



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO.18 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

KADENGE KATANA KAZUNGU.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Mr. Michira for the accused person

RULING

1. On 31st October, 2019 the state through the Director of Public Prosecution preferred a charge of murder contrary to section 203 of the penal code against the accused person, **Kadenge Katana Kazungu**. It was alleged in the indictment that on the 14th October, 2016 at Kwa Mwangari, Makongeni within Kilifi County, jointly with others not before court accused murdered **Karisa Kayaa Ngari**.

2. On being arrested and arraigned before court accused pleaded not guilty. The case had to proceed for trial to enable the prosecution discharge the burden of proof under Section 107(1) of the Evidence Act. Learned Counsel **Mr. Michira** represented the accused person while **Ms. Sombo**, appeared for the state.

3. The prosecution summoned seven witnesses to establish that an offence of murder had been committed on 14.10.2016 against the deceased and the person responsible happened to be the accused person.

4. At the close of their case it's a requirement under section 306 (1) of the Criminal Procedure Code that a decision be made whether a *prima facie* case has been established to warrant an accused person to be placed on his or her defence. Both counsels opted out of making any submissions of a no case to answer as provided for under section 306(1) of the code.

The legal perspective

5. At this stage of the proceedings there is therefore an agreement that the standard of proof is not that of beyond reasonable doubt. In view of the fact that the accused person has not testified the court should tread cautiously so as not to make definitive findings on the ingredients of the offence. In the case of **Queen v Lorne Parsons and others BVI** Criminal Case number 9 of 2005 the court held as follows;

“The judge does not have to consider whether the crown have proved the case beyond reasonable doubt. The statement on a prima facie case is not to determine proof of the guilt of an accused person but rather is to decide whether the evidence has the potential to lead to a conviction. The real question is to decide whether there is sufficient evidence on which a reasonable jury properly directed might convict.”

6. The former Court of Appeal for East Africa in **R. Bhatt v Republic 1957 EA** held that on the definition involved of a prima facie case to be one which;

“A reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is given by the defence.”

7. When addressing the legal threshold on a motion of a no case to answer is limited so as not to shift the burden of proof to the accused persons. That the prosecution is vested with the duty to prove any criminal offence against an accused person beyond reasonable doubt and

not vice versa. This is consistent with the constitutional provision under Article 50 2(a), that the accused has a right to be presumed innocent until the contrary is proved.

8. When considering the evidence at the conclusion of the prosecution case it is the duty of the court to observe the following as considered in the case of **S v Mathebula and another 1997 1 SACR 10** where the court held that;

“The duty to prove an accused’s guilt rests fairly and squarely on the shoulders of the state. The accused need not assist the state in anyway in discharging this onus. If the state cannot prove any evidence against the accused at the end of the state’s case, why should the accused be detained any longer and not be afforded his constitutional rights of being regarded as innocent and thus being acquitted and accorded his freedom? Can it be said that he was given a fair trial If, at the close of the state’s case wherein no evidence was tendered to implicate him in the alleged crimes, the trial is then continued owing to the exercise of a discretion in the hope that some evidence implicating him might be forthcoming from the accused himself or his co-accused.

To my mind such a discretionary power to continue the trial would fly, in the face of the accused’s right to freedom, his right to be presumed innocent, and remain silent, not to testify and not to be a compellable witness. To my mind it would constitute a gross unfairness to take into consideration possible future evidence which may or may not be tendered against the accused either by himself or by that co-accused and for that reason decide not to set him free after the state had failed to prove any evidence against him.”

9. From the above principles what is required in a prima facie case is that there should be sufficient cause at the conclusion of the prosecution case prima facie evidence which has to be displaced by some adequate explanation by the accused person. To displace the presumption, the accused is then called upon to rebut the evidence as a whole, or a defence which does justify or excuse him from culpability. It is sufficient if the accused satisfies the court that he was not personally liable for the crime in which he was charged by the state or the unlawful act was justified and falls within the known criminal defences.

10. The accused in this case is charged with the offence of murder contrary to Section 203 of the Penal Code. At the close of the prosecution case, the evidence adduced must be tested against the background of the following ingredients:

- a). **The death of the deceased Karisa Kayaa Ngari.**
- b). **That the deceased death was caused by unlawful act or omission.**
- c). **That in causing death, the accused person was actuated with malice aforethought.**
- d). **That the evidence on record places the accused at the scene of the crime.**

From the above essential elements, a motion of no case to answer succeeds when there is no inference by either direct or circumstantial evidence that the accused was involved in the death of the deceased.

