



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL CASE NO 2 OF 2016**

**REPUBLIC**

**VERSUS**

**ALEX MUTUA KYALO**

**RULING**

1. The Accused person herein, Alex Mutua Kyalo was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were as follows:-

**“In between (sic)the night of 11<sup>th</sup> April 2016 and morning of 12<sup>th</sup> April 2016 at Marodo Village in Taveta Sub County within Taita Taveta County, jointly with others not before the court murdered BONIFACE MWONI MUSYA.”**

2. On 8<sup>th</sup> February 2017, the Prosecution closed its case after calling a total of five (5) Prosecution witnesses whereupon the court directed that counsel for both the State and the Accused person file their respective Written Submissions on the question of whether or not the Accused person had a case to answer.

3. The Accused person filed his Written Submissions dated 15<sup>th</sup> February 2017 on even date. The State’s Written Submissions were dated 27<sup>th</sup> February 2017 and filed on 28<sup>th</sup> February 2017.

4. When the matter came up on 28<sup>th</sup> February 2017, both the counsel for the State and counsel for the Accused person asked the court to rely on their respective Written Submissions, which they did not highlight. The Judgment herein is therefore based on the said Written Submissions.

**THE PROSECUTION’S CASE**

5. The Prosecution submitted that the evidence it had presented before this court had proved the ingredients of the offence of murder as contemplated in Section 203 of the Penal Code Cap 63 (Laws of Kenya) :-

**a. Proof of the fact and cause of death of the deceased;**

**b. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the Accused person; and**

**c. Proof that the said unlawful act or omission was committed with malice aforethought.**

6. It, however, urged this court to analyse and determine the case herein purely on circumstantial evidence as it admitted that there was no direct evidence showing that the Accused person killed, Boniface Mwoni Musya (hereinafter after referred to as “the Deceased”).

7. It submitted that the principles of the application of circumstantial evidence were set out in the case of **GMI vs Republic [2013] eKLR** which echoes the *locus classicus* case of **R vs Kipkering Arap Koske & Another 16 EACA 135** (sic).

8. It was its submission that through their evidence it had demonstrated that a *prima facie* case had been established against the Accused to warrant him being put on his defence. It stated that what amounted to a *prima facie* case was given in the case of **Bhatt vs Republic [ 1957] EA 332** where the Court of Appeal expressed itself as follows:-

**“Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to suggesting that the Court would not be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question where there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight, sufficient to put the accused person on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true as Wilson J said that the Court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively: That determination can only be made when the case for the defence had been heard. It may not be easy to define what it meant by “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.”**

9. It was its submission that the evidence of Christopher Meleji Sekiondo, Elizabeth Nthambi, Dr Kangona Gitau, Sagaru Mloloi and No 35917 Corporal Ndereba (hereinafter referred to as “PW 1”, “PW 2”, “PW 3”, “PW 4” and “PW 5” respectively) were all cogent and consistent in explaining in detail what happened between 11<sup>th</sup> April 2016 and 12<sup>th</sup> April 2016 and they placed the Accused person at the scene of the incident.

10. It asked this court to consider the following observations it said directly pointed to the guilt by the Accused person:-

- a. THAT the deceased, Accused person and the two workers were to sleep at the farm house for the period they were to till the land according to the agreement with PW 4.**
- b. THAT the Accused person and the two workers were the last people seen with the deceased on the evening of 11<sup>th</sup> April 2016.**
- c. THAT the deceased was found with deep cut wounds on the head on the morning of 12<sup>th</sup> April 2016 hence it was not a normal death.**
- d. THAT the Accused person and the two workers left the farm on the morning of 12<sup>th</sup> April 2016 under unclear circumstances and did not return.**

