

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 14 OF 2011

REPUBLICPROSECUTOR

VERSUS

MWEMA MWEU KIMWELI1ST ACCUSED

VINCENT SILA JONA.....2ND ACCUSED

KYALO MUSYOKA3RD ACCUSED

RULING OF THE COURT

1. The Three accused persons herein **MUEMA MWEU KIMWELI, VINCENT SILA JONA** and **KYALO MUSYOKA** have been charged with a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on unknown date between 8th and 14th January, 2011 at Kathyaka sub-Location, in Kibwezi District within Makeni County jointly with others not before court murdered **PHILES NDULU KIN'UU**.

2. The Prosecution's case is that neighbours to the deceased herein **PHILES NDULU KIN'UU** got suspicious when they found her animals tethered for too long while others roamed neighboring farms without a caretaker. The neighbours proceeded to her house and were shocked to find her body sprawled on the kitchen floor. This was on the 14/1/2011. The area Assistant Chief was alerted who in turn alerted the police. The scene was visited. The body of the deceased was collected and taken to the mortuary at Makindu District Hospital where Dr. Aluvala Eliud (PW.8) conducted a post mortem and formed the opinion that the cause of death was due to severe head injury. Police at Makindu conducted investigations and discovered that the persons who had killed the deceased had also stolen some of the deceased's properties such as money, bicycle and a mobile phone. The DCIO one Samuel Agutu (PW.7) sought the services of Safaricom Company Limited for call data records and it transpired that the deceased mobile handset had been inserted with a new sim card whose numbers were traced to the first accused herein. He was promptly arrested and he implicated the 2nd and 3rd accused herein as well as the deceased's gardener one Boniface Mwau who later escaped from police custody. The three (3) accused persons were interrogated and the 2nd accused made a confession implicating himself as well as the rest of the accused as well as the runaway deceased's gardener. The three (3) were subsequently charged with the present offence.

3. At this stage of the proceedings, the prosecution is under a duty to establish a prima facie case against the accused persons so as to require them to be put on their defence. A prima facie case was described in the case of the **BHATT =VS= REPUBLIC [1957]332** as one in which a reasonable tribunal directing its mind to the law and evidence placed before it can convict accused person(s) if no evidence is offered to the contrary by the defence. Hence in a nutshell the evidence adduced herein at this stage should be sufficient to sustain a conviction against the accused persons were they to elect to remain silent in defence.

4. Parties herein agreed to file written submissions. However it is only counsel for the defence who filed submissions while counsel for the state did not. Defence counsel submitted that no prima facie case has been made out by the Prosecution since the alleged confession by second accused linking the 1st and 3rd accused was not obtained procedurally, counsel further submitted that the said confession was obtained in violation of the provisions of the evidence Act and the Rules thereunder.

5. Determination:

I have considered the evidence adduced herein at this stage by the Prosecution. It is not in doubt that there were no eyewitnesses to the killing of the deceased. The deceased was killed while at her compound. It is also not in dispute that some items were stolen from the home of the deceased. It is not in dispute that the accused persons herein were arrested after the deceased's mobile phone handset was traced to one of them. The call data records were produced herein as exhibits. It is also not in dispute that a confession was obtained from the 2nd accused herein which confession was admitted in evidence. Even though the defence counsel has submitted that the said confession had not been obtained procedurally, I note that the defence did not deem it fit to object to its production during the hearing herein so as to necessitate a trial within a trial and thereafter establish whether or not the same would be deemed as retracted or repudiated. The said confession was obtained in the presence of 2nd accused's aunt who also signed the same. The confession was also made before an authorized officer. Hence the confession is now part of the Prosecution's evidence. The stolen mobile phone was recovered a few days after the death of the deceased and therefore the same was a recent possession requiring an explanation as to how the same was acquired by the handler. The confession admitted herein in evidence and the recovery of the stolen mobile phone confirms that the three accused persons were either directly or circumstantially involved in the commission of the offence herein. Hence it is the finding of this court that the prosecution has made out a prima facie case against the three accused persons to warrant them to be called upon to make a defence. Consequently, I find all the accused persons have a case to answer and now called upon to make a defence pursuant to the Provisions of Section 306 (2) of the Criminal Procedure Code.

It is so ordered.

Dated, signed and delivered at Machakos this **3RD** day of **MAY** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Mukula for Kamolo for accused

C/A: Kituva