



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR. NO. 74 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

JOHNSTONE MULUKA MBATI.....ACCUSED

RULING

1. The accused is charged with offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code (Cap. 63), Laws of Kenya.
2. The particulars being that on 25/03/2013, at Wote township Location in Makueni District within Makueni County murdered Christine Nzilani.
3. The case was heard and prosecution closed its case.
4. The parties agreed to put submissions but only Accused Advocate filed and served same.
5. The prosecution relied on the evidence on record.
6. The accused via Advocate submitted a prima facie case was discussed in **Republic –Vs- Bernard Obunga Obunga [2015] eKLR**. In this case the court considered the case of Ramanlal **Trambaklala Bhatt –Vs- Republic [1957] E.A. 332 at 334 and 335** where the court stated as follows:-

“It may not be easy to define what is meant by a prima facie case, but 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.”

The prosecution failed to prove the ingredients of the offence.

7. It is now trite law that for the offence of murder to lie, the prosecution must establish the following elements;

- a) Whether the deceased was murdered by the accused.***
- b) Whether accused had malice aforethought.***
- a) Whether the deceased was murdered by the accused***

8. The evidence adduced by the prosecution does not create any nexus between the offence and the accused. No single prosecution witness identified the accused as the one who murdered the deceased.
9. For instance, PW1’s evidence as to the murder of the deceased was purely hearsay. He testified that ***“Kieti said that the accused had injured the deceased badly on the head and on the hand.”***
10. On cross examination, PW1 confirmed that the only information he had as to who stabbed his daughter is from one Kieti, the brother to the accused.
11. PW2 (taxi driver) also testified that ***“what I can confess is that I do not recall the person I took to the hospital.”*** On cross examination, PW2 confirmed that he did not know the person he took to the hospital.

12. Benson Kieti (PW3) testified that he was telephoned by a member of the public who informed him that the deceased had been stabbed with a knife.

13. PW3 further testified that he rushed to the deceased house where he found the deceased on the floor with cuts on the head. The deceased was alone. He then rushed to the accused's house where he found the accused on the bed but unconscious. On cross examination, PW3 testified that "***I am not sure who killed the deceased...***"

14. PW5 testified that she was neighbours with the deceased and that on the fateful day she was told by her neighbour one Mbithe that she (Mbithe) had heard the deceased letting out some sounds as if she was unwell. They went and knocked at the deceased's door but there was no answer.

15. It was also PW5's evidence that the door was bolted from inside and that she pushed her hand through a space at the door and opened it.

16. They found the deceased on the floor near the kitchen area and the deceased was bleeding from the neck and there was no sound coming from the body.

17. On cross examination, PW5 confirmed that "***I do not know if it was the accused who killed the deceased.***"

18. PW9 who was the investigating officer confirmed in his evidence that blood samples and murder weapons were taken to a government chemist for analysis on 08/04/2013. The report of the examiner was that the blood samples matched that of the deceased and that on the weapons.

19. However, there was no report linking the accused with the murder weapons. PW9 on cross examination testified that he could not tell which weapon was used. He also could not tell the ownership of the weapons. PW9 finally testified that "***nothing belongs to the accused that was found.***"

20. The prosecution has failed to establish any nexus between the accused and the offence. Nothing in evidence shows that the deceased was murdered by the accused.

b) Whether accused had malice aforethought.

21. PW1 testified that on 24/03/2013 she received a call from her daughter (the deceased). The deceased asked PW1 to proceed to her house at Wote Township. The deceased informed PW1 that she had a disagreement with the accused who was her boyfriend.

22. It was PW1's evidence that together with PW3, the accused and the deceased, they resolved the disagreement. On cross examination, PW1 testified that by the time she left the accused and the deceased, everything was okay.

23. PW2 also confirmed that indeed there was a disagreement between the accused and the deceased. He however on cross examination testified that the said disagreement had been resolved and that on the night of 24/03/2013 PW3, the deceased, the accused and PW1 had dinner together at the house of PW3.

24. PW5 testified that she saw the accused come to the deceased's house and that she saw the accused had a bag he was carrying to the deceased. She greeted the accused when she was passing him.

25. On cross examination, PW5 testified that when she saw the deceased and the accused, they were talking in a normal way with the accused standing outside the door of the deceased's house. PW5 further confirmed that there was no bitter exchange of words between the accused and the deceased.

26. The upshot of all these is that there is no evidence on record that can direct this honourable court to a finding that the accused had malice aforethought. The accused had normal disagreements with the deceased which were properly resolved.

27. The prosecution has therefore failed to prove that the accused actually had the guilty mind to murder the deceased.

The prosecution case is based purely on circumstantial evidence.

28. For circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence.

29. The High Court in **Solomon Kirimi M'Rukaria –Vs- Republic [2014] eKLR** cited with approval the case of **Abanga Alias Onyango – Vs- Republic, Cr. Appl. No. 32 of 1990** where the Court of Appeal tabulated the conditions as follows:-

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

30. PW1 testified that indeed there was a disagreement between the accused and the deceased. Her testimony on cross examination was that by the time she left on 24/03/2013, things were okay between the deceased and the accused.

31. PW2 testified that he did not remember the person he took to hospital and that he could not confirm that the said person had taken poison. PW3 on the other hand testified that the accused and the deceased had disagreements which were resolved on 24/03/2013. He also confirmed that he could not tell whether it was the accused who killed the deceased.

