



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 31 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PAUL KARIUKI WAITHAKA.....ACCUSED**

**RULING**

**INTRODUCTION**

1. The issue before me is whether or not a prima facie has been made out to require the accused to be put on his defence in terms of section 306 (2) of the Criminal Procedure Code (Cap. 75) Laws of Kenya.
2. The answer to the issue lies in the analysis of the prosecution evidence in the light of the applicable law. It should be borne in mind that the accused is charged with murder contrary to section 203 as read with 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased John Metamei Wapari. He pleaded not guilty to the charge.
3. The prosecution called four witnesses in support of the charge.
4. The accused pleaded not guilty.

**The case for the prosecution**

5. The prosecution called Tinga Ole Punyua (PW 3). PW 3 testified that the deceased lived in a wooden rafts and twigs house covered by plastics. Upon visiting the house of the deceased, he saw an axe and a sharpened ended wooden stick. He further testified that there was dew and was able to see foot prints from the house of the deceased to that of the accused.
6. When they arrested the accused, he wore a blood stained T-shirt and a pair of red long trousers. It was also the evidence of PW 3 that the accused suspected the deceased to be in a love relationship with his wife. As a result the accused sent people to tell the accused to stop interfering with his marriage.
7. According to PW 3, the motive for the killing of the deceased was due to the said love triangle.
8. Furthermore, the prosecution called Dr. Allan Soita (PW 2), who put in evidence the postmortem report in respect of the deceased as exhibit 1; on behalf of Dr. Ngulungu pursuant to the provisions of section 33(b) of the Evidence Act ( Cap 8) Laws of Kenya. The report showed that the deceased was aged 51 years old. The report also indicated that his brain was lacerated. The cause of death was due to severe head injury with skull fractures from a blunt and sharp object.
9. In addition to the foregoing witnesses the prosecution called James Wapari (PW 1), who on 2/5/2014, identified the body of the deceased to Dr. Ngulungu, who performed a postmortem examination on the body of the deceased.
10. Finally, the prosecution called NO. 70330 Cpl Roy Temoi (PW4), who was the investigating officer. He took over this case from the original investigating officer, PC Diba Halake. He produced the investigation diary as exhibit 3, being OB entry NO. 53 of 19/4/2014. The entry shows the deceased was found in a pool of blood at Emurun village in Ntulele location, with cut wounds on the face inflicted by a sharp object.

11. It is important to point out that all witnesses testified before Lady Justice Meoli, except No. 70330 Cpl Roy Temoi (PW 4), who testified before me. It is also important to point out that the prosecution were forced to close their case due to the refusal by the court to grant a further adjournment, after they had been granted a number of adjournments.

## **Submissions on no case to answer**

12. Following the close of the prosecution case, both parties were given opportunity to file written submissions. Only the defence counsel, Ms Muigai filed written submissions. The prosecution did not file written submissions.

## **Submissions by the defence**

13. Counsel for the accused filed written submission in which she urged the court to acquit her client. She submitted that the evidence against the accused is circumstantial in nature. In this regard she cited the decision of the High Court (Kasango, J) in *James Muriithi Njoroge v. R (2016) eKLR*, which in turn cited *Miller v. Minister of Pension (1947)* in which Lord Denning defined what is meant by proof beyond reasonable doubt. He stated as follows: “*it need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt but nothing short of that will suffice.*”

## **Issues for determination**

14. In the light of both the prosecution evidence and the applicable law, I find the following to be the issues for determination.

1. Whether or not a *prima facie* case has been made out so as to require the accused to be put on his defence in terms of section 306 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya.
2. What are the appropriate orders to be made in this case.

## **Issue 1**

15. I find after considering the totality of the prosecution evidence that the evidence of the accused is circumstantial in nature. According to *Ramanlal Bhatt v. R (1957) EA 332* a *prima facie* case is established when a tribunal properly directing its mind on the law and the evidence could convict, if no explanation is offered by the defence. It further stated that in assessing the evidence at that stage the court is not required to finally determine the credibility or the weight to be attached to the evidence; for that can only be done at the close of the trial. I find from the evidence that there is no direct evidence to connect the accused with the offence. I further find that the investigating officer did not lift the foot prints which started from the house of the deceased to that of the accused for comparison and analysis purposes. I further find that there is no evidence to show that the blood found in the clothes of the accused belonged to the deceased. The court is therefore left with strong suspicion which cannot be a basis for any evidentiary findings of fact that the accused caused the death of the deceased. I therefore find that the accused is not guilty of the offence charged in terms of section 306(1) of the Criminal Procedure Code.

## **Issue No. 2**

16. It therefore follows that pursuant to section 322(1) of the Criminal Procedure Code, the accused is hereby acquitted of murder.

17. He is therefore ordered to be set free unless otherwise held on other lawful warrants.

Ruling delivered in open court this 14<sup>th</sup> day of November, 2018 in the presence of Mr. Omwega for the state and Ms Mwigari for the accused.

**J. M. Bwonwonga**

**Judge**

**14/11/2018**