



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 58 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

KILONZI KITHOME.....1ST ACCUSED

BENSON MULEI WAMBUA.....2ND ACCUSED

RULING ON CASE TO ANSWER

1. The two (2) accused herein **KILONZI KITHOME** and **BENSON MULEI WAMBUA** are charged 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 25th and 26th day of August, 2011, at Njuguini village, Athi River location in Athi River District within Machakos County jointly murdered **JEMIMA MITI KITHOME alias DORIS KITHOME**.

2. The Prosecution's case is that a report had been made to Athi River Police Station to the effect that the deceased herein had gone missing and had not been seen for about three (3) days. Police officers from Athi River accompanied some relatives to the deceased's house within the area and it was discovered that her door had been locked but that there was a foul smell emanating from inside the house. The officers broke down the door and found the body of the deceased stashed inside a carton box and wrapped inside a gunny bag. The body was taken to the mortuary where Dr. Fredrick Otieno Okinyi conducted a post mortem. The said doctor noted the neck had and throat bones were broken and formed the cause of death as traumatic asphyxia to the trachea and larynx. The doctor further noticed that there had been some manual strangulation on the neck and throat. Police conducted investigations and arrested the two accused persons herein. The Prosecution called nine (9) witnesses in support of its case.

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 own defence. A prima facie case has been described in the famous case of **BHATT =VS= REPUBLIC [1957] EA 332** as: "**one in which a reasonable tribunal properly directing its mind to the law and evidence placed before it could convict if no explanation is offered by the defence.**" Hence from the evidence so far adduced, the same should be sufficient to sustain a conviction against the accused persons herein were they to elect to remain silent in defence.

4. As this is a charge of murder, it is necessary to first and foremost for the Prosecution to establish the essential ingredients of the offence under Section 203 of the Penal Code. The said Section provides that any person who with malice aforethought causes the death of another person by an unlawful act or

omission is guilty of murder. The punishment thereof is provided under Section 204 of the Penal Code. The Prosecution therefore is under a duty to prove the act of causing the death of the deceased and the malice aforethought on the part of the accused persons. It must establish that the accused had the intention to cause the death of the deceased and that in fact carried out the act of killing the said deceased. Section 206 of the Penal Code defines malice aforethought in terms of any one of the following circumstances on the part of the accused namely:-

a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused.

5. Parties filed Written Submissions which I have carefully considered as well as the evidence of the nine (9) prosecution witnesses. There are certain issues from the evidence of the nine (9) witnesses that appears not to be in dispute. Firstly that the deceased used to live with the 1st accused herein who was her younger brother. Secondly, that the deceased and the 2nd accused had been lovers although they had not formalized their marriage such as by payment of dowry to deceased's parents. Thirdly that the deceased and 2nd accused had prior to her demise been living separately as they had earlier disagreed on certain issues. Fourthly that the deceased had become acquainted with a new man (PW.3) with whom they had exchanged mobile phone handsets and which had angered the 2nd accused to the point that he had issued threats to the said PW.3 to say away from his said wife (deceased). Fifthly that the deceased and 2nd accused had earlier presented their disagreements before the area Chief (PW.4) who had advised them to involve their respective parents or the police. Sixthly the 2nd accused's personal documents namely a Driving Licence, NHIF Card and KRA Pin Card were recovered from the house of the deceased herein. Seventhly that none of the witnesses saw any of the accused persons killing the deceased herein and therefore if there would be any evidence linking them then the same shall have to be circumstantial in nature. This court therefore has to analyze the evidence tendered and see how each of the accused could be said to have been connected with the death of the deceased.

6. As regards the first accused, it is noted that he is a younger brother to the deceased. His parents who testified herein stated that he travelled home in Kitui and reported that he and the deceased had been attacked by robbers. He accompanied his parents to Athi River Police Station to report the incident. It is rather curious that the said first accused did not see it fit to report to the police as soon as the incident took place and he kept to himself until he reached Kitui and on coming back did not bother to lead his parents to the scene but instead took them to the police station. It was only after the police compelled him to accompany them that he led them to the house of the deceased where the body was recovered. Hence the conduct of the 1st accused raises suspicion and points towards his guilt in the death of his elder sister and therefore I find he has a case to answer.

7. As regards the second accused, the evidence is that he had been a lover to the deceased although no dowry had been paid to her parents. The two had at some point disagreed and separated and that the dispute was later arbitrated by the area Assistant Chief and Police at Athi River Police station. The Assistant Chief and the Police Officer confirmed receiving complaints from the deceased that the 2nd accused had been threatening her. The 2nd accused is said to have later threatened PW.3 to keep off from the deceased as he claimed she had been his wife. The 2nd accused is also reported to have complained that the deceased had not remitted proceeds from a joint business he and deceased were engaged. I find therefore that the 2nd accused had a motive to kill the deceased and hence find that he has a case to answer.

8. In the result it is the finding of this court that the Prosecution has established a prima facie case against both accused persons herein to require them to be put on their own defence. Consequently I find both

accused have a case to answer and now called upon to elect to conduct their defence pursuant to the Provisions of Section 306(2) of the Criminal Procedure Code.

Dated and delivered at Machakos this .2ND day of .MAY 2017.

D. K. KEMEI

JUDGE

In the presence of:

.Kimeu for Mwangangi for accused.

.C/A: Kituva.

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