REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 22 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KANDENGE KOMBE.....1ST ACCUSED

ONESMUS PETER MUSUKO alias

JEMBE.....2ND ACCUSED

KAZUNGU JOHN CHARO alias

KAZUNGU KAGUTU .....3RD ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms Sombo for the State

Mr. Gekanana for 1st Accused Person

Mr. Obaga for the 2nd and 3rd Accused Persons

RULING

The accused persons are jointly indicted with the offence of murder contrary to Section 203 of the Penal Code as punishable to death under Section 204 of the code. The accused persons pleaded not guilty to the offence. In substantiation of the charge, the prosecution pursuant to Section 107 (1) of the Evidence Act set in motion the process of calling witnesses to discharge the burden of proof of beyond reasonable doubt. The facts relating to the incrimination of the accused are straight forward and based on the evidence of five witnesses. The evidence bears the narrative of circumstantial evidence which led to the accused persons being charged jointly with the commission of the offence.

The gist of the star witness **(PW1) – Charo Ponda Chome** was as follows. That on 16.11.2018, the 1st accused left home in company of the deceased but he was never to return back. (PW1) alongside other family members did interrogate the 1st accused person on the whereabouts of the deceased, who explained that he parted ways with the deceased in the evening. He had even to hand over some items to the 2nd accused person to forward to the deceased. The search of the deceased commenced in earnest and on 18.6.2018 his body was to be recovered from the Indian Ocean.

In his turn **PW2 – George Gambo Yamba** testified to the effect that on 17.11.2018, the 1st accused person approached him for an advance of personal loan of Kshs.600/= with his Techno phone used as a security. The witness apparently, became hesitant to loan the 1st accused person the initial request of Kshs.400/= but ended up being convinced to part with the money. The 1st accused was meant to leave the mobile phone as security. He was to settle the debt of Kshs.600 with interest at Kshs.960. PW2 further testified that the following day, he received information that the police officers were looking for him in connection with the mobile phone which was left by the 1st accused person. For his part PW2 told the court that he had only taken possession of the mobile phone to secure the personal loan he gave the 1st accused person.

PW3 – Macdonald Kithi Kalu, introduced himself as brother to the deceased. He told the court that he had gone missing from the 16.11.2018 under the guise that he was out tapping palm wine. However, the fact that there was credible information that he left home with the 1st accused person, it became necessary to interrogate him to give clues on his whereabouts. By following the leads, it became apparent

that the deceased body had been dumped into the ocean. Finally, the recovery was made and police initiated investigations as to the cause of his death. When it came to the identification of the body to the pathologist. It was PW3 who participated as a member of the family at the time of the post mortem.

PW4 – Issa Mwanongo Mwajima, a fisherman by occupation, testified to the effect that on 16.11.2019, 1st accused went to his house and left a knife, radio and plastic container. The following day PW4 stated in court that the 1st accused and 2nd accused persons passed by his house, took some alcoholic drinks and left soon thereafter. From that time it was only **PW5 – PC Dominic Omondi** who went there to inquire about exhibits as being a subject of a murder investigations. As the evidence of PW5 demonstrated he took possession of the exhibits which he produced in court as supportive evidence for the prosecution case.

According to PW5, the recovery of the knife, mobile phone sold to PW2 and the plastic container it was established that the accused persons committed the offence of murder. Together with postmortem expert evidence in this case he duly produced them in evidence as a sum total of the accused involvement with the murder.

At the close of the prosecution case, it's the responsibility of the court under Section 306 of the Criminal Procedure Code to determine the existence or non-existence of a prima facie case against the accused persons. The Law requires either the prosecution or the defence to submit on a motion of no case to answer or proof of a prima facie case. Unfortunately, none of the counsels found it fit to file or advance any arguments under this important procedural section of our times in the criminal administration of justice. However, notwithstanding any supplemental submissions being made, pursuant to the statutory provisions of the code a decision must be made as to the legal and evidential burden of proof on a prima facie case or a no case to answer motion.

Determination

The position of the Law is very clear, Article 50 (2) (a) of the constitution is relevant to the question at hand that an accused person shall be presumed innocent until the contrary is proved by the prosecution in accordance with the applicable Law.

The onus of proof as stipulated in Section 107 (1) of the Evidence Act rests with the prosecution and is pegged at a standard of beyond reasonable doubt.

The words or concept of the burden of proof postulates both the legal and evidential burden of proof. The court is entitled to look at the issues of fact or Law and whether the prosecution has proved existence or non-existence of any fact verifiable from the evidence to support the charge.

For the purpose of a trial of an accused person, the triable issues must be understood and evidence admitted within the confines of the provisions under Article 50 of the Constitution on the right to a fair trial.