32. PW5 testified that she saw the accused at the deceased house at around 7.30 p.m. In addition, PW5 testified that there was duration of around one hour between the time she saw the accused and the time they discovered that the deceased had been injured. It was however PW5's evidence that the accused and the deceased were talking normally without bitter exchanges of words at the time she saw them.

33. PW5 further testified that if there were quarrel or people talking in raised voices they could have heard, but they didn't hear anything. It was also her evidence that she did not know whether the accused left the house of the deceased. PW5 finally testified that she did not know if it was the accused who killed the deceased.

34. PW6 testified that he had taken over this matter from one Cpl Njagi. He testified that blood samples and the murder weapons were taken to the Government chemist for analysis. He government analysis revealed that there was a match of the blood samples and the blood on the murder weapons.

35. However, on cross examination PW9 testified that he could not establish the ownership of the murder weapons. Finally, PW9 testified that nothing belonging to the accused was found.

ISSUES, ANALYSIS AND DETERMINATION

36. The singular issue herein is whether the prosecution has established a *prima facie* case to warrant putting the accused on his defence.

37. In the case of BHATT –VS- REPUBLIC 1957 E.A 332 at P.334 & 35, the court held that;

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

38. In the instant matter the prosecution case purely anchored on the circumstantial evidence. In **M'Rukaria –Vs- Republic 2014 eKLR** as approved by **Cr. Appeal No. 32 of 1990**, the court held that;

“.....circumstantial evidence must satisfy 3 tests;

(i) The circumstances from which an inference of guilt is sought to be drawn must be cogent and firmly established.

(ii) Those circumstances should be of a definite tendency on erringly pointing towards guilt of the accused.

(iii) The circumstances take cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probably the crime was committed by accused and none else.”

39. The question is does the chain of evidence on record implicate the accused as the only person who had opportunity and motive to kill deceased that if he fails to rebutt the same he would be convicted?

40. The cause of death is not disputed or doubted. The postmortem produced and photographs manifestly show the injuries which decimated the deceased. ***“The multiple injuries to head and throat caused by sharp object (panga) caused death.”*** The doctor opined.

41. PW8 Dr. Makau Alex testified to that extent and as much. PW1, mother of deceased testified on disagreement between deceased and accused over her continued education accused was deceased boyfriend.

42. Accused had even taken away her goods including her clothings as he insisted to go to their home for her father to confirm whether deceased will marry accused or not. His father was away, the accused was annoyed. The accused when called by PW1 denied taking deceased goods.

43. The brother to accused intervened via talking to accused but he did not disclose where clothes were. PW1 suggested deceased be bought clothings but accused later called PW1 and told her that deceased burnt her goods outside the gate. She showed her mother (PW1) the remnants of burnt items.

44. The accused, PW1 and his brother bought her new clothes. That night deceased went to her place. Her mother PW1 returned to her home following day at 8.00 p.m. She got report from accused call telling that accused had injured deceased badly and she in hospital.

45. Then later PW1 was informed the deceased had passed away by the same person. She went to the mortuary the following day and shown her daughter's body and confirmed seeing the injuries on head and the hand.

46. On cross examination, she said that she did not leave her daughter in peace. The issue of burnt clothes was partly solved. The source of

problem was the marriage. She said Kieti PW3 brother to accused told her accused injured deceased.

47. PW2 testified on how he rushed accused on the same day. Deceased was murdered at 7.30 p.m. rushed to hospital as he had attempted suicide by taking poison.

48. PW3 Kieti Bati accused elder brother testified how previous day accused and deceased went to his house over issue of their disagreement. Accused denied taking accused clothing/goods. They were also quarrelling over call deceased had received. PW1 called and said they were not able to solve the issues of the two.

49. After PW3 testified to both, he was not able to resolve their problems and advised they refer matter to police. Deceased said the accused burnt her items in the suit case. The accused said he would buy her few clothes.

50. The following day at 7.00 p.m., PW3 got call from a member of public stating that deceased had been stabbed. PW1 rushed to deceased house where he found her on the floor with cut on the head. He also rushed to the accused place who had first called him and found him unconscious and used a taxi to rush him to hospital. He reported both incidents when accused herein he said, **“he had enough of this world.”**

51. On cross examination he suspected accused took poison and he also found a white bottle at the accused table. The call on stabbing and from accused came closely together and also the distance between accused and deceased places was only 4 minutes apart.

52. PW5 Judith Musenya saw accused at deceased door at about 7.00 p.m. minutes before attack. He knew both as he was neighbour to deceased. At 8.30 p.m., her neighbour Mbithe told that she heard some sounds from deceased house as if she was unwell. As door was locked from inside they opened and found deceased on the floor injured. They called relatives of the deceased.

53. The chain of evidence by the above witness ranging from quarrel to the behavior of the accused up to his presence at deceased house minutes to her attack, puts a strong case which on *prima facie* basis can warrant conviction of accused if he keeps quiet on his defence.

54. He has to explain the circumstances leading to the death of deceased, his presence at her house minutes to attack and the reason he attempted suicide minutes after the deceased brutal attack.

55. The court therefore finds that the prosecution has established a *prima facie* case to warrant the putting of accused on his defence.

SIGNED, DATED AND DELIVERED THIS 20TH DAY OF NOVEMBER 2018, IN OPEN COURT.

C. KARIUKI

JUDGE