



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 72 OF 2017

REPUBLIC.....APPELLANT

VERSUS

STEPHEN MUSYOKI NYAMAI1ST RESPONDENT

LEAH MWENDE KISILI.....2ND RESPONDENT

JACKSON MUSYOKI NZIOKA.....3RD RESPONDENT

ELIZABETH MWIKALI KISILI.....4TH RESPONDENT

RULING

INTRODUCTION

1. The four (4) accused persons were charged with **Offence of Murder Contrary to Section 203 as read with Section 204 Penal Code Cap 63 Laws of Kenya.**
2. Particulars being that on the night of 14th/15th day of January 2014 at Kathongo Sub location, Ndauni Location of Kalawa Division, Mbooni East District, Makueni County murdered Janet Ndanu Musyoki.
3. The four (4) pleaded not guilty to the charge and the matter went into trial.
4. The prosecution called seven (7) witnesses to prove the charge.
5. PW1 Syombua Matheka was telephoned by a grand child who informed her of a matter in Musyoki's home. Musyoki is her son.
6. He proceeded to the same home of Musyoki and found Musyoki's wife hanging at the ceiling of the house. The deceased name was Janet Ndanu. She saw the body of the said deceased.
7. She telephoned the husband to the deceased who is her son and was in Nairobi and informed him of the situation at his home. She also informed the area chief who came with the police to the scene.
8. The police photographed the scene and took body to the mortuary.
9. On cross examination she confirmed finding the body of the deceased hanging. She did not know whether deceased had hanged herself.
10. PW2 Anna Mumbua Nzioka heard a child crying heading towards her. This was deceased's child. She asked the child why and she said I go and untie the deceased. She followed the child to their home where she found the door open.
11. From the door step she could see the body hanging from the roof. She saw the body was that of Janet Ndanu deceased.
12. She told the child they leave the scene. The child was 3-4 years old. She went with the child to her house. She sent her daughter to telephone PW1 who is her mother and also mother to the deceased's husband.
13. PW2 informed PW1 what had happened. PW2 also telephoned her brother who came back home. They went to the scene. PW1 telephoned sub-chief. The chief and police came to the scene. The police retrieved the body and took it to the mortuary.

14. PW3 Nzioka Nyutu Musembi said that he was telephoned by his sister Mutheu who asked him to go back home.
15. Upon arrival home, his wife Anna Mumbua Nzioka (PW2) informed him of the death of his brother's wife. He was informed that her body was found hanging in the house. He went to the scene and saw the dead body.
16. The chief and the police officers came to the scene. The police retrieved the body and took it to the mortuary. He identified 3rd accused as his son and 4th accused as his sister in law i.e. wife to his brother.
17. PW4 Joseph Musyoki Matheka says his mother PW1 telephoned him and informed him that his wife had been killed and body hanged in the house with the feet touching the ground.
18. He proceeded home from Nairobi where he resided with the first wife and found the body having been taken to the mortuary in Makueni Hospital.
19. He proceeded to the mortuary and upon observing the body he said she did not have visible injuries. The clothing she was wearing were dusty. The tongue was swollen and some blood stains were on the blouse. There was a bruise on the forehead. The blood stains on the blouse appeared to have been from the mouth.
20. His son who was four and half (4½) years old then had told police that his sister's son and his friend were the last people he saw with the deceased before he (his son) went to bed). He also narrated how accused persons were arrested.
21. On cross examination, he said he had two wives, one the 4th accused and the deceased. The 3rd accused had a cordial relationship with deceased as she used to give him casual work.
22. PW5 Esther Ndungi Musyoka said that on 14/01/2014 he saw his brother Musyoki Nzioka coming with a friend whose name she did not know. He went to his house.
23. On 15/01/2014 at 7.00 a.m., his cousin Samuel Musyoka came to their house screaming that his mother was hanging in the house.
24. PW5 mother went to the same house and confirmed it. She confirmed PW5's aunt was in fact hanging in the house. She (PW5) did not go to see the hanging body.
25. PW6 Mutuku Muasya identified the deceased body for post mortem purposes. She (deceased) was his daughter. PW7 David Kibet Cherop assisted in arrest of accused 2, 3, and 4.
26. In cross examination, he said he was not the investigation officer neither did he know why he arrested them. That testimony of 09/11/2016 was the last from the prosecution side. From that point onward matter came several times without prosecution availing doctor and the investigation officer.
27. On 19/11/2018, this court declined to indulge the prosecution with an adjournment as no witness was available, thus the prosecution closed its case.
28. The prosecution said it would rely on evidence on record that was tendered. However the defence did put in their submissions which the court considered in summary.

