



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CRIMINAL CASE NO.32 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MAKALI MUTISO.....1ST ACCUSED

EMMY MUSIMBI.....2ND ACCUSED

RULING

The accused persons David Makali Mutiso and Emmy Musimbi were charged jointly with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the night of 8th and 9th of May 2015 at Kamulu estate – Kitengela Township the accused jointly with others not before court murdered Nicholas Kamonde Joseph hereafter referred as the deceased.

The accused persons denied the charge and a plea of not guilty was recorded. The matter was set down for trial. The 1st accused was represented by Mr. Kivuva advocate while the 2nd accused was represented by Mr. Ochieng advocate. The state was represented by Mr. Alex Akula a senior prosecution counsel. The prosecution called a total of thirteen witnesses to prove the ingredients of the offence beyond reasonable doubt under section 203 as read with section 204 of the CPC.

In order for an accused person to be found guilty of the offence of murder the prosecution must prove the following elements:

- (1) That the deceased died.**
- (2) That the death of the deceased was unlawful.**
- (3) That there was malice aforethought on the part of the accused.**
- (4) That the accused directly or indirectly participated in the commission of the crime.**

At the close of the prosecution case learned counsels submitted for a no case to answer motion under section 306 (1) of the CPC. Learned counsel Mr. Ochieng for the 2nd accused filed written submissions. Mr. Kivuva for the 1st accused also filed written submissions on a no case to answer.

Mr. Ochieng submitted that the only evidence against the 2nd accused is that of PW3. Hence in his view there was no need to put the 2nd accused on her defence. Learned counsel contended that PW3 testimony cannot be relied upon because it lacks corroboration.

Mr. Kivuva submitted that the prosecution has not made out a prima facie case against the 1st accused. He reiterated the evidence of PW3, PW4, PW5, PW6, PW7, PW8 and PW12 who stated that the injury upon the deceased was inflicted by a caretaker. Counsel Mr. Kivuva submitted that the credibility of the prosecution witnesses PW3, PW8 is in issue. He invited the court to be cautious when relying on their testimony which was impeached during cross-examination. Counsel Mr. Kivuva further submitted on identification of the 1st accused. He based his reasoning that there was no identification parade conducted by the police.

Learned counsel invited the court to disregard dock identification by the prosecution witnesses. He referred to a proliferation of decisions for this court to consider on various legal propositions; *Republic v Domorita Lodur [2016] eKLR, Dickson Mwangi Munene & Another v Republic [2014] eKLR, Republic v Cheya [1973] EA 500, Ajode v Republic [2004] eKLR 81, Republic v Bernard Obanga Obunga [2015] eKLR, R.T Bhatt v Republic [1957] EA 332 – 334.*

In closing his submissions Mr. Kivuva submitted that from the evidence there was no sufficient evidence to place the 1st accused on his defence. He prayed for the court to acquit the accused.

The question which begs for an answer is whether the accused persons have a case to answer or can be put on their defence. A submission on a no case to answer under section 306 (1) may be properly upheld:

(1) When there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence.

(2) When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it.

It is now well established principle of law that a prima facie case is established when the evidence adduced is such that a reasonable tribunal properly directing its mind on the law and evidence could convict the accused persons if no evidence or explanation was set up by the defence (*R.T Bhatt v Republic (Supra)*).

At this stage of the proceedings the standard of proof is not that of beyond reasonable doubt. That can only be tested when the court has heard the other side. If the evidence is so discredited or worthless a finding of guilty cannot be made, the court is mandated to terminate the trial and discharge the accused person.

In the case before me the prosecution has presented evidence from thirteen witnesses. Their testimonies have been a subject of cross-examination by the defence counsel. It is essential to note that the accused persons case involved an incident which occurred within the residential estate of Kamulu where they lived. The prosecution case through the testimony of PW3 and PW8 has alluded to the fact that the two accused persons had something to do with the offence in which the deceased was killed. The postmortem report by Dr. Njeru confirmed that the deceased had sustained extensive haematoma and fracture to the occipital region. His death was due to head injury due to blunt trauma.

It is also clear from the government analyst report PW4 that there is a correlation between the blood stained piece of wood recovered from the scene and the death of the deceased. This link was established through a DNA profile of blood sample of the deceased and the blood stains extracted from the piece of wood. The prosecution went further to identify the accused persons and placed them at the scene of the crime.

I have carefully applied my mind to the law and the evidence at this stage. I find that the prosecution has met the test of a prima facie case from the totality of the evidence to warrant each of the accused to proceed further and answer the charge.

For these reasons, section 306 (2) of the CPC explained to the accused on rights available to state their case.

Dated, signed and delivered in open court at Kajiado on 9/1/2017.

.....

R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Ochieng for the 2nd accused and holding brief for Mr. Kivuva for the 1st accused

Mr. Alex Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant