



**REPUBLIC OF KENYA**

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

**HCCR NO. 103 OF 2017**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**DANIEL KITSAO.....ACCUSED**

**RULING**

1. The accused was charged with offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. Particulars being that on 27/01/2013 at Annex Makuti Bar & Restaurant lodgings in Mtito Andei township, Kibwezi District, Makeni County murdered Monica Matheka.
3. The accused pleaded not guilty and the matter went into full trial. The prosecution called witnesses.
4. PW1 Dorcas Katunge Mutule witnessed the accused open the room he was occupying with the deceased and he was arrested there in while in possession of a bloody knife. PW1 is the one who called the police who recovered the bloody knife in accused possession. The body of the deceased was taken to the mortuary and accused was arrested.
5. PW2 Everlyne Muange heard the screams in the room occupied by the accused and the deceased.
6. The accused opened the door of the room and PW2 with other people saw deceased was dead on bed. The police came and arrested the accused and carried the deceased body.
7. PW3 Athman Mulwa, the watchman was called by PW2 after she heard screams in a room which he says was No. 10 though PW1 and PW2 talk of 105.
8. However when the door was opened the accused was found in the room together with the deceased dead. He tied accused with a rope to stop him from escaping. Police officers came and arrested the accused and took the body away.
9. PW4 Daniel Matheka Kaluu, the deceased father identified the body of the deceased for postmortem.
10. PW5 Julius Kinuthyakinya, was husband of deceased who witnessed the postmortem together with PW4 and PW6 Shadrack Mulinge Matheka, brother to deceased.
11. PW7 Sgt. David Gaduve was duty officer stationed at Mutito Andei on 27/01/2013. He accompanied deputy OCS to the scene of murder. The said accused and the deceased body both in room 105. They arrested accused and took the body away.
12. His evidence is corroborated and replicated by PW8. They also recovered a bloody knife in accused possession.
13. PW9 a police officer produced a postmortem report by consent of both parties.
14. The prosecution closed their case at this stage. The parties submitted as hereunder;
15. **Mr. Mutinda Kimeu for accused submitted that**, the prosecution has not established a *prima facie* case and relied on various authorities. He argued that there is no evidence from any itness who witnessed the incident of killing.
16. The prosecution case is hinged on circumstantial evidence and cited various authorities. He contended that there is no evidence that scene

of crime existed. The alleged venue of crime of bar was not proved to exist. The prosecution via witness never proved act or distress.

17. PW1, PW2 and PW3 are key witnesses. They were first to arrive at the scene. They alleged to have seen the young man and it was the first time. There was no identification parade for PW1, PW2 and PW3 on suspect.

18. It was alleged deceased was in room 105. Yet accused was never with the deceased on same room. PW2 said the deceased took room alone at 8.30 p.m., but PW2 never mention seeing accused.

19. See cross examination, PW3 contradicts PW2 evidence. PW3 talks of room 10. See evidence. There is serious contradiction in room of the incident as PW2 talks of room 10 but PW3 talks of room 105. The benefit ought to go to accused.

20. The prosecution did not connect accused with incident. PW8 produced a knife blood stained and accused trouser allegedly and bed sheet. The blood samples of accused and deceased was taken. The swabs from the genital collected from both accused and deceased were taken and no report has been availed.

21. There is no connection of crime and accused. The case is based on guess work. It appears deliberate to withhold the reports on samples taken. Same would have exonerated him from the offence. Material witness not called. PW1, PW2 and PW3. They say all rooms were booked to full. None of customers was called to give evidence of the incident. They could have corroborated the occurrence or disapprove occurrence.

22. The government chemist was not called to give evidence on samples taken. The photographs were not produced. The doctor who performed postmortem was not called only investigating officer produced it and could not give information on cause of death. Only copy of postmortem was given. Original postmortem ought to have been produced.

23. Circumstantial evidence is contradictory as to the room scene of crime. See PW2 and PW3 testimony. Forensic examination was not produced. Any other person may have entered the room and committed the crime.

24. For offence of murder to be proved, malice aforethought ought to be proved vide S. PC. No prove of the same directly or indirectly. Absence of same no murder charge can be sustained.

25. Suspicion is not enough. There must be enough or sufficient evidence to sustain conviction. Thus seek court to hold that there is no prima facie case established.

26. **Mr. Orinda submits that;** to put accused on his defence or not is a threshold test. The question is; is the evidence on record put the accused person at the scene? Whether an offence under statute has been committed? If above proved, *prima facie* case is established. There is element of malice after thought.

27. The accused is put by evidence within the ambit squarely. The accused and the deceased were in a room in a bar. Noise of alarm was heard in a room. The guard went to answer alarm and found door locked. He refused to open but later opened and accused and deceased body were in the room. Death is not disputed.

28. PW8 produced postmortem. This is sufficient prove of death. The postmortem production was not opposed. PW1 owner of bar, PW2 bar attendant put accused on the scene room was given to the deceased. The accused had knife which was bloody and in his public place the body was stabbed. PW3 forced accused to open the door. The dead person is known.

29. PW5 & 6 identified the body. PW7 & 8 visited scene. No other possible theory is there to rebut accused and deceased were in the room. If accused stands mute in his defence, would he be the one to be convicted?

30. PW1, 2, 3 found accused in the room with bloody dead body. PW2 in particular is very vital to see same. The weapon was recovered .Due to prolonged delay in trial the witnesses die as in this case. Investigation officer died.

31. The case is 5 years old. The evidence before court can convict if accused remains silent. The cited authorities are in finding after accused was put on his defence. They are distinguishable. That's all.

32. **In rejoinder, Mr. Kimeu submits that;** the deceased and accused being found in room is contradictory; PW1 room 105 and PW3 room 10. Existence of bar is not proved to exist. It is alleged accused was found in possession of knife.

33. PW7 does not say of any recovery of knife. It was not even produced. Forensic evidence would have implicated or exonerated the accused but same withheld. PW2 did not see young men, PW3 did not describe the person parade was mandatory.

#### **ISSUES, ANALYSIS AND DETERMINATION**

34. After going through the evidence on record and the parties submissions, I find the issues are;

***i.) Whether a prima facie case has been established to warrant putting the accused on his defence?***

35. In the case of **BHATT –VS- REPUBLIC (1957) E.A 332**, the court held that;

**“..... prima facie case means.....one in which a reasonable tribunal, properly, directing its mind to the law evidence could convict if no explanation is offered by the defence.”**

36. Section 203 Penal Code defines the ingredients of the offence of murder. Section 203 states 203; **Murder; Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.**

37. 204. Punishment of murder; **any person convicted of murder shall be sentenced to death.**

38. The prosecution established that the accused was arrested in the same room they occupied with deceased.

39. He had a bloody knife in his possession. The deceased died of a fatal stab with a knife as disclosed in the postmortem (PM) report.

40. There is no other explanation at this stage as to the cause of death other than by the stab of the deceased at the stomach by the accused.

41. The ingredients of the offence charged on *prima facie* basis have been established such that in absence of an explanation of a different theory other than the accused having murdered deceased via a knife stab, the evidence on record would warrant conviction of murder of the accused person.

42. Thus the court orders that the accused to be put on his defence.

**SIGNED, DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF JULY 2018, IN OPEN COURT.**

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**C KARIUKI**

**JUDGE**