



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE NO. 34 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS MUMO MUASYA,1ST ACCUSED
ZACHARY MUOKI MWANZA.....2ND ACCUSED
JOHANNES MUTISYA MULUILA.....3RD ACCUSED
JOHNSON NGUNGI NGUMBI.....4TH ACCUSED

RULING

Thomas Mumo Muasya, the 1st Accused person; Zachary Muoki Mwanza, the 2nd Accused person; Johannes Mutisya Muluila, the 3rd Accused person; and Johnson Ngungi Ngumbi, the 4th Accused person (hereinafter the 1st, 2nd, 3rd and 4th Accused persons), are charged with two counts of murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the charges as stated in the information from the Director of Public Prosecutions dated 27th May 2010 are that on 10th June 2007 at Muambani village, Kambi Ya Mawe sub-location, Wote Location, within Makueni District of Eastern Province, the said accused persons jointly with others not before the murdered Anold Katambo Kimatu and also murdered Stephen Makewa Munyao (hereinafter referred to as “the deceased persons”).

All the Accused persons pleaded not guilty to the offence on 11th November 2010, The trial commenced before Dulu J. on 25th July 2012, and the learned Judge heard three (3) prosecution witnesses. The learned judge was subsequently transferred, and the trial then proceeded before Mutende J. on 23rd April 2013, who took over its conduct after complying with the provisions of section 200 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya), and heard the four prosecution witnesses.

I took over the conduct of the trial on 18th January 2016, and after complying with the provisions of section 200 of the Criminal Procedure Code, the Accused persons submitted that they wanted the case to proceed from where it had stopped. I heard prosecution witnesses and ordered that the prosecution case be closed after the Prosecution was not able to avail the remaining witnesses, and that the parties file submissions on case to answer.

Nzioki Mutua & Associates, the learned counsel for the Accused persons filed submissions dated 26th September 2016 wherein they analysed the evidence by the prosecution, and urged that that none of the witnesses put the Accused persons at the scene where the deceased persons were being beaten up and burnt. Ms Rita Rono, the learned prosecution counsel, filed submissions dated 16th November 2016

wherein the evidence by the prosecution was summarized and it was contended that the Prosecution had established a *prima facie* case against the accused persons, and that the accused person have a case to answer and be put to defense.

After perusing the original and typed proceedings and submissions made by the prosecution and defence counsel, I am called upon to make a ruling pursuant to section 306 of the Criminal Procedure Code as to whether to find the Accused persons not guilty or to put them on their defence. The issue before the Court therefore is whether the evidence brought by the prosecution establishes a *prima facie* case to warrant putting the accused persons on their defence.

The threshold for a finding of a *prima facie* case has been set out in several cases among them **Ramanlal Trambaklal Bhatt v R [1957] EA 332**, **Wibiro alias Musa v R [1960] EA 184** and **Anthony Njue Njeru v Republic [2006] eKLR**. The law in this regard is that although a court is not required at this stage to establish that the prosecution has proved its case beyond reasonable doubt, it must nonetheless be satisfied that a reasonable tribunal directing its mind to the law and the evidence could convict if no explanation is offered by the defence.

In my analysis of the evidence brought by the prosecution, I am mindful that section 203 of the Penal Code defines the offence of murder as follows

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

Therefore in order to establish the offence of murder the prosecution is required to tender evidence sufficient to prove the following three ingredients:

1. Evidence of the fact and cause of the death of the deceased.
2. Evidence that the deceased met his death as the result of an unlawful act or omission on the part of the accused.
3. Evidence that the said unlawful act or omission was committed with malice aforethought.

Malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not.
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not.
- c. Intent to commit a felony.
- d. 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.

I have analysed the evidence brought by the prosecution and arguments by the parties in light of the threshold that needs to be met to establish a *prima facie* case of murder. Evidence was called by the prosecution that established that the cause of death of Stephen Makewa Munyao was 100% Degree deep 3rd degree burns with resulting hypoxia. The cause of death of Arnold Katambo Kimutu was cardiopulmonary arrest secondary to exsanguination from wounds and fractures sustained on the left tibia and associated burns. Emmanuel Leiposha who was PW9 gave evidence in this regard, and produced the reports of the post-mortem conducted on the two deceased persons as Prosecution Exhibits 3A and 3B.

