

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. CASE NO. 8 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PETER MUNGAI NDUNGU.....ACCUSED

RULING

1. The Accused Person, Peter Mungai Ndung'u ("Accused Person") is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of unlawfully killing Nelly Murenga Ng'ang'a on the night of 28/09/2014 and 29/09/2014 at Gathiongoi Village, Githiga location in Githunguri District within Kiambu County.

2. The Prosecution presented eight (8) witnesses. The Prosecution's case is that the Accused Person's relationship with the Deceased, who was his mother, was strained after the Accused Person forced the Deceased to give him his piece of land as his inheritance and the Accused Person sold it and went off to Nakuru. The Prosecution evidence showed that the Accused Person had returned to live with or visit his mother two days prior to the death of the Deceased.

In the morning of 29/09/2014, the Deceased's body was found dangling from the roof of her bedroom in circumstances which were deemed suspicious and later ruled to be homicide. According to the Prosecution, the Accused Person was the only other person in that house that night and the house was locked and bolted from the inside. He therefore became the prime suspect for the homicide. His position steadily rose to be one of an Accused Person when his conduct that morning was taken into account as well as evidence that a witness overheard a quarrel between the Accused Person and the Deceased the day before.

3. Dr. Njeru who conducted the post-mortem examination concluded that the cause of death was asphyxiation due to ligature strangulation with features suggesting manual strangulation. Her conclusion, therefore, was that this was no suicide and that it was not the laceration on the Deceased's neck that had caused her death.

4. At the conclusion of the Prosecution case, the Court considers submissions by the Prosecution and Defence whether the evidence presented warrants putting the Accused Person on his defence. The task of the Court at this stage in the proceedings is to decide if Prosecution has made out a sufficient case for the Accused Persons to be placed on their defence. The test to be utilised by the Court in making that determination was famously stated in the *Bhatt -vs- R [1957] EA 332*. In plain terms, the Court is expected to determine if there is enough reliable evidence to warrant the Court to hear from the Accused Person or if the case should be stopped at this point.

5. The test was stated in the *R v Galbraith [1981] 1 WLR 1039* thus:

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a [Court] properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be

taken of a witness's reliabilityand where on one possible view of the facts there is evidence upon which a [Court] could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to [proceed for Defence hearing].... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.

6. The Defence Counsel in his submissions has urged the Court to conclude that there is no case to answer. He submits that the evidence presented does not touch on who strangled the Deceased and why. He argues that the "mere fact" that the Deceased and the Accused shared a roof does not prove that the Accused murdered the Deceased. He also argues that the fact that the Accused Person had sold his land and moved away does not create a motive for the killing. Finally, the Defence Counsel argues that the behaviour of the Accused Person immediately after the finding of the Deceased's body is not consistent with the behaviour of someone who had just committed homicide.

7. The arguments by the Defence are plausible arguments upon which the Court can find that the Prosecution has not established its case beyond reasonable doubt upon proper evaluation of the evidence. However, at this stage in the proceedings, the Court will be required to take a view of the "weightness" and credibility and reliability of the evidence presented by the Prosecution in order to come up with conclusions suggested by the Defence. That would be an inappropriate posture for the Court at this stage in the proceedings. As the Defence Counsel correctly states, the Court can only rule that the Accused Person has no case to answer where it forms the view that the evidence presented is so hopelessly contradictory or so woefully unreliable that no reasonable tribunal could convict based on it. With respect, that is not the position here. Here the Prosecution has presented enough evidence which, "taken at its highest", meaning without final determination as to its creditworthiness or weightiness (See ***R v Galbraith* 73 Cr. App. R. 124**) – a reasonable court **could** convict if no explanation is offered by the Defence. Consequently, in the circumstances, the Court finds that the Accused Person has a case to answer.

8. The case shall therefore be scheduled for Defence hearing.

Dated and delivered at Kiambu this 22nd Day of June, 2017.

.....

JOEL NGUGI

JUDGE