased. He later charged the accused persons with the present offence.

PW6, DR. MAKALI DOUGLAS stated that he conducted a postmortem on the body of the deceased and noted that the occipital bone was depressed and formed the opinion that the cause of death was cardio pulmonary arrest secondary to massive cerebral haemorrhage due to severe physical trauma on the head.

5. It was incumbent upon the prosecution to ensure that the essential ingredients of the offence of murder have been established and which are as follows:

a) Proof of the fact and the cause of death of the deceased.

b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which actually constitutes the “*actus reus*” of the offence.

c) Proof that the unlawful act or omission was committed with malice aforethought which constitutes the “*mens rea*” of the offence

From the evidence adduced when cumulatively considered, it is clear that indeed the fact of the death of the deceased and cause of death has been established by the prosecution. The remaining thread is on the issue of malice aforethought. The evidence of PW1 appears to place the two accused persons at the scene of the crime. The said witness (PW1) stated that she was in the company of the deceased when the accused persons seized him and attacked him using a wooden stool. It was from the said injuries that the deceased succumbed to death. The bone of contention between the accused and the deceased was to do with a claim that the deceased had earlier on insulted one of the accused persons and therefore the accused persons had confronted him over the said alleged insults.

The death of the deceased appears to stem from the injuries inflicted upon him by the accused persons in the presence of an eyewitness Purity Wayua Muli (PW1). The repeated blows upon the deceased by both accused could only have been meant to cause grievous harm. The evidence of the eyewitness seems to suggest that the accused persons had a common intention to attack the deceased. It therefore becomes quite clear that the prosecution has established a *prima facie* case against both accused persons.

6. In the result, I find that both accused persons have a case to answer and are accordingly called upon to make their defence in accordance with section 306 (2) of the Criminal Procedure Code.

Dated and delivered at Machakos this 4th day of April, 2018.

D.K. KEMEI

JUDGE

In the presence of:

Mutia - for the 1st Accused

Mutia for Mutinda Kimeu- for the 2nd Accused

Machogu for the State

Kituva - Court Assistant