



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 3 OF 2015

REPUBLICPROSECUTION

VERSUS

FONDO KALAMA KITSAO ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Ms. Mettoh for the accused person

RULING

The accused herein **Fondo Kalama Kitsao** was charged with the offence of murder contrary to Section 203 of the Penal Code as punishable with maximum sentence of death penalty.

The particulars of the offence are that on the night of 30.1.2015 at Midodoni Village, at Ganze the accused jointly with another not before court committed the murder of **Ngowa Mwaringa Mume**.

At the time of arraignment, accused pleaded not guilty and in essence the prosecution was put on notice to discharge the burden of proof in terms of Section 107 (1) of the Evidence Act.

He was represented by **Ms. Mettoh** Learned counsel and on the other hand, **Ms. Sombo**, the prosecution counsel led the prosecution against the accused person.

Thus at the close of the prosecution case under Section 306 of the Criminal Procedure Code, I was called upon to establish whether a prima facie case has been established for the accused person to be called upon to answer.

As a consequence therefore, this court has to consider the evidence of the prosecution on this the first witness became the wife of the deceased as **(PW1) Taabu Ngowa**. According to her on the material day identified as the 30.1.2015 she was with her daughter **(PW2) Raheli Nyevu Ngowa** at their home.

PW1 recalled that both of them had just served the deceased with a meal for the night when the accused and another came to the house and fatally cut his head. In her testimony, she even managed to question the accused why they were assaulting the deceased, but no answer came from the accused save that the other masked accomplice went ahead to inflict harm. The said injuries caused the deceased to bleed to death.

Thereafter, the witness told the court that accused and the other assailant took flight from the home and simultaneously together with (PW2) they screamed and raised an alarm. This distress call attracted the attention of the neighbours who thronged to their home to verify the cause of the screams.

This exhaustive testimony of (PW1) was in every material respect identical with that of **PW2 Raheli Nyevu Ngowa**. The two witnesses were categorical, that though the source of moonlight light and their previous knowledge of the accused, each one of them was able to positively recognize him in the company of the unidentified assailant.

During cross-examination (PW1) told the court that the actual stab against the deceased came from the other accomplice and not the accused on the other hand PW2 stated that the accused was wearing a black shirt and a short black trouser holding a black plume which he used to light the scene. As for the other accomplice PW2 gave evidence that he did cover his face with only the eyes in view to executive the murder.

PW3 – Katana Mwaringa Mume, a younger brother to the deceased testified that on 31.1.2015 he received information on the death of the deceased. He, therefore had to travel their Ganze home and after reconfirming the occurrence of the murder on official complaint was booked with the police.

PW4 – APC David Kazungu Kalume, attached to Ganze AP Camp stated that on 31.1.2015 under instructions from **IP Raymond Karisa** they visited the scene of murder at Midodoni village. On arrival at the home the victim of the murder was being taken to the hospital. His quick physical observation was the injuries he noticed from the head. He also joined the people escorting the victim to the hospital and in the course a brief examination was due at Ganze with a referral to Kilifi District Hospital. PW4 stated that the victim of assault was duly hospitalized to undergo treatment, but the following day he received the report that he had passed on. The latest occurrence initiated an investigations as to the circumstances of his death.

PW5 – Grace Pendo testified that on the night of 30.1.2015 she heard screams from the (PW1) house. The witness armed herself with a panga and rushed to the scene on this material night. On her way to the scene, she happened to meet the accused running very fast from the direction of the incident. It was the evidence of PW1 that the accused was a wine tapper and her employee. At one occasion a dispute arose as to the accused inability to remit the money from the tapping of the wine, but he was adamant to comply with any of such directions from the deceased. It did not take long before the deceased was to suffer death from some injuries inflicted by his attackers.

On cross-examination PW5 told the court that besides the accused she also saw another man running on the same path. Further, PW5 confirmed that her house is about twenty (20) meters apart with that of (PW2). That meant he further stated that the accused was wearing a black torn shirt and a white shirt, being the same clothes he wore during the day.

PW6 – No. 233894 IP Solomon Salu, the investigating officer testified that upon taking his role to unravel the murder he visited the scene, drew a sketch plan and recorded witness statements with information on the commission of the crime. Based on the investigation, PW6 stated that the accused was arrested and charged with the offence.

The post mortem report opined that the deceased had suffered multiple injuries to the head. PW5 produced the sketch plan and mental assessment report as exhibits with that material PW6 recommended that a charge of murder be preferred against the accused.

PW7 – Dr. Ali Nassir of Kilifi Hospital gave evidence on post mortem examination on behalf of **Dr. Khadija** commencing on study leave. According to PW7 testimony, the deceased had suffered deep multiple wounds to the head and parietal area. Therefore stated PW7 that in accordance with the post mortem results. The deceased died out of deep multiple head injury which led to haemorrhage bleeding. This evidence forms the basis of the decision on a motion of no case to answer. In addition this court has the advantage to appreciate submissions from both counsels at this half-time stage of the proceedings.

Analysis and determination

The provisions under Section 306 of the Criminal Procedure guide and do postulate. The standard of proof on the doctrine of a prima facie case and a motion of no case to answer. The section sets the tone in the following language if at the close of the prosecution case, it appears to the court that there is no evidence that the accused or any one of them committed the offence. It shall in the particular case make a finding of not guilty and discharge the accused of any wrong doing.

On the other hand in Subsection (2) if at the close of the prosecution case in support of the charge, it appears to the court that a case has been made out against the accused person, sufficiently to require him to be placed on his defence, then, the court would call upon such accused to state his defence on any of the elective model provided in the provisions what therefore is a prima facie has been clearly stated in the case of **R. T. Bhatt v R {1957} E.A.** to include whether, the evidence availed by the prosecution has established the elements of the offence sufficient.

