



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 34 OF 2017 [MURDER]

CORAM: HON.R.E.ABURILI J

STATE.....PROSECUTION

VERSUS

BERNARD OMONDI ODUOR.....ACCUSED

RULING ON CASE TO ANSWER

1. The accused person herein Bernard Omondi Oduor is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. Particulars of the Information dated 20th December 2017 signed by Eliphias O. Ombati Principal Prosecution Counsel are that on 7/12/2017 at about 21.30 hours are Kahonda village, K'ochieng 'B' sub location, Central Alego location, Siaya Sub county within Siaya county, the accused murdered Stephen Omondi Odindi.
3. On taking of the Plea on 12/2/2018, the accused person pleaded Not Guilty to the Information before Hon. James Makau J.
4. Hearing commenced before me on 17/12/2018 after a long delay as counsel for the accused was sick and witnesses were not available to testify. The accused was however released on bond.
5. PW1 Eunice Awino Omondi testified that on 7/12/2017 she was at her home with her children at about 9pm when she heard noises of fights outside her house and when she got out she was pricked by something on her right hand.
6. PW1 screamed and that is when her husband who was asleep in the house woke up and went towards the door then he dropped down and PW1 started struggling with him to find out why he had fallen. She then saw blood on his right rib so with the help of her children and a lit lamp they removed his clothes and noticed that he had been stabbed. She then called her brother inlaw Charles Otieno who arrived and escorted the deceased to hospital using a motorcycle. They took the deceased to Siaya District Hospital but his condition worsened so he was transferred to Kisumu and he succumbed the following day while admitted at Jaramogi Oginga Odinga Teaching and Referral Hospital.
7. PW1 also witnessed the postmortem being conducted on her husband's body.
8. She was categorical that she never saw the person who stabbed her husband Stephen. She denied seeing the accused that night and stated that she only suspected the accused herein Bernard as her husband's assailant because she heard rumours concerning his involvement in the stabbing and that because they had had quarrels with him.
9. PW2 Samuel Otieno Oduor from Segeyo recalled in his testimony that on 7/12/2017 he worked at PISOKO and that at 10.00pm on the material night he was returning from his place of work when he found his pregnant wife had fallen outside their house and surrounded by children and barking dogs, so he escorted her to hospital because her condition was bad such that albeit she was breathing but she could not see. He stated that he escorted her to Siaya District Hospital but while at the Hospital, he was called by a police officer one Wasonga who asked PW2 to take his wife to the police station if she could talk so that she records her statement. PW2 took his wife to the police station on the motorcycle and after she had recorded her statement, he returned her to hospital where she died before telling PW2 what had happened to her.
10. PW2 stated that he knew the deceased Stephen Omondi Odindi who was his relative. He stated that he only heard that the accused had killed the deceased Stephen Omondi Odindi. He stated that the accused was his cousin. He stated that when he took his wife to hospital, he heard that Stephen was also in hospital but that he did not see him.
11. PW3 No 64257 PC Eliud Wafula Wesonga based at Kinango Police Station in Kwale County testified that he investigated this case

involving the death of the deceased Stephen Omondi Odindi. He stated that on 8/12/2017 at about 10.00 am he received a report from the younger brother to the accused one, Samuel Otieno who reported that there was a serious assault. The said Samuel Otieno was accompanied by the accused. PW3 placed the suspect in custody and proceeded to Siaya Sub-county Hospital where he was told the victim of the assault was but on arrival he was told that the victim's condition had worsened so he was referred to Jaramogi Oginga Odinga Teaching and Referral Hospital.

12. The following morning, PW1, the wife to the victim of assault reported that her husband had passed on while undergoing treatment at Jaramogi Oginga Odinga Teaching and Referral Hospital so PW3 in the company of Inspector Gati proceeded to the scene of assault at Kochieng 'B' sublocation and that he learnt that on 7/12/2017 the accused invaded the deceased at 9.30 hours at the house of the deceased and stabbed him with a spear on the right side of the abdomen inflicting on him serious injuries which cause his death. He further testified that he learnt that on 6/12/2017 there had been a quarrel between the widow of the deceased and the sister inlaw of the accused and that the latter's sister inlaw was found unconscious outside her pit latrine on 7/12/2017 which attracted the wrath of the accused who emerged from his home with a spear and went with it to the scene and proceeded to deceased's house, threatening to eliminate the deceased. PW3 did not recover any Murder weapon but attended the postmortem on the deceased body on 19/12/2020.

13. PW4 Dr. Ombok Lucy testified and produced a postmortem report done by Dr. Rukia who was in Isolation Unit and unable to get to court owing to covid-19 protocols. The witness had worked with Dr. Rukia for 6 years hence she was familiar with her handwriting. She produced the postmortem report of the body of Stephen Omondi Odindi as PEx1. The deceased was found to have sustained injuries involving an entry wound of a sharp forced object on the chest region, in the spaces between the 7th rib.

14. According to the postmortem report, the cause of death of the deceased was due to ruptured internal organs secondary to penetrating abdominal injury.

