



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE NO. 04 OF 2018**

**REPUBLIC .....PROSECUTION**

**VERSUS**

**RAFIKI CHIBUNJA KARISA ..... 1<sup>ST</sup> ACCUSED**

**TSUMVULA KAINGU KARISA..... 2<sup>ND</sup> ACCUSED**

**GIFT THOYA BAYA ..... 3<sup>RD</sup> ACCUSED**

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Sombo for the state**

**Kilonzo advocate for the Accused persons**

**RULING**

This is half time decision following the trial of the accused persons on the charge of murder contrary to Section 203 of the Penal Code. The particulars of the charge are that on 1.8.2017 at Mtangoni area in Malindi, the accused persons jointly murdered **Darius Ngala Chai alias DJ Ndogo**. At the time of arraignment each one of the accused denied the offence.

The prosecution under Section 107 (1) of the Evidence Act summoned six witnesses to prove the elements of the offence. At the close of the prosecution case **Mr. Kilonzo** for the accused persons submitted on a motion of no case to answer in terms of Section 306 (1) of the Criminal Procedure Code. The first witness for the prosecution was **Ngumbao Kazungu** testified that he owns motorcycle registration number KMCF 184G. In his testimony PW1 told the court that on 31.7.2017 he accompanied the deceased to Sabaki area using his motor cycle. On arrival at Sabaki, the witness testified that the deceased left with the motor cycle and in the meantime was meant to wait for him at Sabaki. He recalled that the deceased was never to return as expected so that they can come back to Magarini.

The search for the deceased emerged that his body had been found at Malindi. According to the witness when he travelled back to the scene he saw the body of the deceased which had suffered injuries to the head.

**PW2** the second witness was **Katana Kaingu Mumo**, who stated in court that they were attending a burial at Magarini when the deceased and (PW1) left for Sabaki area. In PW2 testimony they never came back to the home where the burial rituals were taking place. It was only the following day he heard screams and on further inquiry he was informed the deceased body was located at Malindi.

**PW3 – Stephen Ngala** the father of the deceased testified that on 1.8.2017 he received a telephone call to the effect that he has been found dead. Further, in response to the telephone call message he rushed to the scene where he noticed that the deceased had suffered physical injuries to the back, and arms. Ultimately, this became a police case to establish the cause of death. He also participated in the postmortem examination which was conducted by **Dr. Rugarini**. On his behalf **PW4 Dr. Falid** took the court through the findings made by his colleague and final opinion as to the cause of death. According to PW4, the deceased died out of cerebral haemohage caused by a penetrative injury.

**PW5 – PC John Mayani** attached to Malindi Police Station gave evidence that he was instructed to visit the scene of murder following a report booked at the police station. It was at that juncture PW5 made arrangements to collect the body from the scene to the mortuary. In his observations, PW5 told the that the body had multiple injuries to the head.

Further PW5, in the course of investigation seized the mobile number of the deceased referenced as **0724-084, 940** which was subjected to data analysis to track whether any person was in possession of it or current mobile user. According to PW5 he confirmed that the evidence from analysis pointed at the accused persons being the perpetrators of the murder. The call data report was produced in court by **PW6 –**

**Daniel Khamisi** of Safaricom mobile provider involved with forensic data analysis.

With that evidence the prosecution closed its case against the accused persons. **Mr. Kilonzo**, for the accused person submitted on a motion of no case to answer under Section 306 (1) of the Criminal Procedure Code.

According to Learned counsel this was a case purely based on circumstantial evidence and the six witnesses have failed to discharge the burden of implicating any of the accused with the murder of the deceased. Further, Learned counsel went on to postulate that the standard of proof required to establish a prima facie case has not been met by the prosecution to warrant any of the accused to be placed on the defence. Learned counsel relied on the following authorities to urge this court to rule that a prima facie case as known in Law is far from being established by the prosecution. That placing the accused person on their defence would be an action in futility. **Erick Odhiambo v R [2015] eKLR, Sawe v R [2003] KLR**

