



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO.22 OF 2011.

REPUBLIC..... PROSECUTOR

VERSUS

EMANUEL OKUTOYI MALELE..... ACCUSED

RULING

1. The accused was arraigned in court on the information of murder contrary to **section 203** as read with **section 204** of the Penal Code, to which he pleaded not guilty. Particulars of the information stated that on the night of 30th March, 2011 at Mumakunda village Shiatsalla sub-location of Butere District in Kakamega County with others not before Court, murdered **Joseph MaleleOkutoyi**. The prosecution called a total of 4 witnesses.

PW1, **John ShitangiOmwalo**, Assistant Chief of Shiatsala sub-location testified that on 31st March, 2011 at about 7.00 a.m. while at home going on about his duties, a man called **Wandia** told him that there was a dead body along the road. He called the chief and then went to the scene. At the scene he saw a body covered with a blanket. He later learnt that the body was that of **Joseph Malele (the deceased)**. The body did not have a head and had several cuts which made it was difficult to identify. He told the Court when police came to the scene they together visited the deceased's house and saw some blood stains in the deceased's house. He further told the Court that they heard members of the public allege that the deceased's son had been spotted with blood stains on his cloths.

2. The witness testified that police went to the accused's home and found clothes and a club (rungu) with blood stains. The deceased's body was later taken to St Mary's Hospital Mumias. According to the witness, the deceased had a misunderstanding with his son (the accused) and there was a case in his office. The report was that they used to drink after which the accused used to beat his wife which made the deceased unhappy about it. Before this incident, the accused's wife had taken poison and died.

3. In cross examination, the witness told the court that he went to the accused's home with the police where they found the accused's mother and another woman and recovered a shirt and trouser. He told the court that police officers entered the accused person's bedroom and came out with the cloths, but he did not enter the bedroom himself. He said that police officers also recovered another shirt and a club behind the house, which they took to the station. The witness told the court that there was a record of bad blood between the deceased and the accused in his office.

4. PW2, **Solomon Ezra Machinda**, told the court he is a resident of Shiatsala market. On 30th March, 2011 he left his place of business at 8.00 p.m. and went home. In the morning while on his way to his place of business he met women who told him that someone had been killed along the road but the head was missing. He testified that he went to the scene and recognised the body as that of the deceased, a

person he knew. The witness told the court that shortly after, the accused came to the scene and said he could tell why people had killed his father. According to this witness, the accused claimed to have gone to see his wife in hospital who had also died. The accused had an injury and blood stains. The witness tried to talk to the accused but the accused told him to leave him alone. The witness informed the police that he suspected the accused as one who could have committed the offence and the police promptly arrested him. In cross examination, the witness told the court that he did not know how the accused sustained the injury he had.

5. PW3, **Nelson Venus Mbayia** also a business man from Shiatsala market told the court that on 31st March 2011, he was at Shiatsala market when his wife called and informed him that the accused's wife had died in Hospital. It was at night and raining. His wife wanted him to go and collect the body. The following morning the accused went to this witness's house and they went together to the Hospital. When they arrived at the accused's home they found many people. That is when he learnt that the accused's father had died. The witness told the court that he took the accused father's body to Manyala Sub-District Hospital but he was told it was a police case. In cross examination the witness told the court that he met PW2 at the scene at about 7.00 a.m., and that the accused came to the scene while PW2 and PW3 were there. The witness further told the court that he did not hear the accused say anything to PW2. He also said that he did not talk to the accused neither did he move closer to him.

6. PW4, **Fanice Malala Achieng**, testified that on 30th March 2011 the wife to Emmanuel, the accused, sent a child to call her to go to the accused's home/house. In the house she tried to talk to the accused's wife but got no response. She was with her daughter known as Dorcas. The witness detected some foul smell in the house and her daughter, Dorcas informed her that the foul smell was poison which the accused's wife is suspected to have taken. The accused's wife was still alive but in a bad condition. The witness called her husband and informed him that the accused's wife was in a bad state and needed to be taken to hospital. Her husband brought a motor-cyclist who took the lady to Manyala Hospital but she was pronounced dead on arrival. The witness went to the Hospital but was denied entry. She went back to the accused's house and comforted the children. Shortly after, the accused arrived. The witness told the court that she saw blood on the accused's shirt at the chest. She then went back to her home. The witness further testified that at home, she did not find her husband. She tried to look for him within the compound in vain. She sat on a chair till morning, when she found that her husband had died along the road. Policemen from Butere Police Station came to the scene and took the body. The witness told the court that the accused who is her 5th son used to have a dispute with his father (deceased).