PW4 who was Jacinta Wavinya Munyao who was the mother of Kimatu Benson, one of the deceased persons testified that she was informed that her son had been assaulted and went to identify his body at

the mortuary. PW5 who was P.C. Joseph Mutie, also took photographs of the scene and of the deceased persons which he produced in Court as the Prosecution's Exhibits 1 and his report as Exhibit 2.

Three of the witnesses who gave evidence, namely Jackson Nzioki Wambua (PW1); Benson Kiatu Mwangangi (PW3), the father of Katambo Kimatu one of the deceased persons; and a witness who stated that his name was Joseph Ngungi Kamende (PW6), are the ones who connected the accused persons to the crime. PW1 testified that on 20th June 2007 he was at home at Unoa when the deceased visited him and that they went to the home of one Mutuku Kilonzo at Muambani for a drink whereupon they were confronted by the 1st Accused, 2nd Accused and 4th Accused who alleged they were thieves, and tied the two deceased persons and started beating them. PW1 testified that he thereupon escaped and went to Mwala until March 2008, and that he did not see who burnt the deceased persons.

PW3 testified that he went to the scene of the crime from a distance after being informed that his son had been arrested, and that he stood 200 metres away and one of the people he recognized at the scene was the 3rd Accused. He stated that he saw smoke from a fire.

The evidence by PW6 was that he stays at Unoa and that on 7th June 2007 he encountered members of the public beating up the two deceased persons, and he stated that the persons who were beating the deceased were known to him including the 1st, 2nd, 3rd and 4th Accused persons. That the 3rd Accused then came and cut one of the deceased's leg with a panga. The witness testified that the assailants said the deceased persons were thieves, and that he then left the scene and went home. Upon cross-examination, it was then revealed that the person who had recorded a statement was not PW6, but one Joseph Ndunda Kamende, who the witness stated was his brother. The witness was stepped down to produce his identification, but was not recalled to do so.

I note that there were material inconsistencies in the evidence of these witnesses as to the date the alleged crime occurred, with PW1 stating it was on 20th June 2007, and PW6 stating that it was 7th June 2007, while the information indicates the date of the offence as 10th June 2007. Other than PW6 whose identity is not known and whose evidence is therefore of no probative value as his connection with the crime is not known as he never recorded a statement, the other witnesses did not observe the Accused persons actually commit the acts that caused the death of the deceased persons, namely the burning and fractures. PW3 in this regard only testified that he saw the 3rd Accused at the scene but did not testify as to any acts that the said accused person was undertaking. PW1 was categorical that he was not there when the deceased persons were killed.

The evidence of the remaining witnesses was also contradictory. PW2 who was Boniface Nzioki Musyoki who testified that he knew the 1st and 4th Accused persons and saw the deceased persons being burnt by the side of road, further testified that he did not see the 1st and 4th Accused persons at the scene. PW8 Francis Baraza an ex-Inspector of Police and who was the investigating officer of the case before he retired, stated that he did not get any information as to the persons who killed the deceased persons, and that of the Accused persons he only knew the 3rd Accused who was a community policing member. He further testified that the accused were arrested after he had retired.

I therefore find that the evidence brought by the prosecution is insufficient to put the 1st, 2nd, 3rd and 4th Accused persons on their defence, and I hereby enter a verdict of not guilty under section 306(1) of the Criminal Procedure Code against Thomas Mumo Muasya, the 1st Accused person; Zachary Muoki Mwanza, the 2nd Accused person; Johannes Mutisya Muluila, the 3rd Accused person; and Johnson Ngungi Ngumbi, the 4th Accused person. The said 1st, 2nd, 3rd and 4th Accused persons are accordingly acquitted and are set free unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 6th DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE