

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 49 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

D N.....ACCUSED

J U D G M E N T

1. **David Ngovi**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **14th** day of **January, 2015** at about **1.00 a.m.** at **[particulars withheld] Village, Kauwi Location** in **Kitui West Sub-County, Kitui County** murdered **M N D** (Deceased).

2. Fact of case are that the Accused herein, a father to the Deceased returned home while drunk and started shouting demanding to know why he knocked at the door for long prior to his family members opening it. The Deceased who was also drunk confronted him. His mother, PW3, **P K D** attempted to separate them but she could not. She ran to call PW2, **P K N**, his brother-in-law. They returned to the house to find the Deceased injured. They took him to **Kitui District Hospital**. He was referred to **Kenyatta National Hospital** where he later died.

3. To establish whether the Accused had a case to answer the Prosecution called 7 witnesses. PW1, **J K D** a brother of the Deceased and son to the Accused stated that his attention was attracted by screams. He was in the same house with the Deceased. They ran to their father's house and found their younger sister screaming alleging that their father wanted to kill their mother. Their father (Accused), mother (PW3) and their younger sister **R** were in the sitting room. They sorted out the matter and he (PW1) left the house. His sibling, the Deceased, remained in the sitting room. He stood and checked what was happening. He noted his father had a piece of wood that he used to hit his brother on the forehead. By that time their mother had gone to call their uncle to resolve the problems that they had. On cross examination he stated that he turned back to find his brother having fallen on the ground and he believed that the Accused injured the Deceased because he was holding a piece of wood. He said he did not know if his brother attempted to hit his father with his head, missed it and hit his head on the wooden door frame. He admitted the fact that the Deceased was drunk. On re-examination he denied having seen his father hit his brother with a piece of wood and stated that he alleged that he said he hit him because he saw him holding a piece of wood.

4. PW2 **P K N** went to the scene of the incident on being called by his sister-in-law, PW3. He found the Deceased already injured. PW3, **P K D**, a wife to the Accused and mother of the Deceased stated that when the Accused knocked the door she opened. However, the accused who was drunk demanded to know why they took long to open the door. Their daughter who was unwell screamed in a loud voice. Her action prompted their sons to respond. They went to the house and sought to know why their sister was screaming. The Deceased who was drunk confronted the Accused. She attempted to separate them but was overwhelmed. She decided to seek assistance of her brother-in-law therefore left. PW3 deviated from what she recorded in her statement to the police and was declared a hostile witness. As a result she was subjected to cross examination by the State. She denied the allegation that the Accused became violent triggering their daughter to scream. She denied having told the police that her husband carried an iron bar which he wanted to use in an attempt to assault her; and she denied having stated that the Accused used a wooden stick to hit the Deceased.

5. PW4 **R M D** a minor stated that the Accused knocked at the door then entered the house while shouting

prompting her to scream because she feared him. PW5 **D J K** identified the body of the Deceased to the Doctor who conducted the postmortem. PW6 **No. 49320 Corporal Charles Wahome** investigated the case and charged the Accused. PW7 **Dr. Andrew Kanyi Gachie** conducted the postmortem on the body of the Deceased and opined that the cause of death was severe head injury (fracture skull) epidural, subdural and subarachnoid haemorrhage secondary to blunt force trauma.

6. At the close of the Prosecution's case evidence adduced proved the fact and cause of death. PW1 the key witness who purportedly saw what transpired gave contradictory evidence as to what happened. His evidence leaves a doubt as to whether the Accused hit the Deceased with some object or if the Deceased in the spur of the moment missed the Accused and hit himself on the wooden door frame hence sustaining the fatal injury. PW3 who was present turned out to be a hostile witness. In the case of **Coles vs. Coles, (1866) LR IP & D 70, 71 Sir J. P. Wilde** stated that:

“A hostile witness is one who from the manner in which he gives evidence shows he is not desirous of telling the truth to the court.”

Such a witness is unreliable. Having been subjected to cross examination means her evidence is destroyed. Her evidence can only be given very little weight if not any (**Also see Bataler vs. Uganda (194) EA 402**). Taking into consideration the relationship between the witness and the Accused, it may be obvious that PW3 may have wanted to favour the Accused.

7. To place the Accused on his defence this court must consider whether the Prosecution established a *prima facie* case. Such a case was stated in the case of **Ramanlal Trambaklal Bhatt vs. Republic (1957) EA 332**, to be:

“....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 case. 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 It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence adduced could convict if no explanation is offered by the defence.”

8. Having considered evidence above, I find the Prosecution's case full of loopholes that have not been filled. If the Accused is put on his defence and he elects to remain silent this court would not know what to do for the ultimate result would not be a conviction.

9. In the result the Prosecution has failed to establish a *prima facie* case requiring the Accused to be put on his defence. He is therefore acquitted of the offence of **Murder** pursuant to the provisions of **Section 306(1) of the Criminal Procedure Code**.

10. It is so ordered.

Dated, Signed and Delivered at Kitui this 7th day of September, 2016.

L. N. MUTENDE