



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO.18 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

S A M.....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. Particulars of the offence are that on the 5th day of July 2010 in Hamisi District within Western Province the accused murdered **D M**.
2. There was an initial misstep where the prosecution proceeded to call evidence before the accused pleaded to the information but that was eventually addressed when a plea was taken and the accused pleaded not guilty to the information.
3. PW1 **F M**, a minor aged 17 years, testified that on 2nd July 2010 his father the accused came back home from drinking and found him sitting with his sibling **D A** (deceased) in the house. The accused started beating them with a log firewood and a jembe which were in the house. The witness said he was beaten on the leg and hand with the firewood. The deceased was beaten on the head using the same firewood and jembe and sustained head injuries. The witness told the court that there was a burning lamp in the sitting room where the beating took place. The head injury the deceased suffered led to bleeding. The accused ordered the witness to get water and clean his brother which he did. Thereafter the accused ordered them to keep quiet and sleep. He said he was injured on the leg.
4. In the morning his brother could not walk and died later the same morning. The deceased had been placed to rest outside the house. The witness told the court that he was sent to fetch water and after doing so he went to play. He later heard people crying at his home and rushed back only to find his brother dead. Although the accused had seen how badly the deceased had been injured, the accused did not take him to hospital. After his brother died, the accused wanted to run away but was restrained by members of the public. Police came and took the body away. According to the witness the accused drinks daily.
5. In cross examination the witness told the court that the accused was drunk when he beat them. He used a firewood and jembe. He also told the court that although they cried loudly, no one came to their rescue. The witness insisted that the accused beat them on 2nd July 2010 and not 5th July 2010.

6. PW2 **Pius Konzolo** Assistant Chief of Mulundu sub-location told the court that on 5th July 2010 at 2 pm he was at Mbale when **Isaac Mumbono**, retired Assistant Chief called him on phone and told him that someone had killed his child at Shianda village. The witness called a village elder one **Shiundu** and instructed him to rush to the scene and find out what had happened. The witness later went to the scene at 3 pm and found people holding the accused who was said to have killed his child. The body was lying in the sitting room.

7. The witness further told the court that he informed APs (Administration Police Officers) at Muhula Camp who went and arrested the accused. He also called Cheptul police who came in a police vehicle and took away the body, exhibits of firewood and jembe. The body was taken to Mbale Hospital.

8. PW3 **Paul Shiroko Shiverenge**, once a village elder, told the court that on 5th July 2010 he had attended a funeral of his neighbour when a woman known as **Carolyne** called and told him that the accused had killed his son. The witness rushed to the scene and found the body of the deceased lying in the sitting room. He called the Area Chief who instructed him to report the matter at **Muhulo AP Post**. He went to the post and when he came back he found that the accused had ran away. Members of the public however apprehended him. Police came and took the accused and the deceased's body away. In cross examination the witness told the court that the accused had run away when he went to the scene.

9. This last witness for the prosecution testified on 18th March, 2015 and thereafter the prosecution sought adjournments and were given a last adjournment on 23rd September, 2015. The matter was again fixed for hearing on 17th November, 2015 but on that day the prosecution having failed to summon witnesses closed its case, prompting this ruling.

10. The court is called upon to determine whether upon closing its case, the prosecution has made out a prima facie case to warrant this Court calling upon the accused to defend himself. **Section 306(1)** of the Criminal Procedure Code provides as follows:-

“When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any of 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. What then is a **prima facie** case? The Court of Appeal discussed what a prima facie case is in the case of **Ramanlal T. Bhatt v R** [1957] EA 332 when it held at page 334:

“Remembering that the legal burden 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 ... 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. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence.” (See **Wibiro alias Musa v R** [1960] EA 186)

12. A **prima facie** case does not merely mean just evidence. It requires the prosecution to adduce quality, credible and admissible evidence that points to the accused as the one who committed the offence if the court were to put him or her on his/her defence.

13. Murder, the offence the accused faces in this case, is defined under **section 203** of the Penal Code as follows:-

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

Anyone who causes the death of another person, actuated by malice aforethought, commits murder. However the offence of murder will not have been committed if the accused did not have malice aforethought. The ingredients of murder are: proof that there is actual death of a person caused by an unlawful act or omission, that the accused caused the death through an unlawful act or omission, and that the accused had malice aforethought.

14. Malice aforethought as defined by section 206 of the Penal code will have been established if the prosecution leads evidence to show –

- 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) **Intention 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. In the present case, the prosecution called evidence of PW1 son to the accused who testified how his father came home drunk and started beating him and the deceased using firewood and a jembe (hoe). The witness told the court that the deceased was injured on the head, body and legs and started bleeding from these injuries. The accused did not take his son to hospital and he died the following day.

16. PW2 the Assistant Chief of the Area was informed of the death and proceeded to the scene where he found the body of the deceased in the sitting room of the accused’s house. The police came and took the body away and arrested the accused. PW3 was also informed of the incident and proceeded to the scene where he also found the body of the deceased in the house. He informed the chief and also reported the matter at the nearby AP Camp. The accused who had ran away was apprehended by members of the public and handed over to the police.

17. From the evidence by the prosecution only PW1 said that his father beat both him and the deceased. The deceased died the following day. There is no other evidence adduced in this matter to link the accused to the offence other than that of PW1, his son aged 17 years at the time of his testimony and who was 12 years when the incident occurred.

18. The prosecution did not adduce evidence to prove death and the cause thereof. The fact that the accused beat up the deceased which may have caused injuries leading to bleeding, is not enough to hold the accused as the one who killed the deceased. The prosecution needed to adduce evidence to show that the accused caused the death of the deceased through an unlawful act or omission on his part and that he had malice aforethought.

19. Furthermore in murder cases, it is a requirement that medical evidence to prove death and the cause of such death be tendered. In the case of **Ndungu v Republic** [1985] KLR the Court of Appeal held as follows:-

“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.”

The same court reiterated the same position in the case of **Chengo Nickson Kalama v Republic** [2015] eKLR and 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.”

20. The prosecution has not lived up to its expectation in conducting this murder trial. It has failed to call relevant evidence and prove the death and cause of death herein. It has also failed to establish that it was the unlawful act or omission on the part of the accused that caused the death of the deceased, and that the accused had the necessary malice aforethought. The prosecution was lax in calling witnesses and despite the fact that the accused herein was taken to court on 20th July 2010, only 3 witnesses had testified by March 2015 and even when granted an adjournment to call more witnesses, they did not do so. The prosecution having closed its case, and here being no further evidence expected, the accused cannot be called upon to fill the gaps for the prosecution. More so when there is no evidence that the deceased died as a result of the injuries caused by the accused.

21. Having given due consideration of this matter and the evidence on record, I do not find that the prosecution has established a prima facie case to require the accused to be put on his defence. Consequently, I enter a verdict of not guilty and order that the accused be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 12th day of April 2016.

E.C. MWITA

JUDGE