



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 41 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES MUTUNGA MBALUKA.....ACCUSED**

**RULING**

1. The accused herein **JAMES MUTUNGA MBALUKA** is charged with an offence of murder contrary to Section 204 of the Penal Code. The particulars are that on the 24<sup>th</sup> day of April, 2015 at Ntangathiini village, Masinga Sub-County, within Machakos County with others not before court murdered **TABITHA MUSAU SINGI**.

2. The brief summary of the prosecution's case is that on the material date the family of the deceased herein discovered that she was not within her compound. The family members found it rather strange that she could just disappear anyhow. A search was mounted within the home environs for the better part of the evening. Eventually, the body of the deceased was discovered on a bed inside one of the houses within her compound. There was a sisal rope as well as a shoe lace tied round her neck and she was already dead. The police officers were alerted and who visited the scene and collected the body. A post mortem was conducted on the body by Dr. Muli Simon Kioko who formed the opinion that the cause of death was cardiopulmonary arrest due to asphyxia secondary to hanging. After investigations, the accused herein who was a grandson to the deceased and who lived with the deceased was arrested and charged.

3. The Prosecution called seven (7) witnesses in support of its case. **Peter Muli Singi (PW.1)** was a son in law to the deceased. He stated that he was at the market when he was alerted that his mother in law had disappeared from her home. He rushed home and joined members of public in the search and they eventually traced her in one of the houses within the compound. The deceased was found lying dead on a bed and had a sisal rope and shoe lace tied around her neck. The witness went on to add that the accused herein was his nephew who used to live with the deceased plus another employee he had recruited recently. He stated that the accused was found hiding in one of the stores within the compound. On cross – examination, he confirmed that the new employed worker Joseph Kisilu had mysteriously disappeared after the incident and further confirmed that the deceased had had some disagreement with sand harvesters in the area who had not paid her for sand harvested from her farm.

**Tabitha Masaa John (PW.2)** stated that she had confronted the newly employed worker Joseph Kisilu on the whereabouts of the deceased only for him to claim that the deceased had just walked out of the compound. The witness went on to add that they mounted a search of the deceased and stumbled upon her body lying on a bed inside a house which used to be occupied by the runaway employee. The witness on cross – examination confirmed that she had not seen the accused herein that day.

**Boniface Muthama Mwanza (PW.3)** was the village elder and who stated that he joined fellow villagers in search of the deceased and finally found her lying on a bed inside a house that used to be occupied by a newly employed worker. On cross examination, he confirmed that the deceased had received threats in the past from sand harvesting brokers.

**Stephen Musyoka Mutua (PW.4)** was the area Assistant Chief who testified that upon receiving the report from the clan elder, he rushed to the scene and saw the body of the deceased. On cross-examination he confirmed that the deceased had lodged complaints to him about threats from sand harvesting brokers in the area and that he had forwarded the names of the culprits to the chief for action. He also confirmed that the body was recovered from a house the newly employed farmhand used to reside.

**John Mbaluka Mutunga (PW.5)** was the father of the accused herein. He stated that he had sent the accused to go and live with the deceased who was the witness's mother in law. He went on to add that the accused used to live harmoniously with the maternal grandmother with whom he had lived for four years. On cross – examination he confirmed that he was the one who had hired the new worker Joseph Kisilu to assist the deceased and further confirmed that there had been some death threats issued against the deceased by some sand harvesters.

**Dr. Muli Simon Kioko (PW.6)** performed the autopsy on the body of the deceased who formed the opinion that the cause of death was cardiopulmonary arrest due to asphyxia secondary to hanging. He produced the post mortem report as exhibit No.5.

No. 82152 PC. Benjamin Kulei (PW.7) was the investigating officer and stated that he visited the scene and organized for the removal of the body of the deceased. He confirmed seeing a sisal rope and a shoe lace around the neck of the deceased. He also recovered one rubber shoe and a pair of plastic sandals which he later produced as *exhibits 1 – 4*. On cross examination, he confirmed that the deceased had raised some issues to do with sand harvesting activities on her farm which were handled by the area chief. He also confirmed that it was the father of the accused who suspected the accused herein as he had refused to go to school. The witness also confirmed that he could not tell if the items recovered belonged to the accused.

4. Upon the closure of the prosecution's case, parties herein agreed to file submissions on whether the prosecution had established a prima facie case against the accused person herein. It is only the defence Counsel who filed submissions while the prosecution's Counsel did not. I have considered the said submissions together with the authorities cited. I find the only issue for determination is whether or not the prosecution has made out a prima facie case against the accused person so as to warrant him to be placed on his defence.

