REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL NO. 6 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

GUTU SAMBARO JILAT.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the State

Mr. Lughanje Advocate for the accused person

R U L I N G

The accused was charged with the offence of murder contrary to section 203 and 204 of the Penal Code, being accused of killing **Koru Ono Barisa** on **20th February, 2018** at Masikabana Village in Tana Delta Sub-County. The accused pleaded not guilty to the charge.

Prosecution Case

It is the case for the prosecution by the evidence of Pw2, that on one **Gutu** gave land to till and occupy. Pw2 to the effect made use of it by cultivating maize crop. In sustaining the crop Pw2 stated in Court that he had assigned a boy to guard the farm. On that material day he sent **Boru Barisa** to visit the farm in order to harvest the maize. It did not take long before he received information that the boy has been murdered. Considering the matter Pw2 visited the farm only to be confronted with the deceased body with multiple injuries. The police officers responded to the complaint and carried out investigations which resulted in the arrest of the accused.

It is also evident in the prosecution case that a postmortem was carried out by **Dr Kahindi** on 20th February, 2018. According to the evidence of the medical officer the deceased on examination was found to have sustained injuries to the left side of the chest cavity. The Doctor attributed the cause of death to cardiogenic shock and severe haemorrhage and cardio vascular collapse.

At the close of the prosecution case, it was incumbent upon this Court to make a finding under section 306 of the Criminal Procedure Code on a Motion of a no case to answer or existence of a prima facie case.

Determination

The main issue for determination in this trial at half time submission is whether the accused has a case to answer on the charge of murder. The burden of proof of beyond reasonable doubt to proof the ingredients of the offence which comprise of the following rests with the prosecution throughout the trial.

a) That the deceased is dead.

b) That his death was due to an unlawful act by the accused

c) That in killing the deceased accused had malice aforethought

d) That it is beyond per adventure the deceased death was caused by the accused.

It was expected of the prosecution to discharge a wholesome burden as envisaged in section 107 (1) of the Evidence Act which states that; -

1) Whoever desires any Court to give judgement as to any legal right or liability is dependant on the existence of facts which he

asserts must prove those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

It is trite as expressly stated in the cases of ***State Vs Ramadhan Chin Shue HCA No. 104 of 1997 and Sanjih Chaittal V The State [1985] 39 WLR Bhatt V [1957] EA 332*** that; -

> ***"A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence adduced by the prosecution to prove essential elements in the alleged offence (b)With the evidence adduced by the provision has been so discredited that no reasonable tribunal could safely convict on it."***

In addition, in the case of ***Uganda V Mulwa Aramathan Criminal Case No.103 of 2008*** the Court stated that; -

> ***"A prima facie case does not mean a case proved beyond any reasonable doubt since at this stage, Court has not heard the evidence for the defence."***

The indictment is top most of the crimes in the Penal Code as it is commission is against Article 26 of the Constitution on the right to life. The test to be applied on the standard of proof at half time under Section 306 of the Penal Code is clearly lower than the standard of proof of beyond reasonable doubt expounded in the landmark cases of ***Woolmington v DPP {1932} AC and Miller v Minister of Pensions {1942} ALL ER 462.*** The Learned Author **Ray Watson Criminal Law New South Wales 1996** remarked as follows:

> ***"on submission of no case the judge is concerned only with the question whether there is evidence which is legally capable of leading to a conviction and not with the question whether the evidence is so lacking in weight that a conviction based upon it would be unsafe or unsatisfactory, except where the evidence is so inherently incredible that no reasonable person would accept its truth. The test to be applied by the judge in answering the question whether there is evidence capable in Law of supporting a conviction is the same whether the case depends on direct or circumstantial evidence – that is, whether there is evidence with respect to every element of the crime charged which, if accepted, could prove that element beyond reasonable doubt."***

In the present case upon examination of the evidence in totality as stated by the single witness (Pw2), I find that there is no credible evidence apparent on the face of the record to proof the elements of the offence as known in law. While Pw2 disclosed that the deceased went to his farm to harvest the maize, there isn't sufficient explanation on how he met his death. It is on record that the witness was not at the scene of the murder. He came to learn of it and on visiting the scene discovered the deceased body with multiple injuries. It is not in dispute that the deceased **Barisa Boru** is dead as reflected in the post mortem examination report. The prosecution also from the evidence of Pw 1 and Pw 2 establishes that the deceased died of stab wounds to the chest cavity in which he instantly succumbed to death. On the basis of the post mortem report and circumstantial evidence by Pw2, the death of the deceased was unlawfully caused.

However, in light of the weight of evidence by Pw2, the participation of the deceased in causing the death of the deceased is in case at bar in doubt. I note that the prosecution case is wholly based on circumstantial evidence of Pw 2 and taken at its highest, the threshold in proving the charge has not been satisfied. The Court held in ***R V Kipkering Arap Koske & another [1949]16 EACA 135*** that; -

> ***"In order to justify the inference of guilt, the inculpatory facts must be inculpable with the innocence of the accused and incompatible of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

I find it impossible to avoid the conclusion in consonant with the principles in ***R V Turnbull [1976] 3 ALL ER, 549*** that on examination and weighing the evidence in totality, the enquiry on correctness of the identification of the accused as the perpetrator of the offence is in the negative. The deceased died and unlawfully so but the case falls short of squarely placing him at the scene of the crime.

The prosecution case being partly of circumstantial in nature is not sufficient for positive identification or recognition to identify the accused as the one culpable and responsible for the death of the deceased. Looking at the case again and again, I have come to the conclusion that there is no prima facie case established by the prosecution for the Court to call upon accused to state his defence under Section 306 (2) as read with Section 307 of the Criminal Procedure Code. Applying the test enunciated above in the case of **Turnbull (supra)** I find there isn't sufficient evidence on account of murder to implicate the accused. The charge is therefore dismissed and the accused is set at liberty 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