



REPUBLIC OF KENYA



KENYA LAW
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**Republic/State v Mwendwa (Criminal Case 53 of 2015)
[2024] KEHC 6595 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE 53 OF 2015**

MW MUIGAI, J

MAY 27, 2024

BETWEEN

REPUBLIC/STATE PROSECUTION

AND

MARCUS MWENDWA ACCUSED

RULING

Background

1. The Accused person herein Marcus Mwendwa Mwololo is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that the Accused on 22nd September 2013 at Sikia Sub County in Athi River District, within Machakos County murdered Felistar Wanzila
2. The Mental Assessment Report dated 01/07/2015 and filed in Court on 06/07/2015 found the accused person Fit to Plead. The Accused person herein took plea on 08/07/2015 whereof after the charges were read out to him in a language that he understood he pleaded Not Guilty. A plea of Not Guilty was entered on his behalf.
3. The Accused person was granted bond/bail terms and the ODPP was to provide Witness Statements and Documents to the Defense /Counsel and/or Accused person before commencement of the hearing.
4. The Accused person was represented by Mr. Kyalo Advocate while the state was represented by Mr. Machogu and later Mr. Mwongera.
5. The hearing took off and the Prosecution called a total of seven (7) witnesses.



Evidence

6. PW1 Peter Maliti testified that he was a resident of Lukenya location within Athi River and was a mason. On 22-9-2013 at 7.30 pm he was heading home from church when a neighbour called him and informed him to stop as he was seeing him. He joined him and was in company of his wife. That guy is called Ndunda and wife is Virginia. They claimed that their children had heard screams from someone inside a thicket. His mother was called Felister Wanzila. He tried to call her but her phone was not picked. He then called his brother Amos and sister Lilian Nthenya and enquired whether their mother had arrived home. It was then dark and on the way they heard their mother's phone ringing inside the thicket.
7. They checked and saw their mother had been severely cut on the head, hands and back. Ndunda had a torch and used it to observe the scene. He then alerted his brother to rush there so that they could take mother to hospital. His brother arrived after 30 minutes. He then briefed him and then his injured mother was rushed to hospital. They later spotted the deceased's scarf, hat and one shoe. Police and members of public came to the scene, he showed them the items which were almost 50 meters from where his mother lay. He identified the brownish scarf which belonged to Marcus who used to work for a certain person in the area. He used to see him in the area. Marcus' girlfriend one Regina Wayua used also to wear the same scarf. MFI 1- one brownish scarf.
8. He also identified the yellow cap recovered from near the scene. The said Marcus Mwendwa Mwololo used to wear it. MFI 2- one yellow cap.
9. He testified that he led police officers to the house of Regina Wayua so as to confirm about the recovered items. She was a girlfriend to the said Marcus Mwololo who is the accused herein. The police woke up the said Regina Wayua and who confirmed that the recovered items belonged to her boyfriend Marcus Mwololo. He proceeded to Machakos Level Five Hospital to check on his mother and was referred to Kenyatta National Hospital. The following day he went home to see his siblings. He also passed by the accused's house but there was nobody at the time. He saw one bag his mother had used while at the market.
10. There was blood near accused's door. He also found a bloodstained panga outside the house, and identified it MFI 4- one bloodstained panga. He reached home and met his two sisters and young brother. He briefed them about the incident. He went back to where he used to reside and on the way learnt that his mother had passed on. Later a member of the community policing alerted him that the accused had been apprehended. He rushed there and confirmed. He also led the police to accused's house where the items were recovered. The police conducted a search at accused's house and other items were recovered. MFI 5- one stripped and bloodstained jersey/ MFI 6- one bag was recovered. A handbag near the gate of Cynthia and that was the one as it was being used by mother. He had not disagreed with the accused before. He did not know if she had any difference with his mother
11. On cross-examination he stated that he did not reside at the house of his mother since he had moved out in 2011 and had his own family. He used to work at the centre and commute to and from my home on foot which took about one hour. He was not present when deceased was attacked and Ndunda also did not witness as he was only informed by children that they had heard screams. Ndunda's wife did not witness the incident. He did not know if those children saw accused or deceased. Isaac and Amos claimed to spotted the items near the scene and they led him there and he saw the yellow cap and brown scarf. the two items are ordinary items worn by several persons as they did not have specific marks. He was not present when accused purchased the scarf and cap. The scarf and cap can be worn by anybody. Police from Makutano junction picked up the two items at the scene. The scarf and cap



- were not collected from accused's compound and did not see any dogs. They had dogs at their home. Accused's house was about 1 ½ km away from their home. Accused's employer was one Mutinda. Yes I entered accused's home without permission. The jersey (MFI 5) was inside the house and that there were bloodstains near the door. the basket and panga were outside and at different places outside accused's house. The members of public searched for the accused that night.
12. The police collected the items around 11.00 am. the small bag was recovered and it contained milk and sugar. He did not know if photographs were taken or an inventory being made. He did not touch the recovered items until police arrived. He recorded his statement with the police and which contains the issues. He had not met his mother earlier that day.
 13. Pw2 Amos Mwaniki he was a resident of Sikia village in Lukenya location within Athi River Sub County. He recalled on 22-9-2013 at about 8 pm he was at centre Sikia when his wife Cecilia Mumbua and sister Florence Mbula came and alerted him that his mother had been killed. He then contacted his brother. The scene was about 1 km away from the centre. They then rushed towards the scene. On the way he saw a scarf and a yellow cap. He was using the mobile phone light. It was his first time to see them and he moved to where his mother was lying. She was bleeding profusely. She was in critical condition. She had severe cut wounds on the head, face and hands. The owner of the farm one Ndunda and his wife Virginia were also there with his brother Peter Maliti. They used an unused door to act as a stretcher to ferry their mother to the road where Cosmas Ndeti assisted to rush the victim to hospital at Shalom and then to Machakos Level Five Hospital from where the patient was referred to Kenyatta National Hospital where his mother died on arrival. Later a postmortem was conducted in his presence. He used to see the accused in the area. He had no problem with him. He did not know if he had any problem with his mother.
 14. On cross – examination he stated that he used to live at his mother's compound. He used to see the accused in the area and used to live around 600 metres from their home. He was at the trading centre when he received the sad news. Deceased used to run a business at a centre called Kikuyu and was walking home when she was attacked. He was in company of my friends such as Masai, Mwazia Musyoki, Mutua. It took about 40 minutes to reach the scene. He was not present when police visited scene since I had accompanied my mother to hospital.
 15. Pw3 Virginia Mutindi Ndunda testified that she was a resident of matatani area of Mavoko and a farmer. The deceased was her neighbour. The accused herein used to work in the area. On 22-9-2013 at around 7 pm she was from visiting my mother Annah Katuku and heading home. She found her children and husband Philip Ndunda. Her children are Esther Ndunda, Nzibo Ndunda and they informed her that they had heard screams from a nearby thicket which is about 50 meters away from my house. She then alerted her husband who in turn called Peter Maliti (PW1) who arrived shortly and joined them and then they walked together towards Peter's home and they stumbled upon the deceased herein lying inside a thicket. She was in critical condition. She saw cuts on the head and hands.
 16. On cross examinationshe stated that she knew the accused who used to live within her village as he had been employed. she had only seen the accused for one month prior to the incident. She did not see accused at the scene. She did not meet the accused on my way to the scene. Police came after She had left. She has dogs at my home and used to visit the deceased's home and would take about 30 minutes while walking on foot. The accused's house is nearer that that of deceased.
 17. Pw4 Regina Wayua testified that she was a resident of Mua Hills and run a kiosk at Matatani centre. She knew the accused herein who used to be her boyfriend. She recalled that on 22-9-2013 at night she heard a knock on my door around 11 pm. She came out and saw police officers in company of Peter Maliti (PW1). They had a scarf and a yellow cap and they enquired if she knew the owner. They