7. In cross examination the witness told the court that she met the accused when she was going to hospital while the accused was coming from the hospital where his wife had died. When she met the accused, he was on a bicycle. The accused did not tell her that his wife had died. According to the witness the accused did not tell her that he had fallen off the bicycle and got injured. She also told the court that it was at night when she met the accused so she did not check the accused's shirt. She saw the accused's shirt when the accused came to the house and that is when she saw blood stains on his shirt. The witness told the court that she was the first person to see the deceased's body in the morning at about 6.00 a.m. and she stayed at the scene until after the body had been taken away. She further told the court that police came to the scene then proceeded to the accused's home and arrested him. She told the court that there were no blood stains in their home or that of the accused.

9. After the witness wound up her testimony, the prosecution applied for an adjournment to call more witnesses and the case was fixed for hearing on 10th December 2013. However no witness was called on that day. After numerous adjournments the court finally declined to grant any more adjournment on 15th March 2016 when the prosecution closed its case hence this ruling.

10. In trials before the High Court, upon the prosecution closing its case, the court is required to determine whether the evidence tendered by the prosecution is such that the accused person should be put on his defence. **Section 306(1)** of the Criminal procedure code provides as follows:-

“When the evidence of the witness for the prosecution has been concluded, the court if it

considers that there is no evidence that the accused or any several accused committed the offence shall after hearing if necessary, any arguments which the advocate for the prosecution, or the defence may desire to submit, record a finding of not guilty.”

11. At the close of its case, the prosecution is required to have established a **prima facie** case against the accused for him to be put on his defence. In the case of **Ramanlal Bhatt v R** [1957] EA 332 the Court of Appeal held:-

“... the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if, at the close of the prosecution case, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction. ... The question whether there is a case to answer cannot depend only on whether there is some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.”

The issue of what constitutes a prima facie case was again discussed in the case of **Wibiro alias Musa v R** [1960] EA 184 where the Court of Appeal quoted the judgment in Bhatt and said at page 186:-

“... 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 is made out if, at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near 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 ... nor can we agree that the question whether 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 on his defence..”

12. The offence of murder which the accused faces is defined by **section 203** of the Penal Code as follows:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

13. From the definition of murder above, the prosecution is required to prove that death did occur, that the death was caused by the unlawful act or omission on the part of the accused and that the accused caused such death with malice aforethought.

14. The prosecution will be deemed to have established malice aforethought according to **section 206** of the Penal code when it leads evidence of

a) Intention to cause death of or grievous harm to a person whether that person be the one who is actually killed or not

b) Knowledge that the act or omission causing death would probably cause the death of or grievous harm to a person whether that person be the one actually killed or not.

c) Intent to commit a felony

d) Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

15. The accused herein faces a single count of murder contrary to section 203 as read with **section 204** of the Penal code. He is alleged to have jointly with others not before court murdered **Joseph MaleleOkutoyi** on the night of 30th and 31st day of March, 2011 at Mumakanda village. None of the 4 witnesses called to testify witnessed the murder being committed. PW1, the Assistant Chief received

information about the murder and rushed to the scene after informing the chief. At the scene he found a headless body which he later learnt belonged to the deceased. After the police came to the scene, he accompanied them to the deceased's home where, according to him, they saw blood stains. They visited the accused person's house and recovered blood stained cloths and a club ('rungu'). The witness said he was aware of misunderstandings between the deceased and his son the accused and a report had been made in his office to that effect.