5. A prima facie case has been defined in the case of **RAMANLAL TRAMBAKLAL BHATT =VS= REPUBLIC [1957] EA 332** as one in which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. Hence from the evidence tendered so far by the seven (7) prosecution witnesses, the same should be sufficient to sustain a conviction against the accused person herein were he to elect to remain silent in defence.

The accused before this court faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal code. The key provision which provides the offence is Section 203 which is as follows:-

***“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder”.***

In order for the prosecution to establish the offence of murder, it was under a duty to bring to the fore the following essential ingredients namely: ***the evidence of the fact of and cause of death of the deceased; evidence that the deceased met her death as a result of an unlawful act or omission on the part of the accused herein; the evidence that the said unlawful act or omission was committed with malice aforethought.***

For the charge of murder to sail through, the aspect of malice aforethought is quite crucial and whose salient features are provided for under Section 206 of the Penal Code which should reveal the following:-

***(i) Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not.***

***(ii) Knowledge that the act or omission causing the death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not.***

***(iii) Intent to commit a felony.***

***(iv) Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

6. As regards the aspect of the fact of death and the cause of the deceased's death, it is not in dispute that the deceased was discovered lying on a bed with a sisal rope and a shoe lace tied round her and was already dead. The body was collected from the scene and later an autopsy was conducted by Dr. Muli Simon Kioko who formed the opinion that the cause of death was cardiopulmonary arrest due to asphyxia secondary to hanging. A post mortem examination report was produced to that effect.

7. As regards the aspect that the deceased met her death as a result of an unlawful act or omission on the part of the accused herein, I find from the totality of the evidence of the seven witnesses that the same does not link the accused to the murder. First and foremost, none of the witnesses ever stated that they saw the accused committing the murder. All the family members who testified herein appear to point fingers at a recently employed worker one **Joseph Kisilu** who is reported to have disappeared from the home immediately the murder was committed. It also transpired from the evidence that the house from where the body of the deceased was discovered had been initially occupied by the runaway employee **Joseph Kisilu**. Further, the evidence of Tabitha Masaa John (PW.2) is that the accused herein was not at home at the time the deceased is alleged to have disappeared. It also transpired from the testimonies of the witnesses that the deceased had had some dispute with some sand harvesting brokers who had earlier issued death threats to her as she was opposed to the sand harvesting activities on her parcel of land. It was also confirmed that the said threats and names of the suspects had been forwarded to the area chief for action.

It seems the accused person herein has been roped into the murder on the grounds that he had earlier been a truant and a delinquent and which forced his father to send him over to live with the deceased who was the maternal grandmother. The accused is reported to have lived with the deceased for about four years without any serious run-ins with the deceased. It is noted that the accused's father claimed that the accused had refused to attend school and it would appear that his father saw him as a social misfit within the family. The only thing that is said to link the accused is the fact that he used to work together with the runaway employee who is still at large. The witnesses confirmed that the house where the deceased was found used to be occupied by the said runaway employee Joseph Kisilu. Further the recovered shoe and plastic shoes were said to belong to the said **Joseph Kisilu** and not the accused herein.

The investigating officer did not follow up other leads such as the death threats issued to the deceased by sand harvesters an issue which was well known in the area and even by the chief. The investigating officer merely waited for the family to hand over a suspect in the name of the accused herein whom he re-arrested and proceeded to prefer charges without conducting thorough investigations such as finger prints or even a DNA profile so as to link the accused beyond any doubt to the killing of the deceased. It would appear that the accused herein was rounded up purely on suspicion yet it is trite that suspicion however strong cannot form a basis for conviction. It would appear the accused has been made the fall guy while from the look of things the real culprits might still be out there.

8. From the foregoing observations, I am convinced that if the accused herein elects to remain silent in defence, the evidence adduced by the prosecution at this stage will not sustain a conviction against him. Consequently, I come to the finding that the prosecution has not made out a prima facie case against the accused person to warrant him to be put on his defence. Hence I find the accused has no case to answer and is hereby acquitted of the charge herein under Section 306(1) of the Criminal Procedure Code. He is to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at **MACHAKOS** this **3<sup>rd</sup>** day of **October,2018**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Machogu - for the State

Muema for Kaluu for the Accused

Josephine - Court Assistant