- informed her that they had recovered them near the deceased. she informed them that items belonged to the accused herein. He used to wear them for about one year when they were lovers. She did not visit the scene. She later recorded her statement
18. On cross –examination she stated that the accused had been her lover. They had already parted ways with the accused one year prior to the incident. They disagreed over the business they used to run. They used to cohabit together. Amos Mwaniki and Peter Maliti are fellow church members. She had never worn such a scarf. There are several such scarfs and caps in the market. she was familiar with the items since one part of the scarf was torn. The accused was not at her house at the time of the incident.
 19. Pw.5 Isaac Mwanzia Musyoki testified that he was a resident of Sikia village in Lukenya and was a mason by profession. He recalled that on 22-9-2013 at about 9 pm he was at Sikia shopping centre enjoying a drink when a young child aged about 4 years came and informed those he was with namely Amos Mwaniki, Peter that their mother had been seriously cut and injured. Mwaniki and Peter then rushed to the scene. It was Mutua Kamuti who later relayed the news to most people in the market. He volunteered to use his motorbike to rush to the scene within Mua area. On arrival he met children who informed to go near a farm where he met a large crowd. He found the deceased who was well known to him as Wanzila. They had torches. He joined Mwaniki and Peter. The deceased appeared to have been viciously cut on the head and hand. She could not talk. The scene was along a certain footpath. Cosmas Ndeti helped to rush the deceased to hospital while they remained at the scene. They managed to recover some items near the scene a scarf (MFI 1) belonged to one Wayua. The yellow cap (MFI 2) used to be worn by the accused herein. Later police visited the scene and they proceeded to the home of Wayua who confirmed ownership of the scarf (MFI 1) and she claimed that she knew the person who used to wear them and accused's name was mentioned.
 20. The accused then used to be an employee of a certain man in the area. They rushed there and approached accused's house. They saw bloodstains leading to his house which was locked. They entered the house and found bloodstained clothes. a t-shirt (MFI 3) a long sleeved jersey No. 8 (MFI 8). The basket had bloodstains. one brown rubber open shoe (MFI 9). They made enquiries on the whereabouts of the accused and one Albanus Wambua who was his friend informed them that he had not seen him. The following day they proceeded to accused's house. They also passed by a neighbour's house and we stumbled upon a lady's handbag (MFI 6) which had bloodstains. Later a bloodstained panga was recovered by Peter. They then embarked on searching the nearby bushes for the accused. They managed to catch up with him. The AP officers arrested him. He later recorded my statement. I had never disagreed with accused before. He used to work for my neighbour. He was not aware if he had problems with the deceased.
 21. On cross examination, he stated that the Incident took place on 22-9-2013. He used to meet the accused within the market and had seen him about three days prior to the incident. He reached the scene around 9 pm. He found one James who was a Maasai and who had arrived at the scene first. it is AP Mireri who picked up the items recovered. Deceased's son Peter accompanied her to hospital while his other brother Mwaniki remained at the scene. Peter claimed that he had earlier in the morning spotted accused wearing the scarf and yellow cap. They found the items placed in a wheelbarrow at accused's house. the deceased used to carry a basket to the market to carry goods. the yellow cap used to be worn by accused. yellow Tusker caps are quite common. the items recovered from accused's house were collected by Peter who was a son to the deceased. the accused at the time had been laid off by his employer but was still residing at the employer's compound. The home of the deceased was about five hundred meters from accused's house. the scene was not that far from the deceased's home. He was not aware of any differences between the accused and deceased's family. He had known the accused who had no bad antecedences in the area.



22. Pw.6 Charles Ndonge Ndamuki stated that he was aged 50 years old and resided at Kilifi. In 2013 September he was at Mathatani area of Mua Hills in Athi River Machakos County as he was an employee of one Catherine Mbithe Kilango. He used to live in her house. He did not know the deceased. . On 22-9-2013 at 7.30 pm, he went to the village shopping centre a five minute walk. It was during the time of the Westgate bomb blast. Later someone informed him that there were screams emanating from his place. It was Kioko Mueni who alerted him of the same. He went outside and learnt that his employer might have been harmed. He then rushed back and found his employer safe and sound. She informed him that she had not heard of any screams. He went to bed, the following day at 6.00 am, he saw a certain handbag placed next to their main gate. He alerted his employer about it. She went to the gate, she denied being the owner. She raised alarm upon seeing some bloodstains on the said bag. The bag contained milk in clear polythene bag, vegetables (kales). Her employer made phone calls and they saw many people searching the nearby bushes. They informed them that a certain lady had disappeared from the area previous night. One of them looked like a son to the missing woman. Police officers later arrived and took photographs of the recovered bag. They went to the house of the accused herein. Later around 10.00 am reports came that the accused who was alleged to be the suspect had been apprehended. He rushed there but did not find the suspect. There were many people. He had no relationship with the accused herein. The accused is in court and he had known him well.
23. On Cross – examination he stated that he was alerted of the incident and on coming out of the hotel he heard screams once. It took about eight minutes to reach my place. He found his employer at home who informed him that she had not heard screams. He did not hear any more screams while at his place. The accused’s place was about four minutes’ walk. He did not visit the scene and had never passed by such a route through the forest. He saw the bag at our gate and it had some bloodstains. The bag is available in many places. His employer did not take the bag as police came for it afterwards. He did not meet with the accused around that time and did not get any information from anyone who claimed to have met him. He did not know the deceased and did not witness the incident.
24. Pw.7 NO. 235130 IP Mireri Mokaya Wilson testified that he was based at Kikuyu police station. In 2013 he was based at Kitanga Mathatani within Machakos County. On 23-9-2013 He was at the AP camp when He received a call from a member of public Peter Wanzila. It was around 10 pm. He informed him that his mother had been cut with a panga and was in critical condition. He then suggested to him to try and rush her to hospital as he made arrangements to rush to the scene. His superior IP Gathua Mutum alerted the OCS who sent CPC Philip Kurgat, PC Nyamai and PC Mwendwa to pick him up. They rushed to the scene. They found a large group of people there. The place was called Kikuyu within Mathatani. They found a yellow cap and brown scarf. The deceased had already been rushed to hospital but they were informed that she had passed on. Members of public identified the cap and scarf as belonging to one Marcus Mwendwa Mwololo (accused). They were led to his place by members of public. They carried the two items to his place. On arrival they met one Regina Wayua who was claimed to have been an ex-girlfriend and who identified the items as belonging to her said ex-lover who is the accused herein. They did not find him, it was getting dark and they called off the operation. The following day they received a report from members of public who had apprehended the accused at a place called Malalani as he was headed towards Machakos. They rushed there in order to save his life from the angry members of public. They rearrested him and escorted him to the camp. The OCS Kyumbi police station was alerted and he dispatched S Sgt Kemboi and CPL Priscah and other to pick him up. CPL Kurgat took possession of the recovered items. He had not known accused before. He did not visit the hospital. The accused was before court.
25. On cross examination he stated that they were alerted on 23-9-2013 at 10 pm and they reached the scene around 11 pm. They were four police officers and had torches. They did not find the deceased



