



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 7 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

DAMA KAZUNGU.....1ST ACCUSED

ANDESON MULEWA.....2ND ACCUSED

JIMBI JEFFA KAREMA.....3RD ACCUSED

AMANI NGALA.....4TH ACCUSED

MWALIMU KAINGU JEFFA.....5TH ACCUSED

RACHAEL KAZUNGU.....6TH ACCUSED

JEFFA KAZUNGU KAREMA.....7TH ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms Sombo for the State

Mr. Michira for the Accused persons

RULING

The seven accused persons were jointly charged with the offence of murder contrary to Section 203 of the Penal Code as read with Section 240 of the same.

It was alleged in the particulars that the accused persons on the 6th February, 2015 at Roka Village jointly with others not before court murdered **Kazungu Jefwa Karema**.

Each of the accused pleaded not guilty and their defence was under the direction of legal counsel **Mr. Michira** while the State prosecuted the charge.

Through prosecution counsel **Ms. Sombo** the burden of establishing the guilt of the accused persons to meet the essential elements of the offence was based on the evidence of six (6) witnesses.

In this respect a summary of what they told this court suffices on drawing inferences on a motion of no case to answer under Section 306(1) of the Criminal Procedure Code.

To start of the prosecution case was the testimony of **PW1 – Charo Kithepe** testified that on 6th February, 2015 he was asked by his neighbour to go to their home to treat a patient by the name **Salama**. He readily agreed to walk to their home in company of his wife. On arrival PW1 explained that they were many people including the deceased **Kazungu Jefwa**. He noticed that **Kazungu Jefwa** had suffered injuries on the nose and lay down unconscious. That time he also decided to treat **Kazungu Jefwa** soon thereafter he was ordered to leave the homestead. Due to the threat he was receiving from the people in the homestead he had to lodge a complaint with chief of the area (**PW4**) **Hudston Kithi Yaa**. According to PW1, he was later to be informed of the death of the deceased.

On cross-examination, the witness denied identifying the accused persons assaulting the deceased. He only referred the incident of his assault to the police for further investigations to bring the culprits to account.

PW2 - Sgt. Daniel Kimeu of Matsangoni Police Post testified that PW1 and PW3 reported an assault incident in which PW1 sustained harm at the home of the deceased. The investigations showed that the 2nd accused was one of those involved in the assault of (PW1) on the material day.

According to PW3, while at their home with (PW1) the 1st accused and another by the name **Jora Kazungu** riding a motorcycle came for (PW1) at his homestead to go and treat the deceased but as they arrived he was bleeding due to the injuries already inflicted by some people at the home.

In a short while, (PW1) was ordered to leave the home with threats of dire consequences if the treatment fails. On reflection PW3 told the court that they decided to have the matter reported to the chief of the location (PW4).

PW5 – Dr. Zeinat Zahran a medical officer attached Kilifi hospital produced the postmortem report on behalf of **Dr. Bachu** in respect of the deceased which was carried out on 17th February, 2015. According to PW5 the examining pathologist found the deceased sustained multiple injuries to the tibia; fibula, left jaws, chest, fracture of the 1st, 2nd, and 3rd rib of the chest wall. Fracture of the fibula bone

The Doctor opined that the cause of death was due to hemorrhage secondary to head trauma.

PW6 – P.C. Machoka gave circumstantial evidence as to the death of the deceased and assault of the (PW1) who was forcibly taken to the home to offer treatment. PW6 said that in the company of other police officers they visited the scene where he saw many people and the deceased **Kazungu Jefwa** already confirmed dead.

inside his house. PW6 testified that he made arrangements to have the body of the deceased removed from the scene for the mortuary at Kilifi.

According to PW6, on the evidence collected from the surroundings the accused persons were suspected to have played a role in the death of the deceased that was the time they were arrested and jointly charged with the offence of murder. The prosecution case was therefore depended upon these circumstantial evidence against the accused persons.

Analysis

The minimum consideration of a motion of no to answer is as indicated in Section 306(1) of the Criminal Procedure Code. It states inter alia that if at the close of the case for the prosecution, the court considers that there is no evidence that the accused or any of the accused committed the offence charged or any offence of which at or she might be convicted, the court may enter a verdict of not guilty and discharge the accused or accused persons.

If on the other hand the prosecution case demonstrates existence of sufficient evidence in respect of the elements of the offence, the court may direct that the accused persons be called upon to state his or their defence.

The concept of a no case to answer at halftime considerations, when the defendant is yet to be called upon to state his or her case was considered in the case of **Zannetti v Hill 1962 108 CLR** where the court held in part that:

“The question whether there is a case to answer, answering as it does at the end of the prosecution’s evidence in chief, is simply the question of law, whether the defendant could lawfully be convicted on the evidence as it stands, whether, that is to say there is with respect to every element of the offence save evidence which if accepted, would either prove the element directly or enable its existence to be conferred to be carefully distinguished from the question of facts for whether decision, namely whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt, see (May v O. Suleiman 1955 HCA 38. The ultimate question of fact must be decided on the whole of the evidence.”

As is clear from the review of the evidence undertaken above I am of the view that a prima facie case to answer the charge has been established by the prosecution on the following elements:

- a) That the deceased Kazungu Jefwa died;**
- b) That his death was unlawful;**
- c) That there is a causal connection between the unlawful acts of assault and malice aforethought.**

As a consequence is the prosecution has sufficient evidence of a prima facie case to order the accused persons to state their defence in terms of Section 306(2) as read with Section 307 of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30TH JANUARY, 2020.

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R. NYAKUNDI

JUDGE

In the presence of: -

Accused persons