REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL CASE NO 81 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

FLOMENA CHEROP RUTO.....1ST ACCUSED

CATHERINE TERIKE TOROITICH.....2ND ACCUSED

(Formerly Nakuru High Court Criminal Case No. 125 of 2015, Republic versus

1. Flomena Cherop Ruto 2. Catherine Terike Toroitich AKA Jematian)

RULING

1. The issue before me is whether the prosecution have made out a case to warrant the accused to be put on their defence in terms of section 306 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

2. The accused are charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya in respect of the deceased Kigen Chemitei; which allegedly occurred on 11/5/2016.

3. The prosecution called Ezra Kibichi Lagat (Pw 1). Pw 1 testified on 11/5/2016 at 3.00 pm he was helping the deceased to plant maize. Pw 1 saw the 2nd accused approach the deceased with a jembe. When she was close to the deceased, the 2nd accused put down the panga and started to beat the deceased with a stick, that was one metre long. The 2nd accused struggled with the deceased and the two fell down. At that time the 1st accused took the panga and cut the deceased on the head. After cutting the deceased the two accused ran away.

4. Pw 1 testified that the 1st accused is the daughter of the 2nd accused.

5. He also testified that the accused had a boundary dispute with the deceased.

6. Pw 1 informed the assistant chief who arrived there at 7.00 pm. Pw 1 took the deceased to his home.

7. Pw 1 further testified that on 12/5/2016 the body of the deceased was taken to the mortuary for postmortem.

8. The evidence of Pw 1 is supported by that of David Kigen (Pw 2).

9. The report of the doctor who performed the postmortem was put in evidence by consent as exhibit Pexh 1. According to that report the cause of death was due to intracranial and extracranial haemorrhage arising from a cut wound on the head.

The applicable law

10. The applicable is to be found in section 306 (1) and (2) of the Criminal Procedure Code [Cap 75] laws of Kenya, which reads as follows:

> "*(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, 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.*
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> *(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that*

the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact."

11. The issue is whether a prima facie case has been made out to require the accused to be put on their defence in terms of section 306 (2) of the Criminal Procedure Code. If the prosecution have failed to make out a prima facie case, the accused should be acquitted in terms of section 306 (1) of the Criminal Procedure Code. On the other hand, if the prosecution has succeeded in making out a prima facie case, the accused should be put on their defence.

12. In view of the foregoing, reference to court decisions is necessary since the foregoing statutory provisions have not defined what constitutes a prima facie case. According to *Bhatt* v. *Regina* [1957] EA 332 at page 335 paragraphs (a) and (b) *a prima faci*e case is made out when:

"*a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."*

13. Furthermore, if the prosecution witnesses have been discredited it cannot be said that prima facie has been made out. In this regard, this court (Trevelyan & Hancox, JJ) in *Republic* v. *Wachira* [1975] EA 262 at page 263 paragraph d, pronounced itself as follows:

"*a court is only entitled to acquit at that stage (at the close of the prosecution case) if there is no evidence of the material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself could safely convict."*

14. It seems that the above principles are followed in trials conducted before a judge and a jury. The English Court of Appeal (Lord Lane, C.J.) in that regard pronounced himself as follows in *R.* v. *Galbraith* [1981] 1 WLR 1039:

"*How then should the Judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The Judge will of course stop the case. (2). The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a). Where the judge comes to the conclusion that the prosecution evidence, taken as its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b). Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within 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 ……. There will of course, as always in this branch of the Law, be borderline cases. They can safely be left to the discretion of the judge."*

15. It is important to point out that in trials before a jury and a Judge, it is the Judge alone who makes a determination as to whether a prima facie case has been made out to warrant the accused to be put on his defence. This is the position in law as the issue as to whether the accused has a case to answer or not is an issue of law. In Kenya the Judge is both a Judge of law and fact, whereas in England the Judge is only a Judge of law and the jury are judges of fact.

16. Furthermore, the charge against the accused is a joint charge. In that regard the doctrine of common intention does arise. The said doctrine is embodied in section 21 of the Penal Code which reads as follows:

"*When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

17. The courts have interpreted the foregoing doctrine in a number of cases including *Dickson Mwangi Munene & Another* v. *Republic* [2014] eKLR in which the court (Nambuye, Maraga & Mohammed, JJ.A) at para 53 observed that:

"*This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In Solomon Mungai v. Republic [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged."*

18. Furthermore, the Court of Appeal (Nambuye, Warsame & Murgor, JJA) in *Stephen Ariga & Another* v. *Republic* [2018] eKLR cited with approval the ingredients of common intention as set out in *Eunice Musenya Ndui* v. *Republic* [2011] e-KLR, in which that court stated that:

"*The ingredients of common intention were enunciated in Eunice Musenya Ndui versus Republic, Criminal Appeal No. 534 of 2010 (2011) eKLR as follows:-*

(1) There must be two or more persons;

(2) The persons must form a common intention;

(3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another;

(4) An offence must be committed in the process;

(5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of the unlawful purpose."

Issues for determination.

19. I have considered the totality of the evidence and the application law. As a result, I find that the following are the issues for determination.

1. Whether the prosecution has established a prima facie case to warrant the accused being put on their defence.

Issue 1

20. I have considered the totality of the evidence in the light of the applicable law. I find that at this stage I am not required to give reasons for my ruling because I am not required to finally determine the credibility of the prosecution witnesses. This will be done after the close of the evidentiary hearings for both parties.

21. In the premises, I find that a prima facie case has been made out to require the accused to be put on their defence.

22. I hereby put the accused on their defence.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT KABARNET THIS 26TH DAY OF JULY 2021.

J. M. BWONWONG'A

JUDGE

In the presence of:

Mr. Kemboi and Mr. Sitienei Court Assistants.

Mr. Chepkilot for the 1st accused.

Mr. Kipkulei for the 2nd accused.

Mr. Mong'are for the Republic.