



**Republic v Adan (Criminal Case 7 of 2020)
[2024] KEHC 13441 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL CASE 7 OF 2020
JN ONYIEGO, J
OCTOBER 30, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MOHAMED MUHUMED ADAN ACCUSED

JUDGMENT

1. The accused person herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Chapter 63 of the Law of Kenya). The particulars of the offence are that on 08.08.2020 at Lagbadhana Saka Location, Tana North Sub County within Tana River County he murdered Hassan Hussein Noor.
2. The accused pleaded not guilty to the charge. Consequently, the prosecution called a total of five (5) witnesses in support of its case against the accused person and thereafter closed its case. Under Section 306 of the Criminal Procedure Code, hereinafter, the Code, this court has a duty, upon close of the prosecution’s case, to make a ruling on whether the accused person has a case to answer or not.
3. Upon the close of the prosecution’s case, the prosecution relied on the evidence tendered while the accused person via his counsel filed submissions dated 17.10.2024. In the submissions, it was urged that the prosecution’s evidence did not directly or indirectly link the accused person to the offence in question. This court was urged that where there was no evidence of commission of a crime, the court must stop the case. To that end, reliance was placed on the case of Republic vs Galbraith [1981] WLR where the court emphasized that; where a jury properly directing its mind that the prosecution evidence could not properly convict, then the court must stop the case. This court was therefore urged to find that the prosecution did not establish a prima facie case to enable the court place the accused person on his defence.



4. Under Section 306(1) of the Code, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is no evidence that the accused or any one of several accused persons committed the offence should, 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.
5. On the other hand, Section 306(2) of the Code provides that when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is evidence that the accused person or any one or more of several accused persons committed the offence, the court should proceed to put the accused persons on their defence and thereby the accused is supposed to present evidence in defense.
6. What is therefore pending determination at this stage is whether the prosecution has established a prima facie case that would warrant this court to place the accused person on his defence.
7. Under Section 211 of the 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 rebuttal is offered by an accused person. [See Ramanlal Trambaklal Bhatt vs R [1957] E.A 332 at 334 and 335]. However, it is trite that, where the court is not acquitting the accused person at the close of prosecutions' case, there is no need for a reasoned ruling for a case to answer. Reasons should only be given where the submissions of a no case to answer by the accused are upheld and the accused is to be acquitted. [See Festo Wandera Mukando vs Republic [1980] KLR 103].
8. In this case, PW1, Mohamed Abdi Bille stated that on 08.8.2020 he was in Garissa when Abdullahi called informing him of the death of the deceased. It was his evidence that the deceased was a person unknown to him. He proceeded that he thus drove to the said scene, which he could not remember its name, and reached a remote village where roads were impassible. It thus forced them to walk for a distance of three kilometers before reaching the scene.
9. It was his case that they found many people and upon observing the body of the deceased, he learnt that he had been stabbed on the stomach and the hands and the intestines were hanging out. They picked the body and took it to Madogo police station upon which the police interrogated them and later took the body to the morgue. On cross examination, he stated that the deceased was a person unknown to him and further, he was not aware whether the accused person herein perpetrated the offence.
10. PW2, Mohamed Ali Hussein, a herder and a businessman recalled that on the material day, he was in the forest when he received information from one Hussein on the death of the deceased. That they took Issack Ahmed Hussein's vehicle and travelled to the scene where they found many people. That they took the body and thereafter, reported to the police after which they recorded their statements. On cross examination, he stated that he later learnt that the accused herein had been arrested in relation to the death.
11. PW3, No. 113799 PC Shadrack Kipchirchir recalled that on the material day, while at the station together with his colleagues awaiting deployment for the night patrol, they saw several vehicles driven into the station. That one elder came out of the vehicle and told them that a person had been attacked by a person known to them. It was his evidence that the deceased had a deep stomach cut and the intestines were exposed.
12. Upon informing the officer commanding station, they took the body to Garissa Hospital mortuary for preservation and thereafter embarked on the process of recording statements. On cross examination, he stated that the incident was reported at the same time when the body was taken to the station. He testified that he did not carry out investigations and therefore, he was not aware of the person who caused the deceased's death.



