



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 23 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MARTHA NABIASHARA LEMUYUK.....1ST ACCUSED

JACKSON ARIKI.....2ND ACCUSED

RULING

Case to answer

[1] The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya. The prosecution closed its case on 11th December 2019; after calling seven (7) witnesses. Both parties intimated that they shall not file written submissions. Now I should determine whether or not the prosecution has established a prima facie case against the accused as to call upon them to enter defence.

[2] Section 306 of the Criminal Procedure Code provides that:-

306. (1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

(3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.

[3] A *Prima facie* case has been said to be;

“...one which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is offered by the defence”. See RAMANLAL BHATT vs. R (1957) EA 332(CA)

[4] Does the evidence adduced meet the threshold? The prosecution called seven witnesses to support the charge of murder against the accused persons. Pw1 to Pw6 all led evidence that the deceased had committed suicide. It is only Pw7, the investigation officer who testified that the deceased may have been murdered by the accused persons. He supported his claims by stating that there were marks on the face of the deceased which are not suggestive of suicide but an indication of a struggle. The evidence of pw5 was that he had seen the 2nd accused person with the deceased prior to his death. That in his investigations he had also learnt that there was a dispute between the 1st accused person and the deceased.

[5] I have also perused the post mortem report. It notes that there were fresh injuries on the face of the deceased. It however states that the cause of death was due to strangulation leading to hypoxic brain damage due to cardio pulmonary arrest. The post mortem report also notes that there was a rope that was cut; one part was around the neck and the other was hanging on the tree. I have also considered the evidence of

Pw5; it is not categorical that he saw the accused persons with the deceased prior to his death. Pw7 also acknowledges that the 1st accused person mentioned that they had an argument with the deceased prior to his death. All the prosecution witnesses averred to there being good relations between the accused persons and the deceased.

[6] In **Republic v Alex Mwanzia Mutangili [2017] eKLR** the court cited the case of **Sanjil Chattai v The State [1985] 39 WLR 925** where it was stated thus;

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

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

(b) When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it.”

[7] **R.T. Bhatt v Republic [1957] EA 332 – 334 & 335** also cited in **Republic v Alex Mwanzia Mutangili (supra)** defines what constitutes a prima facie case. The court of Appeal of Eastern Africa stated thus;

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the 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 would 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 agree 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.

[8] The evidence presented by the prosecution witnesses does not provide any credible link between unlawful acts by the accused persons and the death of the deceased. The prosecution witnesses have not laid out a prima facie case and I therefore acquit both accused persons. They shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Meru this 30th day of June, 2020

F. GIKONYO

JUDGE

Representation

1. Both accused persons – in person
2. DPP, Meru for state

dppmerucounty@yahoo.com