- at the scene. They saw a pool of blood on the ground and a few blood spots indicating that it came from the deceased as she was being assisted to a vehicle. The two items recovered were not at one place but at a distance of five meters apart. He could not recall if the two items had been placed there by somebody. They proceeded to the home of Regina Wayua as it was claimed that she was former lover of the suspect. They did a search and learnt the accused had stopped visiting his lover for a long while now. He was not the investigating officer. They did not visit the house occupied by the accused. None of the members of public came forward to claim having met the accused in the area. He learnt accused had been apprehended the following day by members of public. The accused was apprehended within Kaani village around 9.00 am. They found accused had been surrounded by members of public.
26. PW8 NO. 522246 CPL Philip Kurgat testified that he was based at Kapsokwony police station. On 23-9-2013 he was based at Kyumbi police station and at around 11.30 pm with John Nyamu and Mwendwa, they received a call from one Peter Wanzila who claimed that there had been a raid in their Mathatani area by people unknown and who had injured his mother. He rushed to the scene in company of two officers. They met members of public at Sikilia village and who gave them a brief of what had happened. There was a police officer already at the scene. The deceased had already been rushed to hospital. They had torches. They recovered a cap (yellow) and scarf (brown) these are the one (MFI 1 & 2). It was claimed that the two items belonged to the accused herein. They searched the area but did not recover any more items. They later briefed the OCS. The following day the accused was apprehended by members of public and was later handed over to their station. He had not seen him before. He could not recall the names of the deceased.
 27. On cross examination, he stated that they received the distress call around 11 pm and took half an hour to reach the scene. They were four officers at the scene. They found two members of public standing at the scene. He did not see any bloodstains at the scene. The two items were about five meters apart. The members of public claimed that the owner of the two items recovered was one Marcus Mwololo. They searched the bushes in vain and did not manage to locate the suspect. They visited the accused's girlfriend's house.
 28. PW9 NO. 233968 CPL Joseph Ngaira testified that he was currently based in Garsen police station. Previously, in 2013 he was at Athi River police station where he was in charge of crime branch office. On 24-9-2013 at 2 pm his supervisor informed him that there was an incident of a certain lady who had been violently attacked and robbed and that she had finally died. He proceeded to Mathatani area and met PC Wilson Mireu who led them to the scene of crime. They saw bloodstains along a footpath. They learnt that some exhibits had been taken to Kyumbi police station which comprised a yellow cap and a brown scarf. There were also more items collected. He then proceeded to accused's house and along the way they could see blood spots which led them all the way to accused's employer's compound. A neighbour showed them the accused's house which was then locked. He entered inside and saw a polythene bag containing clothes belonging to the deceased. There was sugar, vegetables (kale), milk. He then took photographs. The bag was a manila one which had bloodstains. There was a t-shirt, One brown open shoe (MFI 9) A son of the deceased was present and he positively identified some of the items as belonging to his mother. He took custody of the items and kept them as exhibits at Athi River police station. He also received from Kyumbi police station bloodstained panga that had been recovered from the accused (MFI 4). He produced the items as exhibits. MIF 1,2,4,5,6,8,9- now produced as exhibits 1,2,4,5,6,8 and 9 respectively. From the scene he went to Kyumbi police station and picked up the accused who had injuries inflicted by members of public. He took him to Athi River police station. Later he accompanied an officer to the hospital who confirmed that the deceased had passed on. He issued a postmortem form which was later filed after autopsy. The accused is before court. He had not known him before. He also had not known the deceased before.