15. The Prosecution then closed its case and this court was called upon to determine whether the accused person has a case to answer, based on the evidence adduced on record by the 4 prosecution witnesses and submissions by counsel for the accused Mr. Oduor and as supported by the Prosecution counsel, Mr. Okachi.

16. The burden of proof in criminal cases always, lie with the prosecution to prove their case against the accused person beyond reasonable doubt and that burden does not shift to the accused person at any stage.

17. At this stage, however, the Prosecution is only expected to establish a prima facie case against the accused person to warrant him being placed on his defence.

18. A prima facie case need not be one that must succeed. However, the evidence must be credible enough and sufficiently link the accused person to the commission of the offence. Such evidence can either be direct or indirect or circumstantial evidence.

19. The question is whether on the evidence adduced by the 4 prosecution witnesses there any scintilla of evidence linking the accused to the Murder of the deceased Stephen Omondi Odindi.

20. Admittedly, the incident took place at night at about 10.00pm. PW1 did not see anyone stab the deceased. There is no dispute that the deceased died as a result of being stabbed by a sharp forceful object, as stated by PW4. However, no weapon was recovered. PW3 the Investigating officer advanced the theory of the accused having attacked the deceased with a spear. No witness was called to corroborate that evidence of an Investigating officer which was purely hearsay.

21. PW2 who allegedly went to the police station in the company of the accused to report of an assault on the deceased and on the wife to PW2, never mentioned that he saw the accused assault the deceased Stephen.

22. PW2 carefully avoided mentioning the deceased in his testimony and only stated that he only heard that the accused is the one who killed the deceased.

23. PW1 testified that she heard rumours that the accused killed her husband because they had a disagreement at home with the accused.

24. Section 306 of the Criminal Procedure Code Section provides:

“(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 recording 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 on his own behalf or make unsworn statement and to call witnesses in his defence.....”

25. The test of prima facie case was settled in the case of **Bhatt –v- R (1957) E. A 332** as cited with approval in **Republic v Benson Ochieng Oyungi [2016] eKLR** where the Court held:

“A definition as to what amounts to a prima facie case was given in the case of Bhatt –vs- R [1957] EA 332. In that case the Court of Appeal expressed itself on this issue:

“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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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. It is true as Wilson J said that the Court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively: That determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case” but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

26. At this stage of the proceedings the standard applicable on whether a prima facie case has been made out is lower than the standard on beyond reasonable doubt which applies at the conclusion of the full trial after the accused person has been heard. The strength of the evidence establishing a prima facie case must be the sort of evidence upon whose strength the Court could convict if the defence says nothing to rebut such evidence.

27. First the case for the prosecution from the four witnesses is purely based on circumstantial evidence. None of the prosecution witnesses witnessed the incident leading to the deceased’s death. As to what constitutes circumstantial evidence, the principle espoused in the case of **Sawe v R 2003 KLR 364**, is that:

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

i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

ii) Those circumstances should be of 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 connected by the accused and none else.”

28. None of the witnesses’ evidence pointed to the accused person as the person who killed the deceased. Their evidence against him was hearsay. The deceased’s wife claimed that she relied on rumours to suspect the accused because there was a disagreement at home. The investigating officer gave detailed evidence which was hearsay as the witnesses who told him what he told the court were never called to testify.

29. Out of the 7 witnesses listed on the information of Murder, only 4 testified. Of the four, two are formal witnesses, a doctor and an investigating officer, while two are civilian witnesses. There are other witnesses listed namely, Carolyne Achieng Otieno, Tonny Onyango Omondi and Eunice Akinyi Atieno who never testified and no reasons were given for their non-appearance in court to testify. There was no allegation that they were not willing to testify in the matter as the court could have inquired whether they were competent and compellable witnesses to enable it issue summons to appear and where they resisted, issue warrant of arrest.

30. The prosecution case is accordingly grounded on conjecture, rumours and suspicions. It is possible that the accused herein could have killed the deceased but this court was not presented with any material evidence that would sufficiently place the accused person at the scene of Murder of the deceased to warrant this court place the accused on his defence.

31. Having so found, I hold that the prosecution has not discharged the legal and evidential burden of establishing a prima facie case against the accused person.

32. For the above reasons and for want of credible evidence linking the accused to the demise of the deceased Stephen Omondi Odindi, I find the prosecution case barren to sustain a charge of Murder.

33. I find the accused person Bernard Omondi Oduor has no case to answer and acquit him of the charge of Murder and discharge him from the Information of Murder.

34. Therefore, unless otherwise lawfully held, the accused person Bernard Omondi Oduor is hereby acquitted and set at liberty forthwith.

35. Sureties are hereby discharged and any securities deposited in court to be discharged and returned to the sureties.

36. The advocate Mr. Oduor is hereby discharged from the pauper brief and ordered to be paid his *probono* fees as the matter is concluded.

37. This file is closed.

38. orders accordingly.

Dated, signed and delivered at Siaya this 19th day of October, 2020

R.E. ABURILI

JUDGE

In the presence of:

Mr. Okachi Senior Principal Prosecution Counsel for the State

Mr. Oduor Advocate for the accused person

Accused person present/on bond

Court Assistant: Brenda