



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 20 OF 2018

CORAM: HON. R.E. ABURILL, J

STATE.....PROSECUTION

VERSUS

COLLINCE ONYANGO ODUOR.....1ST ACCUSED

MAURICE ODIWUOR OLOO.....2ND ACCUSED

RULING

1. The two accused persons herein Collince Onyango Oduor and Maurice Odiwuor Oloo are jointly charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 19th day of December 2018 at between 2030 hours and 2100 hours at Sinapanga Village in Bondo Sub County within Siaya County, jointly with others not before court, they murdered one Paul Omondi Akal.

2. The accused persons denied the charge and the prosecution called 10 witnesses who testified and produced several exhibits before closing their case. The question before this court is whether the prosecution has established a prima facie case to warrant placing the accused persons or any of them on their defences(s).

3. According to the 1st accused person's counsel in his written submissions dated 19/10/2021, the Prosecution have not adduced sufficient evidence to enable the court place him on his defence because the 1st accused was not at the scene of the alleged murder. He attacks the evidence of PW1, PW2 and PW4 who did not recognize the attackers who allegedly killed the deceased and that as the 1st accused was not placed at the scene of murder, he should be acquitted.

4. Secondly, that the evidence linking the 1st accused to the murder of the deceased is purely circumstantial and based on mere suspicion. Nothing was filed for the 2nd accused. **Section 306 of the Criminal Procedure Code** requires the court, after closure of the prosecution case, to make a considered determination on whether an accused person has a case to answer. The section provides:

“36(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.

(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 on his own behalf or make unsworn statement and to call witnesses in his defence...”

7. On what constitutes a prima facie, in **Bhatt v R [1957] EA 332** the Court of Appeal held:

“Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to suggesting that the Court would not be prepared to convict if no defence is made but rather hopes the defence will fill the gaps in the Prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence.” A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true as Wilson J said that the Court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively: That determination can only properly be made when the case for the defence has been heard. 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.”

5. I have considered the evidence of the 10 prosecution witnesses and exhibits produced. I have also considered the submissions by Mr. Ooro advocate for the 1st accused person.

6. At this stage, this court is not expected to delve deep into the evidence adduced by the prosecution in order to determine whether the accused has a case to answer. To do so would prejudice the accused person's case. That is not to say that the court cannot make a finding of no case to answer but that where it is of the view that the evidence adduced establishes a prima facie case against the accused person, then the court should not analyze the evidence. This is so because a prima facie case is not necessarily one that must succeed. The law is clear that the burden of proof throughout the trial lies with the prosecution to establish the guilty of the accused persons and that burden does not shift to the accused persons.

7. This is not to say that placing the accused person on their defence prima facie shifts the burden of proving their guilt. It is for that reason that Article 50(2)(i)(k) and (l) of the Constitution guarantees every accused person the right to fair trial including (i) the right to remain silent, and not to testify during the proceedings; (k) to adduce and challenge evidence; and (l) to refuse to give self-incriminating evidence.

8. The above three constitutional guarantees cushion an accused person who is placed on his defence against any imagination of his or her guilt.

9. Therefore, although, in the instant case, the 1st accused person's counsel submits that his client was not placed at the scene of crime as he was never identified by any of the witnesses present and that he is in court because of suspicion and that the circumstantial evidence linking him to the offence is not sufficient against him, I find that the evidence adduced by the Prosecution weighed as a whole establishes a prima facie case against the two accused persons to warrant them being placed on their defence.

10. Accordingly, I find and hold that Collince Onyango Oduor and Maurice Oduor Oloo have a case to answer. They are hereby placed on their defence to answer to the information of the Murder of Paul Omondi Akal. The provisions of Article 50(2)(i)(k) and (l) of the Constitution and Section 306(2) of the Constitution are hereby explained to the accused persons on their rights.

11. Order accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 25TH DAY OF OCTOBER 2021

R.E. ABURILI

JUDGE