11. It therefore stated that the Accused person was duty bound to explain to this court why he left the farm on 12<sup>th</sup> April 2016 and what transpired on the night of 11<sup>th</sup> April 2016 which it said fell within the ambit of Section 111(1) of the Evidence Act Cap 80 (Laws of Kenya). It placed reliance on the case of **Julius Maina Ndirangu vs Republic [2001] eKLR** which it said was premised on similar facts in which the Court of Appeal stated as follows:-

**“We have no hesitation in coming to the same conclusion. The Appellant was arrested from a hideout in socks but no shoes suggesting that the shoes must have either dropped somewhere, in the course of his escape, or that he removed and dropped them somewhere to enable him escape with ease. He did not explain why he did not have his shoes on. That was a fact peculiarly within his knowledge. Likewise the appellant was duty bound to but did not explain why he had to carry a lot of money in his pocket. If as he said, the money was part of proceeds from his business in Nairobi, it was clearly a matter peculiarly within his knowledge why he did not first bank it or if it was not necessary to bank it, why he had to carry it along with him. Section 111(1) of the Evidence Act, Cap 80 Laws of Kenya places that burden on him.”**

12. It added that it was immaterial whether or not the Accused person had motive which made him carry out his unlawful actions as there was no requirement in law that a motive must be established by the prosecution. It submitted that motive and *mens rea* were totally distinct and separate concepts. It argued that the establishment of motive could assist to explain the reason for an act of murder but that the absence of the same did not negate a charge of murder.

13. It was categorical that it had demonstrated that a *prima facie* case had been established to warrant putting the Accused person on his defence and urged this court to so find.

### **THE ACCUSED PERSON'S CASE**

14. On his part, the Accused person averred that PW 2 never testified of having seen him murder the deceased and that in fact, none of the witnesses testified of having seen him kill the deceased. He said that her evidence was that she last saw him, the deceased and the other two (2) co-workers on 11<sup>th</sup> April 2016 at 6.00 pm and did not see them come back to their house and that the next time she saw the Accused person was on 12<sup>th</sup> April 2016 at 6.00 am.

15. He added that save for the deceased person, PW 4 did not know his co-workers and it may very well have been that he was not with his co-worker on the morning PW 4 contended he had seen him on 12<sup>th</sup> April 2016 at 8.00 am. in the morning at 8.00 am.

16. He pointed out that the Prosecution failed to confirm his assertions that he left the farm to visit a patient who had been admitted in hospital. He submitted that he was under no obligation to offer any defence at all and that if he opted to adduce any evidence, the Prosecution's case would collapse.

17. It was his submission PW 5 had in fact stated that he thought he was telling truth and that the only reason he charged him with the murder of the deceased was merely because his co-workers ran away. He was emphatic that this was a case of murder which required that there had to be direct evidence to link him to the deceased's death.

18. He argued that in view of the fact that there was no circumstantial evidence linking him to the deceased's death, he ought to be acquitted of the charge that had been preferred against him as there was no sufficient evidence warranting him to be put on his defence.

### **LEGAL ANALYSIS**

19. The principles of the application of circumstantial evidence in the cases of **GMI vs Republic (Supra)** and **Republic vs Kipkering Arap Koske & Another (Supra)** are as follows:-

**a. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;**

**b. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused person; and**

**c. 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 person and no one else.**

20. This court therefore carefully perused the evidence of all the Prosecution witnesses to establish whether or not the Prosecution had established a case based on circumstantial evidence seeing that none of the witnesses testified on having seen the Accused person cause the deceased's death. PW 1 testified that the deceased and the Accused person worked on his farm occasionally on casual basis. He stated that on 11<sup>th</sup> April 2016, he went to the farm and found the deceased, the Accused person and two (2) workers who were not known to him

21. He further testified that on 12<sup>th</sup> April 2016, he was at his other farm when PW 2 called and informed him that one of the workers he had hired to work on his farm had been killed. He said that when he got to his farm, he found the deceased with his head nearest to the door of the kitchen. He confirmed having been present when the Post Mortem examination was conducted on the deceased.