16. PW2 a businessman met women on the way on the material morning who informed him that someone had been killed along that road. He went to the scene and recognised the body as that of the deceased, a person he had known for long. According to this witness the accused came to the scene shortly after. He had an injury and blood stains. The witness informed the police who promptly arrested the accused. The other witness was PW3 also a businessman who was informed about the accused person's wife's death. The following morning he, together with the accused went to hospital. When he went to the accused's home he learnt that the accused's father had been killed.

17. PW4 is mother to the accused and wife to the deceased. According to her, she was called to the accused's house where she found the accused's wife in a bad condition. She detected foul smell which was said to be from some poison the accused's wife is suspected to have drunk. She called her husband to assist take the accused's wife to hospital and the deceased summoned a motor cyclist. The lady was taken to hospital but was pronounced dead on arrival. The accused later came to the house and had blood stains on his shirt. When PW4 went home she did not find her husband but discovered the body later the following morning and the matter was reported to police who came and took the body and also arrested the accused. This witness denied seeing blood stains both in their home or that of the accused.

18. As said earlier, none of the witnesses saws the accused commit the offence. The accused was arrested on suspicion that he was the one who had committed the offence. PW1 testified that there was a report pending in his office about a disagreement between the accused and his father, the deceased. He also said that the accused was seen with blood stains on his cloths and a club ('rungu') with blood stains was also recovered outside the accused's house. PW2 saw an injury on the accused and blood stains. It is his information about the blood stains and injury to the accused that prompted the police to arrest the accused.

19. PW4 on the other hand although admitting that she saw blood stains on the accused, denied that there were blood stains in her home or that of the accused.

In cases of murder, proof of death and the cause of such death is necessary. That requires production of medical evidence in the form of a post mortem report signed by the doctor who performed the post mortem examination and concluded as to what caused the death of the deceased.

In the case of **Ndungu v Republic** [1985] KLR 487 the Court of Appeal held:-

“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution.”

This position was reiterated by the same court in the case of **ChengoNickson Kalama v Republic** [2015] eKLR where it was held:-

“Save in very exceptional cases ... it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular a post mortem examination report of the deceased.”

In the present case, the prosecution did not adduce medical evidence in the form of a post mortem report which was conducted on the body of the deceased since the Doctor was not called, thus omitting a vital evidential segment that would have established the cause of death herein.

20. From the evidence led by the prosecution, someone was killed but no evidence was adduced to confirm that indeed the body was that of the deceased. No witness told the court how they identified the body given that the head was missing. No evidence was led that the head was ever recovered and that it was that of the deceased.

21. The prosecution has closed its case and therefore there is no further evidence expected to establish the ingredients of the offence of murder. From the evidence on record and analysis above, although there is evidence to show that a person was killed and viciously so, and that he was killed through an unlawful act, there is no evidence to show that the deceased died through an unlawful act or omission on the part of the accused. All the prosecution evidence has done is raise some suspicion. In this regard the Court of Appeal stated its position regarding suspicion in criminal cases in the case of **Mary Wanjiru Gichira v Republic** (Criminal Appeal No.17 of 1998 and reemphasised the same in the case of **Sawe v Republic** 2003 KLR 376 as follows:-

“The suspicion may be strong but this is a game with clear and settled rules of engagement ... Suspicion however strong, cannot be a basis for inferring guilt which must be proved by evidence.”

22. In the case of **Republic v Geoffrey Thiongo Wangui Criminal Case No. 62 of 2003 (Nyeri) Okwengu J** (as she then was) took a similar position stating –

“It is evident that the case against the accused is based on nothing more than suspicion. That is not sufficient to establish a prima facie case against the accused.”

The authorities show that the prosecution must do much more than merely rely on suspicion. Evidence of death is available but there is no evidence connecting the accused to the offence. Malice aforethought could also not be established because it has not been proved that it was the accused who killed the deceased. The prosecution’s case is merely based on suspicion and suspicion without concrete evidence that the accused committed the offence is not enough to base a conviction.

23. For the above reasons, this Court has no alternative but to make a finding that the prosecution has not established a prima facie case and the Court has no reasonable basis to call upon the accused to defend himself. Therefore I acquit the accused of the charge of murder and order that he be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 12th April, 2016.

E.C. MWITA

JUDGE