In any given case, with this background on the right to a fair trial in which, it is the duty to examine with minute details the facts laid before it to give effect to the evidence and inevitably the outcome. On this two types of burden of proof outlined above, **Fidelis Nwadialo** in his book **(Modern Nigeria in Law Evidence, University of Lagos Press, Lagos 1999) pg 379**, he had this to say:

> ***"The term burden of proof is used in two different senses. In the first sense, it means, the burden or obligation to establish a case. This is the obligation which lies on a party to persuade the court either by preponderance of evidence, or beyond reasonable doubt, that the material fact which constitute his whole case are true, and consequently to have the case established and Judgment given in his favour. The other meaning of the expression burden of proof is the obligation to adduce evidence on a particular fact or issue. This evidence in some cases, must be sufficient to prove the fact or issue, while in others, are that is required is for it to be enough to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called the evidential burden. This is the sense in which the expression is more generally used."***

In a motion of no case to answer, under Section 306 (1) of the code, the standard of proof is not that of beyond reasonable doubt since the accused has not yet participated in the formal answer to the allegations raised by the witnesses for the prosecution.

By virtue of this section, and the rules made thereinunder, the contention is whether any of the elements of the offence as framed by the prosecution implicating the accused have been established to warrant an answer since the totality of the evidence adduced is based on the impression by the prosecution alone, its incumbent for the court not to arrive at findings on the merits of fact or issue.

In determining this half time submissions of a motion of no case to answer or a prima facie case needless to say that the principle in **Miller v Minister of Pensions {1942} AC 1** sums it as follows:

> ***"It need not reach certainty, but it must carry a high degree of probability."***

Similarly, in **Bakare v State {1985} 2 NWLR 465 Oputa JSC** held inter alia that:

> ***"Absolute certainly is impossible in any human adventure including the administration of criminal justice."***

In the present case therefore, the facts of what happened must point to the charge as on the high probability of what happened and utmost to certainty but not conclusively, beyond reasonable doubt. In the case of **Wilson v Buttery {1926} S. A. SR 150** the court stated on the test that supports a prima facie case as follows:

"If a submission is made that there is no case to answer, the decision should depend not so much on whether, the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but on whether, the evidence is such that a reasonable tribunal might convict." **This correct approach was further restated in the case of May v O' Sellivan {1955} 92 C. L. R**: ***"<u>though an English Court it did address the provisions of Section 306 of our Criminal Procedure Code on this issue of a prima facie case and a motion of no case to answer</u>."*** The principle laid down by **CJ Webb, Fallagar, Kitto and Tayner JJ** was as follows:

"The question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether, on the evidence as it stands, he could lawfully be convicted."

These principles have been applied frequently in our jurisdiction the wake of the celebrated case **R. T. Bhatt v R {1957} EA 332 – 335** where the court held that to arrive at a finding of a prima facie case. The consideration is that:

"It may not be easy to define what is meant by a prima facie case, but at least it must mean one which a reasonable tribunal, property directing its mind to the land and the evidence could convict if no explanation is offered by the defence."

When all is said and done one point the court must pursue decisively by weighing the pros and cons of granting a prima facie case is to guarantee that at the end result, the accused is not prejudiced or called upon to supplement the prosecution case. The court must be satisfied that justice will be best served by placing the accused on his defence and not to merely further proceedings directed at hearing the other side.

To that extent the guiding principles by **Lord Lane C. J in R v Gibraith {1981} 1 WLR 1039** appeal to the exercise of discretion at this interlocutory stage, under Section 306 of the code where the court held thus:

"How then should the Judge approach a submission of no case:

(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, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, upon a submission being made, to stop the case.

(3). Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of witnesses reliability or such matters which are generally speaking within the province of the jury (<u>or judge) is the case may be</u> and where on due possible view of the facts there is evidence upon which a jury or <u>judge</u> come to the conclusion that the defendant is guilty, then the judge should and the matter to be tried by the jury, <u>or in our case proceed to call upon the accused to offer his defence.</u> There will of course, as always in this branch of Law, be borderline cases, they can safely be left to the discretion of the Judge." *(underlined emphasis mine)*

In drawing an inference in this matter, at the conclusion of the prosecution case regard must be given to particulars of the charge that the evidence by the prosecution is purely circumstantial.

The approach to adverse an inference against an accused persons based on circumstantial evidence has been adopted and defined in a number of cases. In the case of **Chimera Omar Chimera v R CR Appeal No. 56 of 1998 UR** where the court properly commented on threshold issue of circumstantial evidence as follows:

"It is settled Law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:-

(i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established,

(ii) Those circumstances should be of a 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 committed by the accused and no one else."

Admittedly, the strength of the prosecution case was based on the testimony of a single witness who was part of the trial. Viewed that way I am also bound by the principles in the case of **Abdallah Bin Wendo R 20 EACA 166 and R v Turnbull {1976} 3 ALL ER 551.**

I have given careful consideration to the whole evidence adduced by the prosecution and the issues which arose during cross examination by the defence, I am inclined to rule as follows:

The evidence upon which the 2nd and 3rd accused persons were indicted is in my view weak and its evidential significance not able to discharge the existence of a prima facie to entitle this court to draw an inference against the two accused persons.