22. PW 2 was a neighbour. Her evidence was that she last saw the deceased, Accused person and the other two (2) workers at about 6.00 pm on the night of 11<sup>th</sup> April 2016. She said that she saw the Accused person and one of the two (2) workers on the morning of 12<sup>th</sup> April 2016 at about 6.00 am and the Accused person told her that there had been a scuffle the previous night. She said that she called PW 4 at about 11.00 am to inform him about the scuffle and he requested her to check on the other workers. It was her evidence that she stumbled upon the deceased's body when she went to the farm house to check on the said workers.

23. In her Cross-examination, she stated that the Accused person did not tell her that there had been a fight the previous night but she contended that they were carrying pangas, which she said she was not sure if they had blood.

24. PW 3 confirmed that the cause of the deceased's death was intra-cranial haemorrhage with severe head injury secondary to assault secondary to a fractured skull and brain exteriorisation. This was evidence that the deceased did not die of natural causes.

25. PW 4 testified that he met the Accused person and his co-worker on 12<sup>th</sup> April 2016 at about 8.00 am and they told him that they were going to visit their colleague who they had been told had been admitted at Taveta Hospital. His evidence was that the Accused person and his co-workers would work at his farm for about two (2) weeks whereafter he would return them to their houses because it was far for them to walk. He confirmed that the Accused person and the deceased lived in the separate adjoining rooms in the farm with each of the other co-workers living with them.

26. PW 5 reiterated the evidence the other Prosecution witnesses adduced in court. He stated that he interrogated the Accused person who did not give him a reason to show that he was not involved in the deceased's death. He testified that the Accused person was found hiding in his house at Bura Ndogo at night which was evidence that he was guilty of the offence he had been charged with.

27. During his Cross-examination, he admitted that it was only the Accused person, the deceased and the two (2) co-workers who could explain what happened on that material night and he thought the Accused person was speaking the truth when he told him that he was drunk and went to sleep in his room but that when he woke up in the morning he found the deceased dead. He added that the Accused person had informed him that he had failed to report the incident because he was scared. In fact, he had also suggested that there was a possibility that the deceased could have been killed by the other two (2) workers and not by the Accused person.

28. It was not lost to this court that on 5<sup>th</sup> September 2016 the Prosecution informed this court that it was contemplating entering a *nolle prosequi*. The matter was thus adjourned several times on the ground that instructions to enter a *nolle prosequi* were being awaited until 16<sup>th</sup> November 2016 when the said counsel

indicated that she had not received instructions to terminate the case as aforesaid and would therefore be proceeding with the hearing of the case herein.

29. As was rightly stated by the Accused person, he was under no duty to explain to the court what happened at the farm on the material night. There was no doubt in the mind of this court that if he was put on his defence, he would repeat the same story he gave PW 5. Indeed, if he opted to remain silent as it was his constitutional right to do so, the Prosecution would remain in the same spot and would be unable to explain exactly what happened on that material night.

30. Notably, PW 5 was clear in his testimony that it was only the Accused person, the deceased and the other two (2) co-workers who could tell what transpired on that material night. He was categorical that he believed the Accused person was speaking the truth. His assertion that he thought the Accused person was lying when he told him that he did not report the incident because he was scared thus baffled this court as he was sending mixed signals.

31. Indeed, it was not the Accused person's responsibility to give a reason that he was not involved in the deceased's murder. In fact, the Prosecution ought to have tendered sufficient evidence implicating the Accused Person which he ought to have disproved as envisaged in Section 111(1) of the Evidence Act. The fact that PW 4 took time to locate the Accused person's house where they eventually found him at 8.00 pm on the same day of 12<sup>th</sup> April 2016 was not sufficient for this court to have drawn inference of the Accused person's guilt as he may very well have gone to his home on other business other than running away. In addition, if he had gone to his house after he discovered the death of the deceased as had been contended by PW 5 was also not sufficient reason for this court to have inferred guilt on the part of the Accused person.