## **Analysis and determination**

### **The Law**

The power of the court to determine existence of a prima facie case is provided for under Section 306 (1) as read with subsection (2) of the Criminal Procedure Code. The essence of the provisions are that if at the close of the prosecution case and in assessing the evidence in light of the elements of the offence the court is of the view that the prosecution has not proved any of the elements against the accused sufficiently to require him or her to state or answer the charge. There should be no hesitation for the court to enter a verdict of not guilty. As a consequence, the accused is to be acquitted of any culpability. It is also clear under sub-section (2) of the same provisions if the proper test is met, then of necessity, the accused person (s) must be called upon to proceed and offer his or her defence to the offence.

I reckon that the Criminal Procedure Code provides no definition as to what is the meaning of a prima facie case. However, the doctrine has received attention from legal scholarly works and various jurisprudential decisions by the Superior Courts to achieve a clear understanding of the concept and its application.

In respect of the measure of a prima facie case within the permissible limits of Criminal Law the standard of proof required is not that envisaged in the dictum by **Lord Denning** in **Miller v Minister of Pensions [1947] 2 ALL ER 37** in which he held as follows:

***“That degree is well settled it need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt, does not mean proof beyond a shadow of doubt.....”***

In this case the burden on a prima facie case to be shown by the prosecution according to **Lord Denning** is consistent with the proposition that the degree need not reach certainty but it must carry a high degree of probability but not beyond reasonable doubt, that there exists evidence which can sustain a conviction.

In what I consider one of the land mark cases by the English Court of Appeal in **R v Galbraith [1981] IWL R** it addressed the concept of prima facie case in this way, where **Lord Lane C. J.** said:

***a) 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.***

***b) The difficulty arises where there is some evidence but it is of a tenures character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.***

When the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon on, it is his duty, upon a submission being made, to stop the case where however the prosecution evidence is such that the strength or weakness depends on the view to be taken of the in house, reliability, or other matters which are generally speaking within the province of the jury and when 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 be tried by the jury, (***in our case to call upon the accused persons to state their case***).

Another very Learned Authors of Blackstone’s Criminal Practice 2002 at Section D14 in regard to the question of what constitutes prima facie case laid the following emphasis to determine a motion of no case to answer by the court:

***a) “if there is no evidence to prove an essential element of the offence a submission must obviously succeed.***

***b) If there is some evidence which taken at face value establishes each essential element, the case should normally be left to the jury – (in our jurisdiction trial by a single Judge – the case should proceed to the defence). The Judge does, however, have a residual duty to consider whether the evidence is inherently weak or tenuous. If it is so weak that no reasonable jury (read court or tribunal) properly directed could convict on it, then a submission should be upheld. Weakness may arise from the sheer improbability of what the witness is saying, from internal inconsistencies in the evidence or from its being of a type which the accumulated experience of the courts has shown to be of doubtful value.***

***c) The question of whether a witness is lying is nearly always one for the jury; but there may be exceptional cases (such as Shippey 1988 Criminal LR 767) where the inconsistencies whether in the witnesses’ evidence viewed by itself or between him and other prosecution witness)are so great that by reasonable tribunal would be forced to the conclusion that the witness is untruthful. In such a case, and in the absence of other evidence capable of founding a case) The Judge should withdraw the***

*case from the jury.” (underlined emphasis is mine)*

In the above authorities the courts and Learned authors addressed the question of burden of proof and the standard of proof to establish a prima facie case which would carry the day and the stated exception that enables the trial court to stop the case from proceeding to next stage to call upon the accused to state his or her defence.

