



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CRIMINAL CASE NO. 12 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**STEPHEN GITHINDI MBUGUA.....ACCUSED**

**RULING**

The accused was charged before this court with the offence of committing murder contrary to section 203 as read with section 204 of the penal code. The brief particulars of the offence being that on the night of 13<sup>th</sup> and 14<sup>th</sup> day of July, 2017 at unknown time at Bondeni in Loitoktok Town in Kajiado South within Kajiado County did murder Milkah Njeri. The accused denied the charge, and learned counsel Mr. Itaya represented him at the trial. In prosecuting the case on behalf of the state Senior Prosecution Counsel Mr. Akula summoned twelve witnesses and tendered three exhibits.

**Factual Matrix and evidence by the prosecution:**

Pw1 pastor Moses Milungo, attached to Ark of Jesus Pentecostal Church where the deceased and the accused worshiped stated that on 16<sup>th</sup> July, 2016 he was visited by the accused at his home where the issue of death of his wife was discussed. It was his testimony that it was agreed to have the accused submit himself to the police at Loitoktok to record a statement. Additional Pw1 further stated that he did not see any physical injuries on the accused at the time he went to inform him of the incident.

The other prosecution witness who testified at this trial was Benard Matia as Pw2 and the father to the deceased. He testified that the deceased was married to the accused-Stephen Mbugua. Pw2 further stated that on 16<sup>th</sup> July, 2017 he was summoned by the police to attend a postmortem of the deceased at Loitoktok mortuary where he positively identified the body to the pathologist.

Pw3 - Mary Wanjiru testified as a neighbour to both the accused and the deceased at Bondeni area in Loitoktok. According to Pw3 testimony she came to learn of the death of the deceased from the information given by the daughter – Wacuka. In Pw3 evidence she went to the home of the deceased to verify the report she received from the daughter. While entering the house she saw her seated on the floor with her head covered with a bed cover. According to Pw3 testimony she tried to call the name of the deceased but with no success. From what Pw3 observed she sought the assistance of the clan elder- Peter Ndegwa Pw4. Thereafter pw4 also visited the home in company of Peter Njoroge where they confirmed that the deceased might not be alive.

Pw5 Justus Kabira testified as the employer to the accused for a period of two months where he worked as a driver to Motor Vehicle registration number, KCH 761S. In his evidence Pw5 stated that they parted ways with the accused on 13<sup>th</sup> July 2017 when he gave him leave of absence to visit his family at Loitoktok. It was agreed between Pw5 and the accused that he was to join them later on the 14<sup>th</sup> July, 2017. However Pw5 stated that on the material day he was to receive a report that the accused had assaulted his wife. In a short while also Pw5 stated that the accused joined them at Kimende town where he explained that he had indeed quarreled with his wife, Pw5 further told the court that the accused confirmed the incident which may have resulted in her death. Thereafter he advised the accused to go back home and report the matter to the police station.

Pw6 – Rodha Wanjiku testified as the sister to the deceased. On the identification of the deceased body at the mortuary where Dr. Njoroge carried out a postmortem. According to Pw6 evidence the observation she made revealed that the deceased had sustained multiple injuries to both the upper and lower limbs.

Pw7- Esther Wacuka who testified as the daughter of the accused and the deceased told the court that she was present on the 12<sup>th</sup> July, 2017 when the assault took place against the deceased. In her own words Pw7 stated that the accused had summoned the deceased to the bedroom to have a discussion. As they entered Pw7 deposed that they locked the bedroom door. Later Pw7 testified that the deceased started crying and calling for help. Pw7 further gave evidence that the accused opened the door and started looking for a club (rungu) which he retrieved

from the shelves. According to Pw7 while armed with the said club, the accused returned back to the bedroom and started to inflict bodily harm on the deceased. In addition Pw7 stated that the accused came out of the bedroom picked a stool which he used to hit the deceased on both legs. It was Pw7 testimony that the fight between them went on for some time in and out of the bedroom until the assault stopped and everybody retired to the respective rooms to sleep. Again according to Pw7 in the following morning another quarrel ensued culminating in the accused launching another attack against the deceased. According to Pw7 when the accused left the house together with his brother Mbugua – Pw8 they covered the deceased and decided to inform their neighbor Pw3.

Pw8 – Talvin Mbugua who testified as the son of the accused also gave a narrative which materially is similar with that of Pw7 regarding the sequence of events on the 13<sup>th</sup> July, 2017. Pw8 alluded to the fight between the accused and the deceased. He was later to be sought by the police to record a statement.

Pw9 - Dr. Deborah Osiemo testified on behalf of her colleague Dr. Ruth Njoroge in respect of a postmortem report admitted as exhibit 2 in support of the cause of death of the deceased. Pw9 further stated and explained that according to the examination conducted by Dr. Njoroge it revealed that the deceased suffered multiple injuries to the forehead, upper limbs, left limbs, abdomen, back lower limbs and spinal cord. In her opinion the cause of death was attributed to the cervical spine injury.

Pw10 – Cpl Mwangi Gitau testified as a Gazetted Scenes of Crime Officer who processed a media device containing photographs taken of the deceased person and the scene. The set of photographs with details of various view of this murder charge were admitted in evidence as exhibit 1A with the certificate as exhibit 1(b).

