



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO. 3 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

MOHAMED OKEY ABAE.....1ST ACCUSED

BAKARI KOMORA GUBANI.....2ND ACCUSED

SAID BAKARI KOMORA.....3RD ACCUSED

BWANAMKUU JILLO ALI.....4TH ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. J. Mwangi for the state

Ms. Ochoo watching brief for the family

Mr. Bosire for the 1st accused person

Mr. Gekanana advocate for the 2nd, 3rd and 4th accused persons

R U L I N G

The four accused persons namely, **Mohamed Okey Abae, Bakari Komora Gubani, Said Bakari Komora** and **Bwanamkuu Jillo Ali** were arraigned in Court on 16th January, 2019 charged of murder contrary to Section 203 and 204 of the Penal Code.

The brief particulars were that on 30th November, 2018 at Mnazini village, Tana River, they jointly murdered **Abubakar Tune**. Each of the accused pleaded not guilty. As a consequence, the prosecution was put on notice to prove each ingredient of the offence is beyond reasonable doubt.

At the trial the 1st accused was represented by Learned Counsel **Mr. Bosire** whereas **Mr. Gekanana** appeared for the 2nd, 3rd and 4th accused persons in order to discharge the burden of proof. The prosecution summoned the attendance of the witnesses.

Overview of the Evidence **(PW1) Buya** testified as the father to the deceased that on 30th November, 2018 he received a telephone call from his daughter in regard to a misunderstanding behavior. The deceased and his wife thereafter, he was informed that the deceased had been taken to the hospital where he succumbed to death.

(PW2) Fatuma Jillo, a wife to **(PW1)**, testified that on 29th November, 2018 she was at home when her daughter complained of the loss of Kshs.1,650/=. She inquired from the deceased on the whereabouts of the money being alleged by the daughter as missing. The deceased failed to give any information and as such attempts were made to conduct a quick search on him. In the course of that action the deceased who was armed with a panga used it to inflict harm on the wrist. **(PW1)** further testified that in view of the injuries she proceeded to Mnazini dispensary to seek medical treatment. In the afternoon when **(PW2)** went back home, the deceased happened not to be within the homestead. That is when **(PW2)** was told that the accused persons had gone away with the deceased. In the course of inquiring information came in that the deceased was at Mnazini hospital where he was pronounced dead.

(PW3) Bakari Marowa gave evidence that on 30th November, 2018 he was in the mosque when he heard the deceased had cut his mother. He took a step to go and see for himself whether the incident indeed had taken place. On arrival (PW3) told the Court that he was informed that the 1st accused and the Kenya Police Reservist picked him from the home. He followed up the issue to the Chief's office but it was closed. (PW3) further testified that on his way back from the Chief's office he met school children surrounding the body of the deceased. In the same scene (PW3) told the Court that the accused persons were also present armed with sticks.

(PW4) Nuur Hadia evidence was to the effect that on 30th November, 2018 she heard screams by Fatuma saying "amenikata". On rushing to the scene (PW4) explained to the Court that she saw the deceased armed with a panga and the complainant Fatuma bleeding from her wrist. (PW4) further testified that in company of one Ali, they persuaded the deceased to surrender his panga and subsequently tied him with a rope soon thereafter (PW4) told the Court that she received information that the deceased is dead.

(PW5) Mwanamtiti Hajito testified that on 30th November, 2018 while at home with the deceased and his mother a conflict arose in which the deceased cut Fatuma with a panga. It did not take long the accused persons came to the scene and took away the deceased as the mother proceeded to the hospital for treatment. He came to hear of the death of the deceased on the same day.

(PW6) – Mwanaisa Madawa told the Court that she went to the Chief's office where she found the other three accused persons. (PW7) Kokaine Adhumani testified that he operates a bodaboda, which the 3rd accused asked him to use to pick a sick child. According to (PW7) the sick child he was to carry happened to be the deceased. On arrival at the pick up point he met with the accused persons. In his observations the deceased was wearing a trouser but no shirt but in bad physical shape. However, (PW7) told the Court that he escorted the deceased to Mnazini Dispensary. On examination by the doctor, the deceased was pronounced dead. (PW8) Dr. Falid Swaleh attached to Malindi Sub-County hospital gave evidence with regard to the postmortem examination report dated on 1st December, 2018. According (PW8) evidence the deceased had sustained blisters on the right upper limb, facial oedema, blood oozing from the nose, mouth and ears. In conclusion (PW8) opined the cause of death to be the head injury due to fracture base of the skull.

Last was the testimony of (PW9) – PC. Francis Manyonge of Garsen DCIO office. In this case (PW9) gave evidence on the nature of investigations carried out which culminated in holding the accused culpable for the death of the deceased.

Resolution

Given that position by the prosecution case at the close of it the Law requires of this Court at half-way stage of the trial to test the evidence pursuant to Section 306 (1) (2) of the Criminal Procedure Code. If the evidence satisfies the test of a prima facie case the accused persons should be called upon to offer their respective defences. Second, if on assessment of the evidence it turns out that its distinctively below the bar of a reasonable standard of proof, a motion of no case to answer carried the day and each of the accused persons should be acquitted of any wrong doing.

Where the prosecution fails to disclose a prima facie case for accused persons to be put on their defence. The Judge in **Comba Case {1938} 70 CCC 205 SCC and Walker {1939} 71 CCC 305** stated as follows:

“If the trial Judge is satisfied, as a matter of Law, that the Court has failed to establish a prima facie case, he or she must direct the jury to return a verdict of not guilty, if the judge is the trier of fact, he or she must acquit the accused.”

More succinctly, on this jurisprudential question, the Court in **England and Wales Lane C. J. in R v Galbraith {1981} WLR 1039** gave the following guideline:-

“How then, should the judge approach a submission of “no case”? 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. The difficulty arises where there is some evidence but 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 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 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 proceed or in the jury system 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.”

On review of the evidence by the prosecution, I am satisfied that a prima facie case for the offence of murder contrary to Section 203 has been made out at this stage to warrant each of the accused persons to be placed on his defence. For that reason, each accused is at liberty under Section 306 (2) as read with 307 of the Criminal Procedure Code elect to give his defence.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 19TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for DPP
2. Mr. Bosire advocate for the 1st accused persons
3. Mr. Gekanana advocate for the 2nd, 3rd and 4th accused persons
4. The accused persons