It is at that stage that courts engage in a balancing exercise between the standard of proof on the one hand and the account of the evidence tendered by the prosecution against the accused persons. The analysis done by **Lord Devlin** in Trial by Jury, the **Hamlyn Lectures (1956) republished in 1988** do illustrate the distinct roles of the Judge and jury when asked to decide whether a prima facie case has been established against the accused persons within meaning of a prima facie case and a motion of no case to answer he held as follows:

*“There is in truth a fundamental difference between the question whether there is any evidence and the question whether there is enough evidence. I can best illustrate the difference by an analogy. Whether a rope will bear a certain weight and take a certain strain is a question that practical men often have to determine by using their Judgment based on their experience. But they base their Judgment on the assumption that the rope is what it seems to the eye to be and that it has no concealed defects. It is the business of the manufacturers of the rope to test it, strand by strand if necessary, before he sends it out to see that it has no flaw. That is a job for an expert. It is the business of Judges as the expert who has a mind trained to make examinations of the sort to test the chain of evidence for the weak links before he sends it out to the jury, in other words, it is for him to ascertain whether it has any reliable strength at all and then for the jury to determine how strong it is. The trained mind is the better instrument for detecting flaws in reasoning, but if it can be made sure that the jury handles only solid arguments and not sham, the pooled experience of twelve men is the better instrument for arriving at just verdict. Thus logic and common sense put together.”*

What in essence is being propounded in the above principles is the aspect that in a prima facie case before the burden shifts to the accused persons to show that the crime occurred the prosecution ought to have rested its case on the required standard of proof. It is only at that time within permissible defences in Law i.e. insanity, self-defence or without fault of his own an accused person can be called upon to state his defence.

These principles from the persuasive case Law have been carefully adopted and applied in our jurisdiction on many occasions as can be seen in the case of **R. T. Bhatt v R [1957] EA** to achieve the objective in a question on what constitutes a prima facie case. Thus whether a trial Judge thinks of existence of a prima facie case this one test is a matter of discretion which must meet the set criteria chosen reasonably and demonstrably justified. The law in Kenya is now trite on this subject and the test of a prima facie case is stated to exist where evidence can prove essential elements of the offence and a reasonable tribunal properly constituted addressing its mind to the facts and the Law may convict if no evidence is offered in rebuttal.

In the instant case the three accused persons are charged jointly with the offence of murder of causing the death of the deceased contrary to Section 203 of the Penal Code. The offence of murder as defined in Section 203 of the Penal Code constitutes the elements of unlawful act and malice aforethought. The four crucial elements of the offence to be proven by the prosecution are:

- 1). *The fact of the death of the deceased.*
- 2). *The cause of such death.*
- 3). *Proof that in causing the death the accused committed it with malice aforethought.*
- 4). *That the evidence on record positioning identifies the accused persons as the ones who killed the deceased.*

First the case for the prosecution from the six witnesses is purely based on circumstantial evidence. As to what constitutes circumstantial evidence its emphatically stated in the following stated in the following cases **Musili Tulo v R Criminal Appeal No. 30 of 2013, Abang alias Onyango v R Criminal Appeal No. 32 of 1990, Sawe v R 2003 KLR 364** the golden thread of the principles that cut across all these authorities can be represented by the passage hereinbelow from (Abang case(supra)):

*“It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:*

- i). The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.*
- ii). Those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused.*
- iii). The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was connected by the accused and none else.”*

It seems therefore at the end of the day if I place the accused persons in their defence that there exist a prima facie case the sufficiency of evidence shall be tested within the threshold issue of circumstantial evidence.

From what the six witnesses told the court starting with (PW1) to PW3 there is no iota of evidence which came out from each one of them how the deceased met his death.

In PW1 on evidence he had travelled from Magarini to Sabaki area with the deceased riding his motorcycle and on arrival at Sabaki, the

deceased excused himself that he had an errand to run in a short while he was to be back. As such (PW1) was left behind to wait for his return which was never to happen at the end of the day it was after the witness commenced a search of the deceased as a missing person a report came in that his body had been discovered at Malindi.

Furthermore, PW2 and PW3 alluded to the fact of death and observations made to the injuries inflicted upon the deceased when each of them had an opportunity to visit the scene.

The significance of PW4 testimony was to the effect that the deceased had been attacked sustaining serious injuries to the head. In the postmortem report produced in evidence on behalf of his colleague **Dr. Rogani**, the assailant, inflicted penetrating wound to the head as a result the deceased he died of cerebral hemorrhage. How the deceased left Sabaki on 31.7.2017 to be found dead at Malindi on 1.8.2017 was never sufficiently explained by PW1, PW2 and PW3.

