



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 9 OF 2013

REPUBLICSTATE

VERSUS

MERCY WACERA ITHEGE.....ACCUSED

RULING

The accused has been charged with **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that

“On the 3rd day of February, 2013 at Maina Village Nyahururu District within the Laikipia County, murdered RICHARD MWANGI NGENDO”

The accused pleaded ‘**Not Guilty**’ to the charge. Her trial commenced on 4/6/2014 before **Hon. Lady Justice Hellen Omondi**, who heard the first five (5) witnesses in the case. Following the transfer of the Honourable Judge to Bungoma High Court I took over the case and recorded the evidence of the last witness. A total of six (6) witnesses testified in the case.

The prosecution case is that on 3/2/2013 at about 5.30pm the deceased was found in a pool of blood inside his house at Maina Village. The accused who was the deceased’s wife was found outside muttering that she had cut her husband. The deceased was rushed to hospital but unfortunately he succumbed to his injuries and died. The accused was taken into custody and was eventually charged with the offence of murder.

At the close of the prosecution case this court must make a determination on whether the evidence adduced by the prosecution is sufficient to prove a prima facie case sufficient to warrant calling upon the accused to defend herself.

The definition of what constitutes a ‘**prima facie**’ case is to be found in the case of **RAMANLAL T BHATT Vs REPUBLIC [1957] E. A 333** where it was held 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”

In this case the fact of the deceased’s death was readily proved. **PW1 ESTHER MUKAMI MULANGO, PW2 MAGADALENE WANGARI** and **PW3 ALICE NJAMBI KURIA** all testified that they saw the body of the deceased lying in a pool of blood inside his house.

PW4 DANIEL KANYORA GACHAU and **PW5 ISSAC MAINA GACHAU** both brothers to the deceased both testify that they witnessed the autopsy and identified the body of the deceased to the doctor. All these witnesses who knew the deceased very well identify him as “**Richard Mwangi**”

Evidence on the cause of death is provided by the testimony of **PW6 DR. JOSEPH KARIMI** a medical doctor based at Nyahururu District Hospital who produced the post-mortem report **P. Exb 1**. Upon examination the deceased was found to have several deep long cuts to his upper body with fractures to his skull and brain contusion. The cause of death was opined to be ‘**massive blood loss, severe head injuries due to trauma**’. This was expert medical opinion evidence which was not challenged or controverted in any way. I find that the deceased met his death as the result of a vicious attack on his person.

Having proved the fact and cause of death the prosecution must go further and adduce evidence to prove that it was the accused who so attacked the deceased and inflicted the fatal injuries.

There was no eye-witness to the incident. There was no witness who saw the accused attack or cut the deceased. **PW1, PW2** and **PW3** all came to the plot after the incident had occurred. None of them is able to tell what happened.

PW1 told the court that she heard the accused say that she had killed her husband. This would amount to a confession. The law regarding admissibility of confessions is very clear and is set out by Section 25A of the Evidence Act Cap 80 Laws of Kenya which provides as follows-

“25A (i) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in open court before a judge, a magistrate or before a police officer (other than the investigating officer) Inspector of Police and a third part of the person’s choice”

This alleged **“confession”** was not made in open court. **PW1** was not a person qualified to receive or record a confession. There was no evidence of any statement recorded by a duly qualified police officer in which the accused confessed to her guilt. I therefore find that this statement allegedly made by the accused is not admissible and cannot be taken by this court to amount to proof of her guilt.

The prosecution may be seeking to rely on circumstantial evidence as proof of the involvement of the accused in this case. The accused was the wife of the deceased and the deceased was found lying in a pool of blood inside his house. Suspicion would obviously fall on his wife.

However, it has been severally held that suspicion alone no matter how strong cannot form the basis for a finding of guilt. **[see JOAN CHEBICHII SAWE Vs REPUBLIC [2003] eKLR]**

In the case of **JUDITH ACHIENG OCHIENG Vs REPUBLIC [2009] eKLR** the Court of Appeal sitting in Kisumu whilst discussing circumstantial evidence held as follows:-

“..... It is settled law that when a case rests entirely upon circumstantial evidence such evidence must satisfy three tests:-

(i) The circumstances from which the 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 the 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”

I find that the facts of the present case have not met the above standards. Nobody witnessed the accused and deceased engaging in any fight or altercation. The accused was not seen assaulting the deceased. The investigating officer failed to testify to explain to court the reasons why he charged the accused. On the basis of the test in the **Bhatt Case** (Supra) if the accused elected to keep silent in her defence the evidence on record would not be sufficient to warrant a conviction.

Based on the foregoing, I find that no prima facie case has been shown. I enter a verdict of **‘Not Guilty’** and I acquit the accused of this charge of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 3rd day of February, 2017

Mr. Wambeyi for Accused

Maureen A. Odero

Judge