That an independent reasonable tribunal properly constituted, directing its evidence could safely convict the accused upon it. The definition of what has to commonly known as a prima facie case concept in the discussion on a motion of no case to answer under Section 306 (1) of the Code has been defined. In **Osborne’s Concise Law Dictionary** as follows:

“A case in which there is some evidence in support of the charge or allegations made in it, and which will unless it is displaced. In a case which is being heard in court, the party starting, that it upon whom the burden of proof rests, must make out a prima facie case, or else the other party will be able to submit that there is no case to answer and the case will have to be dismissed.”

The instant case being a criminal trial, the prosecution is vested with the burden of proof to establish the elements of the offence and the accused person as a perpetrator beyond reasonable doubt. Thus the persuasive authority from a comparative Common Law jurisdiction in **Haw Tua Tau {1981} 2 MLJ 49:**

“Set out the criteria to be satisfied as follows:

“The prosecution makes out case against the accused by adducing evidence of primary facts, it is to such evidence that the word if un rebutted refer, what they mean is that for purpose of reaching the decision called for by Section 188 (1) similar to Section 306 (1) of the Kenyan Criminal Procedure Code.”

The court must act on the presumption:

(a). That all such evidence of primary fact is true, unless, it is inherently incredible that no reasonable person would accept it as

being true and

(b). That there would be nothing to displace those inferences as to further facts or to the state mind of the accused which would be reasonably be drawn from the primary facts in the absence of any further explanation.

At the conclusion of the prosecution case, what had to be decided remains a question of Law only, as decider of Law, the Judgment consider whether there is some evidence not inherently incredible which if he were to accept as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential element lacking, then, and then only, is he justified in finding that no case against the accused, had been made out which if un rebutted would warrant his conviction.”

It is in the power of the court to strike down a charge which does not meet the legal threshold of a prima facie case. The fundamental features to guide the court are as laid down by **Lord Parker C. J.** in **Practice Directions submissions of no case {1962} 1WLR 227**. (See also **McCull M. Court Teasers**, practical solutions answering in Magistrates Courts (**West Sussex – Rise Publishers {1978}**)) To this test his Lordship stated as follows:

“A submission that there is no case to answer may properly be made and upheld:

(a). When there has been no evidence to prove an essential element in the alleged offence.

(b). When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it. Apart if, however, a submission is made that there is no case to answer, the decision should depend not so much on whether, the adjudicating tribunal would at that stage, convict or acquit, but on whether, the evidence is such that a reasonable tribunal might convict, if a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.”

In **Regina v Coker and others {1952} 20 NLR 62**, the court held that:

“a submission that there is no case to answer meant that there was no evidence on which the court could convict even if the court believed the evidence given.”

It would appear the concept of prima facie case and a motion of no case to answer are expressed interchangeably to mean almost one and the same thing. However, the basic structural pillar has a very thin line the two concepts. In the Nigeria case of **Onagoruwa v State {1993} 3 NWLR, 340** the court held inter alia as follows:

“The terms no case submission, and prima facie go together in the administration of criminal justice. They do not however go together, like Siamese twins. As a matter of Law, there is no blood relationship between them. They are rather enemies, fighting each other, in opposing directions, with a view to devouring each other. They are enemies perpetually at war with each other. They never see eye to eye. They speak two different and distinct languages in opposition to each other. As a matter of Law and fact, two different persons in the criminal justice system are involved in calling the court’s attention to them. While the accused person submits to the court that he has no case to answer, the prosecution makes the contrary submissions, that a prima facie case is made out against the accused and that he should be called upon to make his defence.”

There in the fullness of the wisdom of the framers of our statute, the sole purpose of advancing a motion of no to answer under such circumstances is to have the trial court dismiss the charge and acquit the accused person. Whereas the pontification of a prima facie case in support of the charge is to have the accused to be called upon to offer his or her defence in rebuttal.

I associate myself with the above principles and the test requirement on the principles to distinguish between a prima facie case and a motion of no case to answer.

It is quite apparent that in our jurisdiction any of the two legal positions are permissible but done in strict compliance that the object under the right to a fair trial in Article 50 which provides constitutional guarantee of due process comes into force even in retrospect whether the prosecution has made out a prima facie case against the accused person. This would equally apply to the submissions on a no case to answer motion by the defence. The grave issues of the constitution which might turn on at this stage of the trial perhaps requires the single most important question as to whether the right to a fair trial under Article 50 remains guaranteed be determined by the court.

In my considered view, the discretion to determine whether the prosecution has satisfied the legal and evidential burden of a prima facie case to call upon the accused to be placed on his or her defence, requires the court to address its mind to two issues one, whether the deserving considerations on the right to a fair trial entrenched in Article 50 are present in the facts of the case under review.

Secondly, whether the prosecution positioned such evidence which affords support of the facts in issue or non-existence of the facts in issue to demonstrate with particular degree of confidence of a prima facie case.

Cordially, to the above in the sense of tactical burden, whether the defence has sufficiently produced some counter or rebuttal evidence in cross-examination which has tainted the onus on the part of the prosecution to adduce prima facie evidence against the accused.

There is no partial finding as to the question on the prima facie case or no motion for case to answer.

At all events in this case and the context of the initial evidence, at the close of prosecution case bearing in mind the above demonstrated principles, the prosecutor has discharged the burden of proof of a prima facie case against the accused person.

Accordingly, the accused is called upon to state his defence in terms of Section 306 (2) as read with Section 307 of the Criminal Procedure Code.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 27TH DAY OF FEBRUARY 2020.

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R. NYAKUNDI

JUDGE