DEFENCE SUBMISSIONS

29. It is submitted that, the only issue is whether the prosecution has established a *prima facie* case against the accused for the accused persons to defend themselves.
30. The defence cites the case by Justice H. K Chemitei in **Republic –Vs- Nicholas Onyango Nyolo (2014) eKLR** where he held that:-

“There are three ingredients of the offence of murder which ought always to be established, namely:-

a) Proof of the fact and the cause of death of the deceased.

b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the “actus reus” of the offence and

c) Proof that the said unlawful act or omission was committed with malice afterthought – which constitutes the “mens rea” of the offence.”

31. It was submitted that, the evidence of PW1, PW2, PW3 and PW5 that the 3rd accused person and 1st accused person had visited the 3rd accused persons homestead on 13/01/2014. Then on the morning of 15/01/2014, the deceased was found hanging on the roof of her house.
32. On cross examination, the witnesses stated that it was normal for the 3rd accused to visit his home with friends. They further stated that

they don't know what caused the deceased's death.

33. It is also submitted that PW4 the husband to the deceased and also the husband to the 4th accused alleged that he accompanied the arresting police officers at Nairobi where the 3rd accused was arrested and identified the deceased's body together with PW6.

34. PW7 was the arresting officer only outlined how the accused persons were arrested.

35. The defence contends that the prosecution did not call the doctor who did the post-mortem neither was the postmortem report produced in court. Therefore, the cause of the death of the deceased herein is unknown and the prosecution failed to establish the cause of the death.

36. The question therefore is whether or not the death of the deceased was the direct consequence of an unlawful act on the part of the 3rd and 4th accused persons?

37. The defense humbly submits that the prosecution has failed to establish any link between the accused persons herein and the death of the deceased.

38. No single witness mentioned the 4th accused person while giving evidence and no single witness witnessed any commission or omission by the accused persons which may have led to the deceased's death. Actually, the court was never informed why the 4th accused person has been charged.

39. On the part of the 3rd accused person, the only evidence by the witnesses was that he had visited his home on 13/01/2014 which was confirmed by PW1 and PW2 that it was not a strange thing and neither was it strange for him to visit with friends.

40. Having failed to establish both direct and circumstantial evidence pointing to the commission of the crime by the accused, the prosecution has failed to establish the main ingredient of "**actus reus**" against the accused persons herein and as such, the issue of "**mens rea**" cannot arise in the circumstances.

41. Further, the investigating officer has failed to testify and give evidence as to what led to the arrest eventually charges against the accused persons.

42. The prosecution has failed to establish any case against the accused persons which can sufficiently require them to make a defense.

43. Further, if the accused persons are put on their defense and they opt to keep silent, there is no evidence to sustain any conviction against the accused persons.

44. They therefore urge this Honourable Court to dismiss the charges herein and proceed to acquit the accused persons under Section 210 of the Criminal Procedure Code.

ANALYSIS AND DETERMINATION

45. The court in ruling on whether to put accused persons on their defense relies on the guiding principle set out in the case of **Bhatt –Vs- Republic EALR 1957.**

46. The ingredients of offence charged are the establishment of the cause of death as by unlawful Act with malice aforethought and the identification of the perpetrator.

47. In the case of **Republic –Vs- Nicholas Onyango Nyolo (2014) eKLR** the court held that:-

“There are three ingredients of the offence of murder which ought always to be established, namely:-

i. Proof of the fact and the cause of death of the deceased.

ii. Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused which constitutes the ‘actus reus’ of the offence and

iii. Proof that the said unlawful act or omission was committed with malice afterthought – which constitutes the ‘mens rea’ of the offence.”

48. The cause of death herein apparently is by hanging from the laymen's language. No professional opinion as to the cause of death was rendered as the doctor never testified nor was postmortem produced.

49. Thus the first core ingredient of murder was not proved.

50. On the 2nd limb, even if the deceased was murdered, which is not proved, there is no circumstantial or direct evidence connecting any of the accused persons with the alleged murder. All the witnesses PW1, PW2 and PW3 talk of seeing the deceased body hanging in the house.

51. None of them talked of any visible injuries. PW4 the deceased's husband is the only witness who talked of seeing a bruise on the deceased forehead and swollen tongue.

52. None of the police officers who went to the scene testified as to what they observed on the body.

53. The alleged bruise and swollen tongue were not professionally assessed as to their cause and the age of the injuries. The cause of death is yet to be known.

54. The only officer who testified is PW7 who said that he was only instructed to arrest the accused persons and did manage to arrest PW2, PW3 and PW4 but did not know why he arrested them.

55. The investigation officer was not called to tell court as to what made him charge the four (4) accused persons. No exhibit pictures, rope etc. were produced yet they mentioned in the testimony in court by some witnesses.

56. The court thus reaches a verdict that no sufficient evidence has been produced to warrant the putting of the accused persons on their defence.

57. Court therefore dismisses the charges herein and proceeds to acquit the accused persons under Section 210 of the Criminal Procedure Code.

58. The accused persons shall be set at liberty forthwith unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 17TH DAY OF DECEMBER, 2018 IN OPEN COURT.

HON. C. KARIUKI

JUDGE