REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 9 OF 2015

REPUBLIC ..... PROSECUTION

VERSUS

BAKARI KAINGU SHUNGU.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Mayaka for accused

RULING

The accused herein **Bakari Kaingu Shungu** was indicted with the offence of murder contrary to Section 203 and 204 of the Penal Code. It is alleged in the particulars of the offence that on 3rd and 4th April 2015, at Tsiara Mia Village, Madamani Sub-location, Vitengeni Location in Kilifi County, the accused murdered **Katana Karisa Kambi.**

The accused who was represented at the trial by Learned counsel **Mr. Mayaka** denied any involvement with the murder of the deceased. That upon a plea of not guilty entered, the Learned prosecution **Ms. Sombo** summoned evidence from the eight witnesses in support of the charge against the accused.

Background and procedural history

It was alleged by **PW1 – Kadzo Katana Karisa**, that on 3.4.2015, she was sleeping in the same room with the deceased when in the course, he stepped out to go and smoke a cigarette. It did not take long before (PW1) heard a distressful voice *"my wife I am dying, I am being killed by Bakari."* – relating to the scream, PW1 testified that she also got out of the bedroom towards the verandah where she saw the accused armed with a knife stabbing the deceased. As the struggle happened to occur in darkness, (PW1) had lit a lamp which illuminated bright light to visually recognize the accused positively. Further, as the neighbours and **PW2** streamed into the compound in response to the screams, the accused took flight but not after inflicting serious physical injuries upon the deceased. She recalled that the accused did drop his shoes accidentally at the house as he moved to escape in a hurry.

PW2 – Kache Katana Kombe, the son to the deceased testified as one of those who woke up due to the screams from the deceased and his mother (PW1). According to PW2, he also left for the deceased house and on arrival he found the accused in possession of a knife at hand in which he used to stab the deceased. He therefore, joined in the struggle to free the deceased from further harm from the accused. PW2 further testified that he also sustained some injuries when he attempted to disarm the accused of the knife. It was PW1 and PW2 evidence that the deceased passed on immediately after the infliction of injuries by the accused.

The body was later to be taken to Kilifi Hospital Mortuary and thereafter a report was made to Ganze Police Station.

PW3 – Fatuma Kaingu Shungu, a resident of Bombolulu and a sister to the accused stated that on 3.4.2015 she received a report from the accused that he has killed their uncle the deceased.

Following a tip off from the family, the accused was arrested on 20.5.2015, at Lango Baya by **PW4 – APC Dennis Mutunga.**

PW5 – No. 219269 CPL Gabriel Kalama, testimony was to the effect that he accompanied PW4 on 20.5.2015 to Malanga area to arrest the accused, as a suspect of murder. It was his evidence that the suspect he arrested with assistance of PW4.

PW6 – No. 61451 Sgt Francis Rono, of Bamba Police Station testified that he did receive a report on the killing of the deceased from **Sgt Mutuku** of APC Vitengene AP Camp. PW6 further told the court that a decision was made to visit the scene and collect the body of the deceased. PW6 testified that at the scene he was able to draw a sketch plan besides carrying out a quick inquiry as to the cause of death of the deceased. He also participated in identifying the body to the pathologist who authorized the post mortem report produced in evidence by **Dr. Khadija Abdulnassir (PW7).**

According to PW7, she was able to identify the signature of **Dr. Badan Ahmed,** currently on study leave in Egypt pursuing a Masters Degree. It was the evidence of PW7 the multiple stab wounds were noted as having been inflicted on the various limbs of the deceased body. She further pointed out **Dr. Badan** opined the cause of death as cardinal haemorhage consistent with penetrative stab wounds.

The post mortem was admitted as prosecution documentary evidence as exhibit 5.

PW8, No. 78304 PC. Stanley Maritim testified as the investigating officer. According to PW8 he went to the murder scene with other police officers amongst them **PW6 – Sgt Francis Rono**. The other second assignment relied on by PW8 was the recording of relevant witness statements who alleged on how the deceased met his death. PW8 further produced in court the shirt as exhibit and shoes as exhibit 2 stated to belong to the accused recovered and credible to the prosecution case. Unfortunately, the witness stated that the murder weapon was never recovered.

Obviously, having summarized the prosecution evidence, it is now my singular duty to analyze and evaluate the whole of it to establish whether a prima facie case has been made out against the accused person.