Pw11 – Cpl Geoffrey Kumbu a police detective attached to Loitoktok police station told the court that while on duty he received the accused at the station while in company of Pw1. In his evidence Pw11 stated that the accused was placed in cells and further directions referred to the officer in charge of the police station.

Pw12 - IP Wycliffe Marwa testified as the investigating officer who put together the witness statements and other relevant material in support of the charge. Pw12 further stated that with the evidence from various witnesses he recommended a charge of murder to be preferred against the accused person.

At the close of the prosecution case pursuant to Section 306 (1) of the criminal procedure code. Learned counsel Mr. Itaya filed written submissions on a motion of no case to answer. The bone of contention as submitted by Mr. Itaya was lack of proof that the accused intended to kill the deceased or cause grievous harm. In learned counsel's argument the deceased provoked the accused by infecting her with a sexually transmitted disease. The learned counsel further contended that such scenario a fight broke out between the two and as a consequence the deceased died. Mr. Itaya contended that it follows therefore the prosecution has not discharged the burden of proof of prima facie case for the offence of murder against the accused.

On the part of the state Mr. Meroka, the Principal Prosecution counsel relying on the evidence of the twelve witnesses submitted that a prima facie case has been established under Section 306(1) of the Criminal Procedure Code to warrant the accused person to be called upon to answer.

### **Analysis and determination**

In order to adequately address the motion of no case to answer one has to consider the wording of Section 306 (1) of the Criminal Procedure Code. The crux of the section provides that if, at the close of the prosecution case the court takes the view that there is no evidence that the accused has committed the offence indicated in the charge sheet a finding of not guilty should be made with an order of acquittal in favour of the accused.

The position in Kenya on this issue is modeled under the English criminal law. The substance of the guiding principles to be relied upon by the trial court faced with the question within the ambit of Section 306(1) of the Criminal Procedure code was set out by the English court of Appeal in the case of **Republic v. Gibraith 1981 1 WLR 1039** where the court held thus:

***1. "If there is no evidence that the crime alleged had been committed by the defendant, there is no difficulty, the judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon submission being made, to stop the case (b) where however the prosecution evidence is such that the strength or weakness depends on the view to be taken of the witness reliability, or other matters which are generally speaking within the province of the jury, and where on one possible view of the facts, there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."***

Whereas in England the matter will proceed to the jury system, the position in our jurisdiction will be for the case to proceed before a single judge as outlined under Section 306(2) as read with Section 307 of the Criminal Procedure code.

I think it also appropriate while dealing with this motion under Section 306(1) of the criminal procedure code to refer to the passage in the case of **Tongo v Cop. 2007 12 NWLR** where the supreme court of Nigeria held as follows:

***"Therefore, when a submission of no prima facie case is made on behalf of an accused person the trial court is not thereby called upon at that stage to express any opinion on the evidence before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged. If the submission is based on discredited evidence that discredit must be apparent on the face of the record, if such is not the case, then, the submission is bound to fail"***. The South African Supreme court considering the application of Section 174 of the criminal

procedure Act which has similar provisions with our Section 306 (1) of the criminal procedure code had this to say in the case of **S v. Phuravhatha and others 1992 (2) SACR 544** stated as follows:

***“The presumption in favour of innocence, the fact that the onus rests on the state, as well as the dictates of justice in my view will normally require an exercise of the discretion under Section 174 read under section 306(1) of the Criminal Procedure Code in favour of an accused person where the state case is virtually and basically non-existent. Strengthening or supplementation of non-existent state case is physical impossibility”.***

The principles from a persuasive perspective do apply to the facts of this case on a motion of no case to answer under Section 306(1) of the Criminal Procedure Code. This can be seen from the weight given to the principles governing a motion of no case to answer as set out in the Land mark case of **R.T. Bhatt v Republic 1957 EA 332 -334** where the court held thus:

***“That a prima facie case is one which a reasonable tribunal, properly directing its mind to the law and the evidence would convict if no explanation is given by the defence”.***

The question for this court then, with reference to the evidence by the prosecution and application of the above principles is whether the accused person has a case to answer.

Bearing in mind that at this stage I am not immediately concerned with the standard of proof of beyond reasonable doubt nor required to have definitive findings on the evidence given the fact that there is only one side of the case. The sequence of events as narrated by the twelve prosecution witnesses in this respect can be at least be said to be reasonably clear on key elements of the offence. The evidence on record has been literally examined on all the essential elements of the charge of murder taken as a whole. It appears to me that the quality and the quantum of the prosecution case in my view has satisfied the legal threshold of a prima face case to warrant the accused to be placed on his defence as set out under Section 306(2) of the criminal procedure code.

The motion of no case to answer by the defence counsel Mr. Itaya therefore fails and the accused is hereby placed on his defence.

**Dated, signed and delivered in open court at Kajiado this 17<sup>th</sup> day of September, 2018.**

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**R. NYAKUNDI**

**JUDGE.**

In the presence of:

Mr. Itaya for the accused

Mr. Meroka for the DPP