

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 64 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

BERYL AWUOR.....ACCUSED

RULING

This is a ruling to determine whether the prosecution has established a prima facie case against Beryl Awuor to have her placed on her defense. Beryl, referred to in this ruling as the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on the 14th day of June 2015 at Mathare Area 4A Estate in Kasarani District within Nairobi County she murdered Lilian Adhiambo. She denied committing this offence when the charge and all its particulars were read over and explained to her.

In support of this case, the prosecution called a total of seven (7) witnesses. I have read all the evidence. It is clear from the evidence that Lilian Adhiambo, the deceased, died due to exsanguination due to miscuvascular injuries due to penetrating stab wound. She had suffered a penetrating stab wound measuring 2cm long by 2cm wide by 11cm deep on the left upper arm about 10cm below the left shoulder. The blood vessels around the arm pit had been severed. The evidence confirming the death of the deceased was adduced by Paul Mbogo, PW2, the Clinical Officer who attended to the deceased and the accused at the Marura Nursing Home in Mathare North on 14th June 2015 and Dr. Peter Muriuki Ndegwa, PW1, who examined the body of the deceased at the City Mortuary on 17th July 2015. PW2 testified that he was called to attend to two female patients in the evening of 14th June 2015. He found the two patients in company of a man identified as the husband of the two women. He testified that one of the women patients was lying on a couch and was unconscious and that the patient had a stab wound on the left upper hand and the thigh. PW2 identified this patient as Lilian the deceased. He testified that the other patient identified as the accused had injuries on both thighs and on the index finger. She was treated and police from Muthaiga Police Station were called to the Nursing Home.

The police officers who visited Marura Nursing home that evening included CPL Otome Richard, PW3, and IP Nzoka Mwendwa, PW7. Both officers confirmed to the court that they went to Marura Nursing Home after a call was made informing the police of the incident. Both officers confirmed to the court that they found two women at the Nursing Home, the deceased Lilian and the accused Beryl and that Beryl was alive and being attended to by the Clinical Officer while Lilian had died. Both officers confirmed that both women had wounds as described by the Clinical Officer, PW2. Both officers testified to seeing a man referred in the evidence of PW7 as Samuel and who was said to be the husband of the two women at the Clinic. Samuel is said to have led the police to scene of the crime where he handed to the police a blood stained knife, Ex. 7. The knife was examined by Elizabeth Waithera, PW6, and found to be stained with the blood of the deceased. Elizabeth produced a report to that effect was produced in court as Ex. 5.

In a criminal trial, the prosecution bears the onus of proving the offence as charged. For murder, the prosecution must prove that death of the deceased has occurred due to an unlawful act or omission on the part of the accused under trial. The prosecution must also prove that in causing that death the accused had the necessary malice aforethought, the intention to cause the death as defined under Section 206 of the Penal Code. From the evidence before the court, it is clear to me that the death of Lilian Adhiambo is not in doubt. She was pronounced dead on arrival at the Marura Nursing Home. It is not a natural death but death due to a penetrating stab wound. It is an unlawful death.

The law requires that at the close of the prosecution case, the prosecution must have tendered evidence proving that the accused under trial is the one who caused the death of the deceased with malice aforethought. Once the case for the prosecution has been closed there is no other chance for the prosecution to tender further evidence unless they seek to reopen the case in the manner authorized by the law and tender further evidence and the application is allowed. The evidence against the accused person must be sufficient and strong enough at the time the prosecution lays down its tools of prosecution that there is proof to the standards required that the accused is the person who caused the death of the deceased. It was stated in the case of ***Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335*** that prima facie case "***at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence***". See also ***Wibiro alias Musa v. R [1960] E.A at 186*** on the same issue.

At the close of the prosecution case, the trial court must ask itself whether the evidence tendered before it fits in with ***Bhatt*** and ***Wibiro*** authorities. To me the question therefore is whether the evidence before me is one on which this court properly directing its mind to the law and the evidence before it could convict if no explanation is offered by the defence. There is no duty placed by the law on the accused to prove her innocence. The law guarantees her certain rights including the right not to incriminate oneself, the right to remain silent and the right to be presumed innocent until proof to the contrary. It falls on the prosecution therefore to ensure that at the time it concludes its trial, it has tendered evidence sufficient enough to prove its case because the accused cannot be expected to fill in the gaps left by the prosecution case.

Evidence shows that there was a man in the picture when the incident giving rise to this offence occurred. This man is named as Samuel. The Investigating Officer IP Nzoka, PW7, told the court that Samuel informed him that he was the husband to both the accused and the deceased and that a disagreement arose in the family between the two women. He told him that on the date of the incident the three of them had met to discuss and try to resolve the disagreement and that the deceased picked a knife and attacked the accused stabbing her; that both women

struggled over the knife and in the process the deceased was stabbed on the left hand near the armpit. He further told the court during cross examination that the accused told him that the deceased had stabbed herself during the struggle. PW7 further informed the court on cross examination that he did not have any other evidence to the contrary. He told the court on cross examination that Samuel picked the knife from the deceased and kept it until the police collected it. According to PW7 Samuel did not tell him that the accused at any time picked the knife and stabbed the deceased.

Samuel did not testify and therefore he could not confirm what he is alleged to have told the Investigating Officer. This court was told by PW7 that although Samuel recorded his statement with the police he was not reachable through his mobile phone to be summoned to testify. PW7 further told the court that in his opinion this was a good case for an inquest into the death of the deceased but after he finalized his investigations he forwarded the file to the Director of Public Prosecutions who recommended that the accused be charged with murder.

While this court finds that there is sufficient evidence to support the death of the deceased has occurred, I find the evidence in support of the fact that the accused is the person who stabbed the deceased shaky. There is absolutely no evidence to support this allegation. What I have on record shows that the accused and the deceased sustained injuries. The deceased was not as lucky as the accused. She died on arrival at the Nursing Home while the accused was treated and survived. How the injuries sustained by the deceased were inflicted is not clear, whether they were as a result of an accidental act as a result of a struggle between the accused and the deceased over the knife or as a result of any other act. What is clear to me is that there is no evidence to show that the accused at any time picked the knife and attacked the deceased thereby inflicting fatal wounds to her.

In my view the police did not put more effort into locating Samuel who is an eye witness. In my view it is not enough to say that Samuel could not be reached. Without the evidence of Samuel or any other witness who may have been present, this court is left with no evidence as to what really took place that evening. As stated above the law does not place any onus on the accused to fill the gaps left by the prosecution. The evidence tendered in court therefore goes to the extent of proving the death of the deceased without prove as to who caused that death and without proof of the element of malice aforethought.

My conclusion of this matter is that the case for the prosecution falls by the wayside. It will not serve any purpose to place the accused on her defense because the evidence by the prosecution is not sufficient to support a conviction. It is my finding therefore that the prosecution has failed to establish a prima facie case against the accused person to warrant her being placed on her defense. The law under **Section 306 (1) of the Criminal Procedure Code** provides that:

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.

I must obey this provision and return a finding of not guilty against the accused person at this stage of the trial. She is at liberty to enjoy her freedom. Orders shall issue accordingly.

Delivered, dated and signed this 20th day of September 2018.

S. N. MUTUKU

JUDGE