32. Going further, this court also noted that there was an explained period between 6.00 am and 8.00 am when PW 2 and PW 4 respectively said they each saw the Accused person and his co-worker. There was no evidence that was led by the Prosecution to close this gap on how far the Accused person and his co-worker were from the farm to explain this two (2) hour gap.

33. Left as it is, this court found that this was a material gap that it could not ignore. This is because it was not reasonable to expect a person who had committed a murder would aimlessly hang around the vicinity of the area he had committed a heinous crime more so if he had been seen living the house the murder was said to have been committed the same morning instead of absconding. It is unlikely that a guilty person would put himself in a situation that would lead to his arrest.

34. In addition, PW 2's evidence that the Accused person and his Co-worker were armed with pangas appeared to this court to have an exaggeration as the same only emerged during Cross-examination. If indeed, PW 2 and PW 4 saw the Accused person and his co-worker as they contended, then there was need to have been a plausible explanation to show where the other co-worker who was not with them, was that morning.

35. Appreciably, an accused person ought not to be put on his defence if at the close of the prosecution's case, inference of his guilt cannot be remotely inferred. Circumstantial evidence can only be accepted when an Accused person's guilt can be inferred based on the evidence adduced by the prosecution in which case it can only be displaced by an Accused person giving his side of the story.

36. Clearly, this was not a case that was based on circumstantial evidence as had been contended by the Prosecution. Its evidence was purely speculative and based on mere suppositions and suspicions of what may have transpired on the material night. Whereas it was not required to demonstrate that the Accused person had any motive to unlawfully cause the deceased's death, it was obligated to demonstrate from the evidence of its witnesses that there was malice aforethought on the part of the Accused person.

37. Having perused the evidence that was adduced by the Prosecution, the Written Submissions and the case law that was relied upon by the State, this court came to the firm conclusion that the Prosecution did not adduce sufficient evidence that would satisfy the ingredients of malice aforethought as defined in

Section 206 of the Penal Code to warrant the Accused person being put on his defence.

38. It is unfortunate that no one will ever know exactly what happened to the deceased. Putting the Accused person on his defence to fill the gaps of the Prosecution case or as the Prosecution opined so that he can tell the court what exactly happened would be shifting the burden on him to show that he did not cause the death of the deceased when it had clearly not discharged its legal burden herein. This would be against the tenets of rules of natural justice that a person is presumed innocent until proven guilty based on evidence that has been presented before a court by a prosecutor.

39. The burden of proof had not shifted to the Accused person as was envisaged in the case of **Julius Maina Ndirangu vs Republic** (Supra) and in Section 111(1) of the Evidence Act that provides as follows:-

**“When a person is Accused person of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person Accused person shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the Accused person in respect of that offence.”**

40. In a nutshell, the Prosecution was unable to demonstrate that the deceased met his death as a result of the unlawful acts or omissions on the part of the Accused person or that the alleged unlawful acts or omissions were committed with malice aforethought or that he failed to prevent the unlawful death of the deceased.

41. Appreciably, if the Investigating Officer had his own doubts as to the role of the Accused person in the deceased's death, who was the court to find that there was an iota of evidence against him and find that the Prosecution had established a *prima facie* case against him to warrant him being put on his defence ?

## **DISPOSITION**

42. For the foregoing reasons, this court has no option but to find that the Accused person was not guilty of the offence that he had been charged with. This court therefore orders and directs that the Accused person be and is hereby acquitted under Section 306(1) of the Criminal Procedure Code and that he be set free forthwith unless he be held for any other lawful cause.

43. It is so ordered.

**DATED and DELIVERED at VOI this 4<sup>th</sup> day of May 2017**

**J. KAMAU**

**JUDGE**

In the presence of:-

Oduor h/b for Muthami-for Accused person

Miss Anyumba-for State

Josephat Mavu- Court Clerk