REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 8 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

ALI SULEIMAN ALI.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Mr. Gekanana for Accused

Mr. Mwangi for the State

RULING

The accused person was indicated with the offence of murder contrary to section 203 and 204 of the Penal Code. On the face of it, the particulars of the charge are that at unknown time between 4th and 5th day of April, 2018 at Breeze view area within Mpeketoni Township at Lamu, accused murdered **Joseph Kamau Kanyi**. The accused pleaded not guilty. At his trial, he was represented by Mr. Gekanana whereas Mr. Mwangi appeared for the state.

The evidence on record in support of the prosecution case from the three witnesses namely Pw 1 – **Francis Mwangi Kariuki**. As regards his evidence Pw 1 alluded to the information given by the accused to the effect that he has killed someone. For purposes of that fact, Pw 1 had to learn from the neighbours that the deceased body was recovered with multiple injuries.

Pw 2 – Paul Gichira also testified that on 12.11.2018 he met the accused who confessed to the murder of someone he had not identified at the time of the conversation. This alleged confession formed the basis of an investigation carried out by **Pw 3 Pc Musyoka**. The import of the present case was purely circumstantial with respect to the crime and participation of the accused person. At the close of the prosecution case an application was made by **Mr Mwangi**, on behalf of the state that there is a prima facie case for the accused to answer the charge, in terms of section 306 of the Criminal Procedure Code.

Determination

The test and procedure for a trial judge to decide if there is no case to answer is attributed in section 306 of the Criminal Procedure Code which provides as follows. At the end of the prosecution evidence on either submissions by the prosecution or defence, or on the courts own initiative may make a finding on whether there is sufficient evidence to proof the elements of the offence. If the prosecution evidence is capable of establishing the case for an independent tribunal to conduct. It may call upon the accused person to state his or her defence in rebuttal. Whereas in the other hand the evidence is insufficient for any independent and reasonable tribunal directing its evidence to the facts may reach a verdict of not guilty and acquit the accused person.

The above test in the criminal procedure code has been amplified in ***R V Galbraith 73 CRAppeal R 124*** as follows;-

> ***a) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will stop the case.***
>
> ***b) The difficult arises when there is some evidence, but it is a serious character, for example because if inherence weakness or vagueness or because it is inconsistent with other evidence.***
>
> ***c) When the judge comes to the conclusion that the provision evidence taken its high-rise, in such that a jury directed could not properly …upon it, it is his duty upon a submission being made to stop the case.***

d) Where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness reliability or other matters which are generally speaking with the province of the jury, and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

From the above text the anchor for the application under section 306 of the Criminal Procedure Code is for the prosecution to discharge the burden of proof against the accused beyond reasonable doubt. That he committed the offence in question. It is to be held that the arguments to advance a prima facie case for the prosecution to secure judgement upon the accused comes essentially from the testimonies of Pw 1 and Pw 2. It was stated that the accused confessed to the murder in the presence of the two witnesses. Thus on the other hand none of the witnesses saw the accused person kill the deceased.

Prima facie mean on the face of it. The literal meaning of prima facie has been expressed by ***Habbard J*** in ***Regina V Cover and Other[1962] 20 NLR 62,*** where he had this to say that:

"a submission that there is no case to answer mean that there was no evidence on which the Court could convict even if the Court believed the evidence given."

In the present case for the accused person to be convicted of murder, the prosecution is under a duty to prove the following elements;-

a) That the deceased died.

b) That his death was unlawfully caused.

c) That in committing the unlawful acts the accused was actuated with malice aforethought

d) That the accused person perpetuated the commission of the offence.

Here in this case the assertion by pw 1, and pw 2 confirms that the deceased is dead but were unaware of the events that subsequently took place. Their evidence purely comes from the conversation they had with the accused person as an admission to the commission of the crime.

As regards the unlawful acts, the basis of it comes from what pw 1 and pw 2 observed. There is also the strength and plausibility of forensic evidence revealed in the impressions made in the postmortem.

For similar reasons on the findings of a post-mortem report, the deceased was found to have suffered injuries to the right side of the forehead, right eye, the upper and lower jaw, left side of the head. In the opinion of Dr Yunis was a determination that the deceased cause of death was severe head injury with hemorrhagic shock secondary to severe bleeding. By the position of the law under section 206 of the Penal Code, the result of the evidence manifests prerequisite of malice aforethought in the killing of the deceased. It is well elucidated in the case of ***R V Tubere s/o Ochen [1945] EACA***. The evidence for the prosecution is sufficient to proof malice aforethought to sustain a conviction for murder on the whole evidence which sheds light on the nature of the weapon used, the gravity of the injuries and parts of the body targeted, the evidence of the accused persons before, during and after he commission of the crime.

To put the matter in more practical terms "malice aforethought is a manifestation of the above elements. The primary of it being an intention to cause death or to do grievous harm. Taking the foregoing material together, there is evidence of existence of malice aforethought at the close of the prosecution case which may be deduced from the evidence of Pw 1, Pw 2 and admitted postmortem examination report. On identification the prosecution placed reliance generally under section 25 and 25A of the evidence act on a confession or acknowledgement, in express terms made by an accused guilty to the witnesses. In our criminal law system for a confession to be admitted, it must be made voluntarily in the sense that it has not been obtained from him either by fear of prejudice, or hope of advantage exercised or held by a person in authority. There is majorly a distinction between an admission and a confession. In the case of ***Ram v State CAIR [1959] ALL 518:***

"The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement above, it is a confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission."