29. On cross examination, he stated that he was the investigating officer herein. He did visit the scene on 24-9-2013 in company of the driver PC Meta. He did not pick any exhibits at the scene but only took photographs. They proceeded to the house of the accused through a footpath and there were blood spots which led all the way to the house belonging to the accused. He was in company of a son to the deceased. EXH 5 was inside the manila bag and likewise EXH 8, EXH 6 and EXH 9. Yes the panga (EXH 4) was given to him by Kyumbi police station as it had been recovered from the accused by members of public. exhibit 1 and 2 were recovered from the accused on 24-9-2013. exhibits 1,2,4,5,6, 8 and 9 had bloodstains. He took photographs. DNA analysis was done on the bloodstains and no finger prints dusting was done on the recovered items. The accused had been beaten seriously by members of public. An exhibit memo was made and used before Mavoko Law Courts. He had not seen the inventory.
30. PW.10 DR. Mativo Mwikali testified that she had worked at Machakos Level 5 Hospital for 6 years and was familiar/stepping in her colleague Dr. Okiri who undertook the post mortem on 27/02/2014. He was indisposed and he relocated from Nairobi. Post Mortem Report Form for cause of death of Felistar Wanzila Mutua under escort of Pc James Wafula. The body was found at Sikia sub location on 22/09/2013 at 8.00 p.m. At the time of death indicated is 22/09/2013 at 23 hours – 11 p.m. The circumstances as indicated are alleged to have been inflicted; Cuts on the head and hand with a blunt object. She was rushed to Machakos Hospital and later referred to KNH and then pronounced dead on arrival. Motive of the incident is unknown. Post mortem report of 22/09/2020 – reflex of the body. External observation of the body – female African Adult 43 years old. Post mortem changes – Body well preserved external appearance was noted – pale – 3+ signs of surgical intervention. Cut wounds on the scalp – with stiches on the scalp – stitching done at the hospital, bandage on the hands, bilateral cut wounds on the right arm left hand with damaged tendons – deeper structures of the body after murder and bond – 10x6 cm. Internal appearance – Respiratory system – normal Cardiovascular – normal Digestive system – normal. Head – multiple cut wounds 7x2 cm On the scalp on the parietal – (side of the head) Occipital (behind the head) temporal – (right above the ear) 7 stab wounds Nervous system – skull fracture – open around 7 x 3 cm with subdural haemorrhage bleeding within the brain. Multiple brain cuts Spinal cord – normal Cause of death – Head injury caused by sharp cutting object specimen taken blood for DNA matching on the assaulting object. Signed by Dr. Okiri – 27/02/2014 at Machakos Level 5 Hospital – stamped – Post mortem on 27/10/2013. she pointed to Dr. Okiri's signature and handwriting - MFI-1 P Exhibit 7.
31. On cross examination she stated that the deceased on presentation to hospital was alive and taken to Machakos level 5 and then transferred to KNH on arrival she died. That was the post mortem report when the deceased was examined. Physically there were surgical wounds and was under medication. Blood collected on DNA to be compared to the assaulting item/gadget. Some blood was found on the object and was sent for analysis
32. The Prosecution closed its case and the Court directed the parties to file and serve their written submissions. Each party was granted 21 days to do so.

Written Submissions

Prosecution Submissions Dated 22Nd February, 2024

33. The Prosecution submitted that it availed seven (10) witnesses in support of its case and the following raised the following issues determination namely;-
- a. Was the accused involved in the murder of the deceased?