13. PW4 No. 113594 PC Malik Oduor stated that on the material day, he was in the station with a reportee who was in the company of his family when they informed him that Mohamed Sheikh had fought with the deceased along which he stabbed him to death. He stated that, he visited the scene and saw the body of the deceased which they carried to the station. On the following day, post mortem was conducted. It was his evidence that the accused person had been taken to the station by the members of the public in that, the accused had differed with the deceased over the assault of his son and in the process, a quarrel ensued. He thus proceeded to re-arrest the accused person and thereby charged him with the offence herein.
14. PW5, Dr. Abass Aden Sanweine stated that he is a surgeon working at Garissa referral hospital. He recalled that he conducted post mortem on the body of the deceased. The body was identified by the deceased's brothers one Mohamed Abdi and Khalif Hussein. That the body was soaked in blood mixed with dust and that, it had multiple fractures and cuts. There was a cut on the abdomen which was deep affecting the intestines as some of the intestines were out.
15. He further stated that there was a second cut on the right hand running through the right thumb and the index finger and further, a fracture on the left arm. In the same breadth, there was a fracture on the; humerus, right femur and on the cervical bone. According to him, the cause of death was consistent to assault caused by both blunt and sharp objects. On cross examination, he stated that he is not a pathologist and the autopsy that he conducted was external. He reiterated that out of the many injuries the deceased suffered, he could not ascertain the exact one which caused the death.
16. It is trite that for the offence of murder to be proved, the prosecution is under the obligation to establish the following key ingredients:
 - a. Proof of death of the deceased, and the cause,
 - b. Proof of an unlawful act or omission on the part of the accused resulting in the death of the deceased,
 - c. malice aforethought on the part of the accused.
17. The standard of proof as in many criminal offences is that of beyond any reasonable doubt. In the case of R. T. Bhatt v R {1957} EA 332 the Court observed that:

“It may not be easy to define what is meant by 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.” (See also R v Samwel Karanja Kuria {2009} eKLR.
18. It therefore follows that the evidence required must be sufficient and one that tends to establish the guilt of the accused which would enable the court to place the accused on his/her defence.
19. In this case, it is not in dispute that indeed the deceased died as a result of an unlawful act. The next question is whether the accused person was responsible for the death of the deceased. Clearly, neither of the prosecution witnesses testified that they saw the deceased being attacked or die nor did they state that they saw the accused person kill the deceased.
20. It is PW4 who came closer to linking the accused person to the death herein although unsatisfactorily. I say so for the reason that he stated that it was reported to him by the family of the deceased that the accused person and the deceased previously had a disagreement and consequently fought. Consequently, he proceeded to arrest the accused person and charged him. He relied on hearsay



and circumstantial evidence which was not supported. In the same breadth, it was noted that no investigations were carried out and further, the alleged reportee who averred that the accused person perpetrated the offence herein was not brought as a witness.

21. It is not lost to this court that in a criminal case, the burden of proof lies on the prosecution. In the case of *Woolmington vs DPP (1935) A.C 462* Lord Sankey in the celebrated Golden thread speech stated:

“Throughout the web of English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner’s guilt subject to...

The defence of insanity and subject also to any statutory exception. If at the end of the whole case, there is reasonable doubt created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

[Also see section 107 and 109 of the *Evidence Act*].

22. In this case, the prosecution presented before this court a case with glaring gaps. It was not to be denied that the prosecution clearly failed to connect the accused person with the death of the deceased as more reliance was placed on unsupported facts which when woven together, could not authoritatively support the charge preferred against the accused person.

23. In my considered view, putting the accused person on his defence would be akin to calling him to fill the glaring gaps by the prosecution. The Court of Appeal in the case of *Edwin Wafula Keya vs Republic, Court of Appeal (2005) eKLR*, had this to say;

“In our view failure to call all or any of the three police officers who arrested the appellant some two months after the offence left unbridgeable gap in the prosecution’s case and the appellant must have the benefit of that gap.”

[Also see article 50 (2) (a) (1) of *the constitution*].

24. As a consequence of the above, it is my considered view that the evidence adduced by the prosecution does not meet the required standard of proof that the accused person is guilty of or responsible for the death of the deceased. I must say the investigation was extremely poor.

25. Considering the entirety of the evidence on record as highlighted herein above, I am of the view that the accused person has no case to answer as none of the witnesses tendered sufficient evidence to implicate him in the unfortunate murder of the deceased.

26. In a nutshell, it is my finding that the accused has no case to answer and therefore, he is hereby acquitted at this stage under Section 306(1) of the Criminal Procedure Code.

ROA 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF OCTOBER 2024

J. N. ONYIEGO

JUDGE

