



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 61 OF 2015

REPUBLIC.....RESPONDENT

VERSUS

IBRAHIM MALIM ABDULLAHIACCUSED

RULING

1. The accused **IBRAHIM MALIM ABDULLAHI** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on 15th June, 2015 at JUA KALI village in Embakasi Division within Nairobi County murdered **LUCAS MUTISO MBINYA**.

2. He first appeared in court on 24/6/2015 when his plea taking was deferred to enable him undergo mental assessment. On 1/10/2015 the matter was mentioned before Justice Lesiit when it was noted that the medical report was not conclusive on whether the accused was fit to stand trial and the accused recommended to be taken to Mathare Referral Hospital for treatment, which order was extended on 21/1/2016. On 22/2/2016 a medical report was presented before the court which confirmed that the accused was fit to stand trial and on 24th February, 2016 a plea of not guilty was duly entered in his favour.

3. On 23rd November, 2016 his trial commenced before me and to prove its case the prosecution called and examined three witnesses. **PW1 Dr. DOROTHY NJERU** a Government Pathologist produced a post-mortem report carried out on the body of the deceased, which had a stabbed wound at the back of the left leg and as a result of the said examination formed an opinion that the cause of death was exsanguinations due to penetrating sharp force trauma to left lower limb. In cross examination she confirmed that there was no evidence of medical intervention.

4. **PW2 AGNES KATHI MBINYA** a sister of the deceased testified that on 18/6/2015 she identified the body of the deceased at the City Mortuary for purposes of post-mortem examination and further confirmed that she did not know the accused who was only pointed out to her by the police. **PW3 PATRICK KILONZO NDISU** an uncle of the deceased corroborated the evidence of PW2 and stated that he had only one stab injury on the leg.

5. **PW4 JUSTUS MUTUA MWONGA** testified that on 15/6/2015 at 9.10 he met two of his friends namely Lucas Mutiso and John Musinga at a club known as KK club and were served by a lady called TERESIA MBITHE. They were at the club until 4.00 a.m. when he left, leaving behind Lucas, John and Nzuki. He was later called by his brother to go and serve a customer, when he saw the deceased being carried on a motor bike and was told that he had been stabbed with a knife at the club where he had left him and that the person who had stabbed him was a Somali man known as "MWORIA" who was known to him. He confirmed having not witnessed the accused stab the deceased.

6. **PW5 PC JOSEPHAT MAKASI** on 15/6/2015 received the deceased at the police station and advised that he be taken to the clinic but was later told that the same had collapsed near Sancy clinic and was pronounced dead. Later members of the public pointed out to him the house of the accused whom they arrested. In cross examination, he stated that the only information they had on the accused was that he was a Somali.

7. On 6/6/2018 the prosecution applied for adjournment and the matter was fixed for further hearing on 20/9/2018 when the same was taken out and fixed for further hearing on 10/7/2019, when the prosecution sought for an adjournment to 11/7/2019, when Mr. Wakaba for the defence informed the court that on 6/6/2018 the court had granted the prosecution final adjournment on the ground of non-availability of witnesses and asked the court to order the investigating officer to testify, but the court was informed that he was not present in court. The court therefore fixed the matter for mention for 16/7/2019 when the DCIO Embakasi was expected to appear in court for further direction.

8. On 16/7/2019 the DCIO failed to attend court and warrant of arrest was issued against the same together with DCIO for 17/7/2019, when PC BENEDICT MANDI appeared in court and confirmed that he had taken over the investigations. INSPECTOR HUDSON MIRITI represented the DCIO and undertook to avail all the remaining prosecution witnesses at the next hearing which was fixed for 16th and 22nd October, 2019, the prosecution having being granted final adjournment.

9. On 16/10/2019 Mr. Okeyo informed the court that there were no prosecution witnesses and sought further adjourned to 22nd October, 2019, when once again there were no witnesses and the matter fixed for mention for 24/10/2019 to enable the prosecution secure their witnesses for hearing at 11.30, when Mr. Okeyo once again indicated that they did not have witnesses and that the office of DPP had not given direction on the way forward. Mr. Wakaba for the defence opposed the application for adjournment and by a ruling of the same date the court declined to grant the prosecution any further adjournment forcing Mr. Okeyo to close the prosecution case and rely on the evidence on record. That marked the sad end of this case.

SUBMISSIONS

10. It was submitted by Mr. Wakaba that there was no evidence tendered by any eye witnesses to the alleged stabbing of the deceased. The only witnesses called were those who identified the body of the deceased, the pathologist and the arresting officer. It was submitted further that there was no evidence of any relationship between the accused and the deceased and further that no motive for the attack was established and therefore the prosecution did not discharge their burden to enable the court put the accused on his defence. Mr. Okeyo for the prosecution opted not to make any submissions.

ANALYSIS

11. I have set out the history of the matter in detail as it is clear that the prosecution closed its case before calling all their witnesses. Article 50(1) and (2) of the Constitution of Kenya 2010 establishes the right to have the trial begin and concluded without unreasonable delay. The right to a speedy trial is a vital lynchpins in a consolidated democracy, which the court must attempt to realize in every day practice and therefore where the delay is caused by the prosecution, the court will always enforce the right of the accused person by among other avenues ordering the prosecution to close their case, as speedy trial is an integral and essential part of the fundamental right and liberty enshrined in the constitution. The prosecution is duty bound to ensure speedy trial and to avoid any excessive delay in trial which could result in grave miscarriage of justice. Criminal Procedure Code however has provisions which the prosecution can fall back to which failed with a case of this nature.

12. At this stage of the trial what the court is required to do is to establish whether the prosecution has established a prima facie case to enable it put the accused on his defence that is to say that based on the evidence on record the court will be justified in calling upon the accused to offer some explanation. What constitutes prima facie case in Kenya was stated in the case **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332 at pg 334** as follows:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.” (Emphasis added)

13. As submitted by the defence the prosecution only tendered evidence to confirm the fact and cause of death of the deceased. There is no evidence tendered that put the accused and the deceased together and therefore to call upon the accused to offer some explanation will be akin to asking him to fill in the gap in the prosecution case. There is no evidence on record as to how the accused was identified as the Somali-man who stabbed the deceased. Sad as it is, I have come to the conclusion that the prosecution has failed to establish a prima facie case against the accused and consequently under the provisions of Section 306(1) of Criminal Procedure Code record a finding of not guilty.

14. The accused person should be set free forthwith unless otherwise lawfully held.

15. I must say for record purposes/state that the prosecution did not make use of the clear provisions in the Criminal Procedure Code including and not limited to Section 87(a).

Dated, signed and delivered at Nairobi this 30th day of January, 2020

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J. WAKIAGA

JUDGE

In the presence of:

Mr. Okeyo for the State

Mr. Wakaba for the accused

Court clerk: Karwitha

Accused person present