- b. Did the accused have malice?
 - c. Was the accused identified appropriately?
 - d. Was the cause of death as a result of the injuries inflicted?
34. On the issue of whether the accused was involved in the murder of the deceased the testimony of Pw4 who was the ex lover of the accused who clearly identified the yellow cap and the browmish scarf that belonged to the accused and were recovered at the crime scene. The testimony of PW1, PW5 and PW9 is evident that the accused's house had blood stained panga and the deceased handbag with bloodstained clothes. The prosecution had adduced circumstantial evidence placing the accused at the crime scene.
35. On the issue of malice On whether the accused have malice Section 206 of the Penal Code states that malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-
- 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;
 - (c) an intent to commit a felony;
 - (d) an 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.

In the present case it is evident that the accused person had malice aforethought because he inflicted head injury on the deceased by using a panga

36. On the issue of whether the accused was properly identified, the state relied on circumstantial evidence to place the accused at the scene of the crime. The yellow cap and brownish scarf recovered from the crime scene clearly identified by PW4 belonged to the accused
37. On the issue of whether the cause of death was a result of the injuries inflicted, PW10 Dr. Mativo testified on behalf of Dr Okinyi who conducted the post mortem. The body of the deceased had signs of surgical intervention cuts wounds on the scalp. Sutures on the scalp bandages on the hands bilateral cut wounds on the right and left hand with damage to the tendons and bones 10cm by 6 cm. she formed an opinion that the cause of the death was the head injury caused by sharp cutting object.
38. Reliance was made in the case of Ronald Nyaga Kiura –vs- Republic [2018] eKLR wherein paragraph 22 it is stated as follows:-

“It is important to note that at the close of prosecution, what is required in law at stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person.



39. Also in the case of Ramanlal Bhat -Vs- Republic [1957] EA 332 at 334 and 335 relied on by the state the Court stated as follows:-

“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 could convict if no explanation is offered by the defence.”

40. Similarly in R. v. Jagjivan M. Patel & Others 1, TLR, 85 the Court stated;-

“All the Court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the Court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

41. The Prosecution finally submitted that by availing testimonies of ten witnesses as well as documentary evidence it has proved its case beyond reasonable doubt and the accused ought to be placed in his defence under Section 306 (2) of the Criminal Code.

Accused Person’s Submission

42. The Accused made reference to section 306 Criminal Procedure code and the case of Republic versus Pius Kikungu John[2019] eKLR where the court noted that the prosecution had the legal burden to prove the critical ingredients of the offence of murder. Reliance was also made to the case of Joan Chebii Sawe vs Republic [2003]EKLR on the laid down principles to guide the court where the evidence to be relied on by the prosecution is purely circumstantial evidence.

43. It was submitted that the prosecution had not made a prima facie case bearing in mind that the prosecution evidence was purely circumstantial, it was his position that the same can only be a basis of a conviction if there are no co existing circumstances weakening the chain of circumstances relied upon.

44. The accused submitted that there was no proof that he committed the offence and the prosecution had failed to prove the critical elements of murder.

Finding

45. This matter/hearing commenced on 7/11/2016 before Hon D.K.Kemei– J who heard prosecution’s case – Pw1, Pw2, Pw3, Pw4, Pw5, Pw6, PW7, PW8 and PW9. This Court took over the proceedings on 19/10/2021 when the Court sought proceedings to be typed and availed to the parties/Counsel before directions.

46. On 15/12/2021 the Accused person confirmed receipt of typed proceedings. The provisions of Section 200 – 201 CPC were explained to the Accused Person by the Court Assistant Geoffrey and the Accused stated that the matter proceeds from where it had stopped.

47. The Court took evidence of PW10; The prosecution closed their case and the Court directed parties to file Written Submissions.



Disposition

48.

1. Upon this Court's consideration of the totality of the evidence adduced and on record, the evidence discloses commission of the criminal offence of murder c/s 203 of the Penal Code.
2. The evidence of Pw1 & Pw2 coupled with the formal witnesses of Pw5, Pw6 & Pw7 confirms that the deceased died from an unlawful act and places the Accused person at the scene and time of incident and the circumstances outlined target the Accused person is sufficient to warrant the Accused person to be placed on his defense.
3. The law requires that the Accused exercises the legal right as prescribed under Sections 306 CPC.

It is so ordered.

RULING DELIVERED SIGNED DATED IN OPEN COURT ON 27/5/2024 IN MACHAKOS HIGH COURT (VIRTUALLY/PHYSICALLY).

M.W.MUIGAI

JUDGE

