REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO. 6 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

MOHAMED ATHMAN MJAHID Alias BADI BURA.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Accused in person

RULING

The accused person **Mohamed Athman Mjahid** was indicted with the offence of murder contrary to Section 203 and 204 of the Penal Code. It is alleged that on the 1.11.2015 at Mbwajumwali village, at Lamu Sub-County, the accused murdered **Bwana Musa Ahmed Mohamed**.

The accused at the time of plea denied the offence that resulted in the prosecution to summon the witnesses to proof the charge beyond reasonable doubt. In that regard, two key witnesses on circumstantial evidence stated as follows:

> **(PW1) – Hashim Ahmed Mohamed** testified to the effect that on the 1.11.2015 he was telephoned by his sister **Amina** with a message on the assault and death of the deceased. The starting point for them was to arrange for the burial in order to inter the body in compliance with Islamic rites. According to **(PW1),** he did not have any knowledge on how the deceased met his death.
>
> **(PW2) – Ahmed Swaleh Bwanamkuu** testified also on 1.11.2015 he received information from the siblings of the deceased that he has been killed. However, that message never named the person who participated in the killing.

Determination

For the offence of murder contrary to Section 203 of the Penal Code, it incumbent upon the prosecution to proof the following elements of the offence:

> **(a). That the deceased is dead.**
>
> **(b). That the death was caused unlawfully.**
>
> **(c). That in committing the offence, there was malice aforethought.**
>
> **(d). That overact, the accused person directly or indirectly caused the death of the deceased.**

At this stage of the trial, the Court is required to make a finding under Section 306 of the Criminal Procedure Code that the essential elements of murder have been proved to warrant accused person to be placed on his defence.

It is further proceeded that if there is no proof of existence of the fact of death, unlawful acts of causing death, or existence of malice aforethought, the Court has to exercise discretion to grant a motion of no case to answer in favor of the accused person. That standard of

proof is to be underpinned in terms of the enumerated principles in **Woolmington v DPP {1935} AC 462** and **Miller v Minister of Pensions {1947} 2 ALL ER 372**. At the close of the prosecution case as held in **Sanjit Chalttal v The State {1985} 39 WLR** and **R. T. Bhatt v R {1957} EA 332**

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

In this context, I have weighed the evidence of the two witnesses and I find no sufficient evidence either directly or circumstantial to demonstrate the accused person committed the crime charged. In this respect the two witnesses failed to attach culpability to both legal and factual components of the alleged offence as defined under Section 203 and 204 of the Penal Code. In that light, none of the two witnesses was able to positively place the accused at the scene of the crime to apportion responsibility on each of the elements of the charge.

It follows from the evidence that the prosecution case this far presented and pursued fails the test of a *primafacie case* to warrant the accused to be called upon to state his defence. This muddle of the evidence is never illustrative of the expectation of a *primafacie case* as elucidated in **Ikomi v State {1986} 3 NWLR 28 340.** The Court held as follows:

> **"Primafacie has been explained by Hubbard J in Regina v Coker and other {1952} NLR 62 while he held that on submission that there is no case to answer meant that there was no evidence on which the Court could convict if the Court believed the evidence given."**

The second limb of this case deals with Article 50 (2) (E) of the Constitution. The accused might have his or her trial begin and conclude without unreasonable delay. In terms of this right trials that begin and concluded within a reasonable remain the hallmark of a fair administration of criminal justice system in a Constitutional democracy. It is worth noting that Article 50 (2) (E) of the constitution protects other actors in the criminal justice besides an accused person. In terms of this provision untimely trials impact negatively witnesses, the state victims, the police investigators and the public at large who have a stake in the public confidence in the administration of justice. The **Supreme Court in Canada R v Morin {1992} 1 S.C.R 771** has set out construction guidelines and mainstreamed the interpretation of what constitutes a trial initiated and concluded within a reasonable time to include: the length of the delay, waiver of any time periods by the accused, the reasons for the delay, the time requirement of the case, the actions of the parties, limitation or institutional resources and prejudice to the person charged.

In the case, prior to this Ruling, accused person had been indicted on 16.2.2016 as outlined in the record of proceedings before the Lower Court. By looking at the length of the delay accused person has been on the waiting list to have his case heard and concluded within a reasonable for a period of five years and ten months. Unsurprisingly, no account of sufficient reasons were advanced by the state for the length of the delay. The only outstanding reason was lack of availability of witnesses. Which means in essence the delay was just a matter of a culture of complacency by the scope in procuring attendance of witnesses. From the record, one finds no implicit or explicit waiver by the accused in the delay not commencing or concluded within a reasonable time. This was a delay solely caused by the stat even with its massive resources to respond to any challenges that impede a fair, facilitative and expeditious administration of justice. I also find no discreet chain of events that contributed to the delay of the trial which militates on the long period of delay to conclude the trial. The by-product of all these being the prejudice and a failure of justice against the accused person. The primary considerations of Article 50 of the Constitution is to avoid miscarriage of justice and to ensure that the due process guarantees contained in that Article are protected and guaranteed. It is against this background that the evidence shows a violation of the accused's constitutional right to a fair hearing.

It follows accordingly, the special inference behooves on me to dismiss the charge against the accused. Accordingly, in terms of Section 306 of (1) (2) of the Criminal Procedure Code, the burden of proof of invoking the subsection that establishes a *primafacie case* fails. From that position, the defence has no case to answer.

The result is for the accused to be acquitted and set free and at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF DECEMBER, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. ……..

2. ……..