11. Hence in interpreting as to whether a prima facie case lies the learned author in **Mozley and Whitleys Dictionary 5th Edition** stated

“that a prima facie case is where a litigation party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called upon to answer it. A prima facie case, then, is one which established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.”

12. For instance in **Prasad v R (1979) 2 A CRIM R 45 Ving CJ** strongly held the following view read on a *prima facie* case where he said.

“I have no doubt that a tribunal which is Judge of both Law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding. That there is evidence upon which the defendant could lawfully be convicted, if that tribunal considers shall the evidence is so lacking in weight and reliability that no reasonable tribunal could safely convict on it.”

13. In the present case I have subjected the prosecution evidence to a material evaluation with a view of making a finding whether a *prima facie* case exist.

14. The evidence of **PW1- Mary Charo**, testified as the wife of the deceased that on the fateful day of 14th October, 2016 he had gone to the field to look after their goats. PW1 stated that in the late hours of the day the deceased failed to turn home as expected after daily activities. This caused some anxiety resulting in her to alert the neighbors who commenced a search of the whereabouts of the deceased. PW1 testified that one of the direct relative she reported the ‘missing’ of the deceased was **PW2- Shikubali Kayaa**. Shortly after in company of other neighbors they began a mission to look for the deceased. There was no dispute that the search began with the proximity of the area; he had gone to grace their goats. According to PW1, PW2 and PW3 on the 16th October, 2016 the body of the deceased was detected floating in Galana River.

15. It was further stated by **PW4 PC(W1) Faida Katana** that at about 12.45 hours on 16th October, 2016 the accused and two other persons visited Lango Baya Station claiming that they were seeking a safe haven as they had information that accused was being sought in connection with the death of the deceased. While at the police station PW4 stated that accused person started crying alluding to the death of the deceased and what had actually transpired.

16. **PW5 PC Thomas Simiyu** attached to Malindi Police Station testified as the investigating Officer of the case. According to PW5 the investigations carried out revealed that the goats being herded by the deceased strayed into the farm of the accused. This incensed the accused who in turn retaliated by attacking the deceased occasioning fatal injuries. The accused having surrendered to the police was therefore charged with the offence.

17. **PW6 – Dr. Faisal** a medical Officer attached to Malindi Hospital testified on behalf of Dr. Andere who carried out the postmortem examination on the referenced body of the deceased. The pathological examination done showed that the deceased suffered multiple injuries to the head and cervical fracture. PW6 indicated that her colleague opined that the deceased cause of death was due to multiple head injury with cervical fracture.

18. **PW7 – IP Charles Getende** testified as to the requirements on the recording of the confession statement by the accused person. In his testimony PW7 told the court that upon summarizing the out of court confession rules requirements the accused agreed to record a confession statement. The particulars alleged were then taken down which the accused signed on the material day. PW7 confirmed that the confession statement was given voluntary, without any inducement, promise, coercion or threat. Therefore, the recording of the confession statement was stated to be within the provision of section 25 A of evidence Act. The key issue to determine as whether at the conclusion of the provision case a prima facie case has been established against the accused person.

19. I have carefully considered and evaluated the evidence from the seven witnesses called by the state in terms of section 107 (1) of the Evidence Act. Borrowing from the principles illustrated in the cases of **R. 7 Bhatt v R, Prasad and Mathebula** (*supra*). I am satisfied that there are sufficient grounds for the state to proceed further against the accused person. The phrase of a *prima facie* case with reference to section 306(2) of the CPC indicates that the court takes notice whether the evidence as it stands implicates the accused in respect of the offence requiring him to be placed on his defence.

20. On the other hand the question as to whether a case as preferred against the accused person satisfies the test of no case to answer at this interlocutory stage fails. In its place I find existence of a prima facie case to warrant him to be placed on his defence in term of Section 306 (2) as read with 307 of the Criminal Procedure Code.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 30TH DAY OF JANUARY, 2020

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R. NYAKUNDI

JUDGE