The events involving the deceased death principally paint a picture of a man who left the burial function in company of (PW1) at Magarini for Sabaki as everyone knew he was expected back for them to proceed to the next destination may be to the burial home where was playing the role of DJ.

The prosecution position is very clear that the material from the Safaricom liaison officer – PW6 on call data analysis and investigation officer who testified as PW5 implicated the accused persons with the offence. According to PW6 upon request by PW5 he extracted the call data of telephone no **0724----940** stated to be registered in the name of the deceased. The call data forensic analysis undertaken by PW6 and the testimony of the investigating officer have been considered in light of the ingredients of the offence and involvement of the accused persons to the crime.

This court finds as follows: that electronic evidence failed to positively identify the accused persons by placing any one of them at the scene of the crime allegedly stated to have occurred on 1.8.2017.

Secondly, the circumstances the prosecution alluded to through the testimony of PW5 were that the 1<sup>st</sup> accused was found to be in possession of the mobile phone of the deceased, while the simcard and the battery was being used by the third accused person. Unfortunately, the investigating officer never requested for subscriber registration of the simcard and call data analysis of the deceased person mobile number. In other words, the electronic evidence deprived the court the correlation between the acts of recovery of the simcard eight months after the death of the deceased and whether prior to his death accused persons had any communication likely to place them at the scene of the murder. When it turns out on the evidence of a single witness as held in the case of **R v Mwendwa & 2 others [1994] KLR** I am unable to satisfy myself that the evidence has met the threshold to identify the accused person who jointly inflicted the injuries against the deceased. It is evidence well evaluated does not discharge the standard of proof that points to the accused persons to be the ones who killed the deceased.

In cross-examination of the witnesses it is of paramount importance, none of them was capable of giving evidence that on the fateful day the deceased was assaulted the three accused persons jointly played a role in the assault and the deceased had to die from the stated injuries in the postmortem report.

The three key witnesses were to receive the sad news of the death of the deceased from different principles prompting them to converge at the scene where they were supposed to come with terms with the death. All that PW1 and PW2 recalled was the participation as a DJ of the deceased at a burial home and the short period he excused himself to leave in company of PW1 for Sabaki area. It is at Sabaki, the deceased abandoned the company of (PW1) and when the report was recorded by (PW1) it was that the deceased is dead. It really cannot be any other way in the nature of the evidence based on the six witnesses.

In response to this submission on a motion of no case to answer and circumstantial evidence, I cite the dissenting opinion by **Dixon C. J.** in **Smith v South Eastern Railway Co 1896 1QB 178** where he held:

*“The state of facts reached by inferences is itself compatible with a number of hypotheses, some of them implying fault outside, some on the other, some on both sides. Hypothesis if this kind are not inferences. What is required is a basis for some positive inference involving the negligence on the part of the driver as a cause of the deceased’s death.”*

As a trier of fact, I am entitled to draw a logical and positive inference from the circumstantial evidence but should not be on speculation, conjecture or guess work.

The point is better understood when one considers the test if evidence, made in the case of **R. T. Bhatt (supra)** that its evidence which a reasonable tribunal could or might lawfully convict the accused persons even if they elect to remain silent upon called upon to state their defence.

From a practical point of view, the prosecution who bore the burden of proof has failed to discharge that duty in circumstances that establishes a prima facie case that even on reasonable suspicion reached by the investigating officer based on case data extracts and as analyzed by PW6 falls short of establishing the elements of the offence contrary to Section 203 of the penal code. It is when the prosecution evidence tendered sufficiently proves on the whole elements on unlawful death and malice aforethought under Section 206 of the penal code in the information shall a prima facie case be inferred in the case.

That being so, the formulation of a motion of no case to answer by the defence succeeds so as to dislodge the burden of proof of a case to answer advanced by the state.

It follows the charge of murder contrary to Section 203 of the Penal Code be and is hereby dismissed and the accused persons are set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF JANUARY 2020

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ruttoh for Kilonzo for the accused