As a general rule confessions are inadmissible in a criminal trial unless the confession passes muster under rigid rules provided in the Evidence Act and rules promulgated therein christened as out of court confession, Rules 2009.

Out of the key requirements of the law is the fact of a confession statement being made voluntarily to a police office above the rank of a chief inspector and above. Any statement made to a private citizen or a police officer not of the defined rank is not admissible. In the persuasive case of ***Wong Kam –Ming v The Queen [1980] AC 247*** the court held:

"Any civilized system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of potential unreliability of such statements, but also and perhaps mainly because in a civilized society, it is vital that a person suspected of an offence should not be subjected to some evidence obtained through improper means ……."

In my view given the surrounding circumstances, the admission of a statement to pw 1 and pw 2 does not however imply that the statement is necessarily valuable.

As a matter of fact, the confession so alleged was incompatible to non-compliance with the Judge's rules. The witnesses are not entitled to

take confessions. The major principle in this regard is contained under Article 50 (4) of the Constitution where the law concludes that evidence obtained in a manner that infringes the rights guaranteed by this constitution shall be excluded, having regard to all the circumstances of the case.

If such evidence is to be admitted in the proceedings at hand, it would bring the administration of justice into disrepute. To that extent taking this evidence as a whole, one can conclude that accused's right to a fair trial would be in jeopardy. For example, under Article 50 (2) (1) of the constitution, looking at the prosecution case an important guideline for a prima facie case is one which an independent tribunal reasonably directing its mind to the issues could convict the accused if no rebuttal evidence is tendered by the defence.

At the heart of the prosecution case is an alleged confession made to the two witnesses by the accused person. It is clear that the specified complaints of a confession statement are missing to warrant court's discretion in favour of the prosecution. The broadness of it in the event accused elects to remain silent. There might be no evidence to support a conviction.

In the instant case the court is not concerned here with a confession, because there was no compliance with the rules under this regulatory statutory provisions to construe existence of a confession. I think that is the position here in which the witnesses conceded that the statements reflected a consciousness of guilt, it is this evidence the prosecution held that it alluded to an admission of the fact causing the death of the deceased. Subsequently, the accused was charged of murder but pleaded not guilty of any crime. Assuming that logic and sense of an admission is deemed as prima facie case, the contrary could not hold that the accused validly pleaded guilty to the charge. It is to be regretted that the evidence by Pw 1 and Pw 2 shifted the burden to the accused person so that he can be placed on his defence to repeat the same words in rebuttal.

Given the gravity of the offence there was need that proof the *corpus delicti* be completely independent of the accused admission to the witnesses to wit Pw 1 and Pw 2. Furthermore, in the probability if the accused intended to confess to the murder, there was no bar it will have been reduced into writing and signed by him in the presence of a Chief Inspector of police and above as a stream of evidence under the powers of section 25 A of the Evidence Act. The court has also the discretion to test the issue on identification drawing inspiration from circumstantial evidence.

Circumstantial evidence against the accused was that he confessed to the prosecution witnesses that he had killed the deceased. However, as it was stated in ***Teper v R [1952] AC*** the surrounding circumstances do not fit the test herein:

> ***"Circumstantial evidence must always be narrowly examined if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

As already known in Law, the prosecution bears the entire responsibility on the standard of proof of all elements of the crime against the accused person. It is true as was said by **Glanville Williams:**

> ***"it is important that for an offender or an accused person to be criminally responsible for his acts or omission, there must be proof beyond reasonable doubt. It means that evidence will be led by the prosecution to show that first, the accused had the intention to commit the crime (mens rea) and secondly, that the ingredients of the particular crime are complete (actus reus). The onus of proof is placed on the accuser and he loses if he is unable to discharge same. It is immaterial if the accused is known to have actually committed the offence. There is no agreed mathematical translation of probable and all we can say about it, likely is that it may cover a lower degree of probability than probable, in statistics, Probability means the whole range of possibility between impossibility and certainty, the degree of probability is expressed either as a vulgar fraction or as a decimal fraction…. that it is a chance of 1 in a hundred or that the odds are 99 to 1 against."***

In deciding the question on a motion of no case to answer it must be noted that the text of Section 306 (1) & (2) of the Criminal Procedure Code has to reflect the existence of the right of an accused person to remain silent and not to testify during the proceedings. **(See Article 50 (2) (i) of the Constitution).**

Having reviewed all the evidence, I appreciate existence of some scintilla material indicating accused may have committed the offence but it is not consistent with the burden of proof to construe a prima facie case in favor of the prosecution. For these reasons the foundation of this case affords a reasonable ground of a motion of no case to answer. I echo the words of ***Lord Devlin in Shaaban Bin Hussein v Chong Fook Kam [1969} ALL ER 1626***:

> ***"Suspicion in its ordinary sense is a state of conjecture or surmise where proof is lacking. 'I suspect but I cannot prove.' Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is at an end."***

Consequently, the charge against the accused person is dismissed and is therefore set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the state

2. The accused person