



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 7 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

GOHU NDUNGI DZIMBA.....1ST ACCUSED

SULEIMAN BAYA MWAR.....2ND ACCUSED

SAMSON KAMBI YAA.....3RD ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Ogeto for the Accused persons

RULING

The above three named accused persons were indicted for murder contrary to Section 203 of the Penal Code on 27th March, 2017. The brief particulars were that on 4th March, 2017 at Mrima Wa Ndege area, in Vitengeni – Division, within Kilifi County, the accused persons jointly with others not before court murdered **Kazungu Kambi Mure**.

Each of the accused pleaded not guilty to the charge.

Mr. Ogeto represented the accused persons while the State case was conducted by **Ms. Sombo** – the prosecution counsel.

The State called seven (7) witnesses to testify against the accused persons to prove the charge of murder beyond reasonable doubt.

The prosecution case

The first witness to lead the pack of evidence by the prosecution was that of **PW1 – Zawadi Kazungu**, a daughter to the deceased. Her testimony was to the effect that on the aforementioned date of 4th March, 2017 she saw the 1st accused persons and other men drive in a motorcycle to their homestead and did have a conversation with the deceased. PW1 told the court that she saw money exchanged hands and the deceased changing his shirt to accompany the 1st accused person and his group out of the home. She later received a report that on the same night the deceased left with the accused he was beaten and burned to death.

In cross-examination, the witness confirmed that she positively identified the 1st accused but not the 2nd or the 3rd accused persons on the material day. Further PW1 told the court that the deceased boarded the motor cycle which was driven to the compound by the motor cycle which the 1st accused was part of on that particular day.

PW2 – Changawa Mure, the mother to the deceased testified that on 4th March, 2017 at about 3.00 p.m. she saw the 1st accused and two other men drive a motorcycle into their homestead and soon thereafter leave with the deceased. It did not take long before PW2 got information that the deceased has been killed. On visiting the scene PW2 told the court that she found the deceased body on fire.

In cross-examination, the witness stated in court that the accused persons were the one who came for the deceased and they did leave together in the same motorcycle.

PW3 - Rua Karisa, in his testimony told the court that on 4th March, 2017 he rode a motorcycle in which **Mungaro** was the rider and the 1st accused was also present. On their way PW3 gave evidence that they passed through a village where they picked the deceased.

In this respect PW3 testified that he was dropped at his destination but on the way the 1st accused and the deceased had alighted at a school whose name he did not remember. It was only at about 8.00 p.m. he heard people discussing about the death of the deceased with his name featuring prominently as a suspect. PW3 further stated that the school where the deceased and 1st accused alighted he clearly saw the 2nd and 3rd accused amongst other people.

PW4 – Christopher Charo Katana, who testified as a dealer in petrol products and other goods at Mrima Wa Ndege confirmed that one Rama Amani did purchase one litre of petrol on 4th March, 2017 at 2.00 p.m. PW4 however was not sure whether the petrol from his station was the one used to burn the deceased.

PW5 – Kahindi Mwalimu testified that on 4th March, 2017 one Rama hired out his motor vehicle for use in the day at fee of Kshs.200/-. That at the close of business on or about 5.00 p.m., the hirer brought back the motorcycle and at the same time informed PW5 about the death for the deceased.

PW6 – Dr. Adalo gave evidence on behalf of Dr. Khadija who performed the postmortem examination on 11th October, 2017. PW6 told the court that there was no body to examine, just remnants of bones. In his opinion, with such, prevailing circumstances no opinion was reached on the cause of death.

PW7 – Sgt. Stephen Owuor, the final witness to take the witness stand testified and adduced evidence as to the indictment of the accused persons the investigations carried out by him, which included scene visit. In his evidence it showed that the deceased was killed as a suspect in connection with the disappearance of Mule, a reported missing person.

It was further his testimony that the evidence collected all linked the accused the master minder of the killing together with other persons not before court.

Analysis

The operative provisions for the court on a motion of case to answer is expressly stated in Section 306(1) of the Criminal Procedure Code if at the close of the prosecution case there is no evidence to prove an essential elements of the offence charged or any other cognate offence the court should discharge the accused persons.

In **R.T. Bhatt v R 1957 EA** the guiding principle is that if the evidence adduced on behalf of the prosecution is manifestly credible that a reasonable tribunal directing its mind to the evidence could safely convict on it, then a prima facie case has been made out to proceed further and call for accused to offer his or thier defence.

One of the principal factors to be considered at the prima facie stage of the proceedings is to bear in mind that while exercising discretion the object and scheme as to the right to remain silence, pursuant to Article 50 (2) (1) of the Constitution is a minimum guarantee availed to the accused person. The place of right to remain silence is not dependent on the weight of evidence adduced by the prosecution was succinctly stated in the case of **Obrian and another v Attorney General of Transvaal 1998 11 BCHR (SA 1224) CC** as follows:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie, an accused who fail to produce evidence to rebut, the case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk, that absent any rebuttal, the prosecution case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence if the right to silence were to be interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.”

At the very least, therefore the test on prima facie case must be concerned at this stage to strike a balance that the following elements of the offence of murder are present either through direct or circumstantial evidence that:

“(a). The accused persons killed the deceased by burning him with petrol.

(b). That The death was unlawful.

(c). The accused persons acted unlawfully and with malice aforethought.

(d). That the element of common intention as part of joint enterprise has been demonstrated by the prosecution.”

The question to be answered on a successful motion of no case to answer is whether if the accused elects to remain silence, the prosecution evidence is such that the court could convict on it.

The test and the standard of proof at this halftime stage of the proceedings is precise and its lower than the standard of proof of beyond reasonable doubt in **Miller's case 1942 1ALL ER or Woolmington v DPP 1935**.

In the end, I therefore hold the view that from the evidence so far on record it's desirable to opine that a prima facie case has been established by the prosecution to warrant accused persons to be called upon to state their defence under Section 306(2) of the Criminal Procedure Code. It is so ordered.

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

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R. NYAKUNDI

JUDGE