The particulars of evidence of PW1, PW2, PW3, PW4 and PW5 made no credible or watertight case to indicate that immediately the deceased went missing the 2nd and 3rd accused persons were involved in causing his death. While, there is mention of the 1st and 2nd

accused seen together within the period under review, there is need for evidence of a much higher quality than there is on the record before a finding of a prima facie case can be made by this court.

In my view, the prosecution obligation is to present evidence to satisfy the test of a prima facie case directed at securing a conviction for the offence charged and the accused expected to be called upon to respond pursuant to Section 306 (2) and 307 of the Criminal Procedure Code.

In my view, the evidence in so far as it relates to the charge of murder cast a doubt on the following elements:

First, whether in reality the 2nd and 3rd accused persons in keeping with the burden of proof jointly with the 1st accused and others not before court murdered the deceased.

Secondly, in many ways, the prosecution was expected to present evidence on common intention under Section 21 of the Penal Code. The question of proof of common intention on criminal proceedings involves the following elements as stated in **Rex v Tabula S/o Kinya & 3 Others {1943} 10 EACA 51:**

> ***"To constitute a common intention to prosecute an unlawful purpose, it is not necessary that there should have been any concerted agreement the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their action and the omission of any of them to disassociate himself from the assault."***

The effect of this principle is to place the accused persons at the scene. As against these provisions, the prosecution case while making reference to the joint venture ought to sufficiently tender prima facie evidence on the following elements:

> ***(a) That the deceased was killed by the three accused persons or with others not before court.***
>
> ***(b) That they formed a common intention.***
>
> ***(c) That the common intention was towards executing an unlawful act in concert and conspiracy with each other to kill the deceased.***
>
> ***(d) That in that common intention, the outcome was the death of the deceased.***

Whereas the prosecution leaned towards showing that this was an offence directly committed from all circumstances under Section 21 of the Penal Code, the standard required on a prima facie case as against the 2nd and 3rd accused did not reach certainty, for the court to exercise discretion of presumably call upon the two to state their defence. The evidence so far presumed is incapable for this court to conclusively draw an inference that the two formed a common intention to prosecute a crime of murder against the deceased.

In this regard the common intention must embrace the *mens rea* and *actus reus* of the offence. I am afraid, the offence of which the 2nd and 3rd accused were indicted jointly with the 1st accused is deemed not to have been disclosed to justify a finding of a prima facie case in favour of the prosecution. The protection of the Law under Article 50 of our Constitution contains provisions to secure the protection of the Law:

> ***(1) Every person has the right to have any dispute that can be resolved by the application of Law decided in a fair and public hearing before a Court or if appropriate another independent and impartial tribunal or body.***
>
> ***(2) Every person charged with a criminal offence shall be presumed innocent until he or she is proved to be guilty or has pleaded guilty to the charge.***
>
> ***(3) Every accused person has a right to refuse to give self-incriminating evidence.***

Though the sole question of Law which arises under Section 306 of the Code is whether a primafacie case has been established, it's critical that the protection for fundamental rights and freedoms in the Constitution be construed generously; to enhance the right to silence and against self-incrimination.

It is common knowledge, sometimes, due to exigency of duty and demands of case load docket accused persons are routinely called upon to offer their defence either under Section 211 or 306 of the Criminal Procedure Code. This simple procedural directions and determination by trial courts has a direct impact on the right to silence and further not to be compelled to give self-incriminating evidence.

In my view reliance placed in **R v Galbraith case (supra)** if there is no reasonable inference on a primafacie case, the case against an accused person should be stopped, in the circumstances that no shifting of the burden of proof from the prosecution to the defence so as to infringe the right of presumption of innocence under Article 50 (2) (a) of the Constitution.

A pivotal consideration and all significant constitutional safeguards on the right to a fair trial taken into account, no primafacie case has been established by the prosecution against the 2nd and 3rd accused persons.

I would therefore allow the motion of no case to answer under Section 306 (1) of the Criminal Procedure Code by entering a verdict of not guilty and an acquittal in favour of the two accused persons. Each of them is set free and at liberty unless otherwise lawfully held.

This is contrary with the evidence touching on the 1st accused. In this cases, the circumstances set out in the question reported to this court for determination on a prima facie case as contemplated under Section 306 (2) of the Criminal Procedure Code can be considered in the affirmative. The fact that a criminal act done can be shown to have been prosecuted by a single person, or absence of evidence of other accomplices does not render the provisions of Section 21 in applicable.

The result then is this to allow the 1st accused to respond to the allegations by the prosecution on the charge of murder contrary to Section 203 of the Penal Code.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF MARCH 2020

.....

R. NYAKUNDI

JUDGE