Analysis and resolution

The Law

The burden of proof expected of the prosecution is consistent with the express provisions of Section 107 (1) of the Evidence Act which provides that:

> **"Whoever desires any court to give Judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist. In the charge of murder contrary to Section 203 of the Penal Code."**

The prosecution has the overall duty to prove its case against the accused person beyond reasonable doubt, in light of the settled principles in the case of **Woolmington v DPP {1935} AC 462 and Miller v Minister of Pensions {1947} 2 ALL ER 372 – 373** the primary mission for the prosecutor is to proof the following elements of murder:

(a). That a death occurred involving a human being identified as Katana Karisa Kambi

(b). That his death was unlawful.

(c). That in causing death the accused person had malice aforethought.

(d). Lastly, the accused was positively recognized or identified as the principle offender of the murder.

Whether the accused person has a case to answer pursuant to Section 306 (2) of the Criminal Procedure Code or not as stipulated under Section 306 (1) of the code is a matter directly for this court to determine at what I call half time submissions of the trial.

The provisions under Section 306 (1) of the code postulates the means of regulating a motion of no case to answer by the defence or existence of a prima facie case by the prosecution. The emphasis is on either party to elect to submit on the evidence at the conclusion of the prosecution case or joined together the case seized of the prosecution can proceed further to defence stage.

The issue to be determined is either the prosecution has discharged the burden of proof of a prima facie case for the accused to be called upon to answer or as provided by Section 306 (2) of the Criminal Procedure Code or there is no evidence or reason to suspect the commission of murder discloses prima facie case to warrant any answer from the accused.

Legally construed various legal scholars and comparative decisions have precisely vested the guiding principles on these issues.

In the land mark case of **R. T. Bhatt v R {1957} EA 332** defines a prima facie case ***"a properly made by the prosecution and the evidence so adduced is able to prove essential elements of the offence that a reasonable tribunal properly constituted directing its mind to the facts and the Law could convict on it."***

There are certain fundamental principles while integrating the presence of a prima facie case or not to build up the contemplated no case to answer maxim. The Learned authors **Blackstone's Criminal Practice 2002 at Section D14, 27** advanced and strongly urged upon the trier of the case to keep and check over the following in this respect.

> **"(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 or <u>in our case the trial Judge.</u>

(c). 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 <u>tribunal</u> or jury 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.

(d). The question of whether a witness is lying is nearly always one for the jury or <u>as this case for the Judge</u>

But there may be exceptional cases (such as Slippey {1988} CR LR 767)

> **"where the inconsistencies whether, in the witness' evidence needed by itself or between him and other prosecution witness, are so great that any 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 finding a case, <u>the Judge should make a finding of not guilty and discharge the accused or in the case of the jury system withdraw the case altogether.</u>"***(underline emphasis mine)*

In the case of **R v Gibraith {1981} 1WLR 1039 Lord Lane C. J.** commands in emphatic terms that:

> **"(1).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.**
>
> **(2). The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.**
>
> **(3). Where the Judge comes to the conclusion that the prosecution evidence, taken at its highest is such that a jury or tribunal properly directed could not properly convict upon it. It is his duty upon a submission made to stop the case."**

In relation to the case on a prima facie case the court is satisfied on the preponderance of evidence that the accused has a case to answer, he must further be cautioned on the right to protection against self-incrimination under Article 50 (2) (J) of the Constitution and (L) on the right to remain silent.

Accordingly, they form part of the protections guaranteed by the constitution which therefore confers wide powers to the adjudicating tribunal to exercise its inherent jurisdiction to stop and quash any evidence which might have its way to the prosecution case under Article 50 (L) of the constitution, as a relevant material to, establish a prima facie case. Its significant for the court to consider any evidence which may arise in the course of the trial which offends the principle of fairness which is fundamental to a right to a fair trial under the pillars of rights in Article 50 of the Constitution.

At the heart of this framework it quickly becomes apparent as derived from the authorities cited that there is some evidence that in one or another a prima facie case stands out against the accused person for the offence of murder contrary to Section 203 of the Penal Code.

In arriving at this conclusion, I am alive to the well-established principle of Law and for the benefit of this discussion I rely on the cases of **Rex v Ramo Katsana {1978} ILLR 73 – 74** where **Contran C. J.** as he then was said:

> **"Further more, the court, it has been held, should not at this stage embark upon a final assessment of credibility and should leave that matter in abeyance until the defence have closed their case and weigh the two together."**

As alluded to earlier, I am of the strong view that the prosecution evidence negatived the accused claim that he has no case to answer.

Accordingly, pursuant to Section 306 (2) of the Criminal Procedure Code, the accused is hereby called upon to answer the charge of murder contrary to Section 203 of the Penal Code.

It is so ordered.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 24TH DAY OF FEBRUARY 2020.

……

R. NYAKUNDI

JUDGE

<u>In the presence of</u>

1. The accused person

2. Mr. Mayaka for the accused

3. Ms. Sombo for the DPP