



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 58 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

ANGELICA MWAU WANZA.....ACCUSED

RULING

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, to which she pleaded not guilty.
2. To prove its case against her, the prosecution called and examined a total of seven (7) witnesses, at the close of which the parties were invited to make submissions on whether the prosecution had established a prima facie case, to enable the court place the accused on her defence.
3. The accused filed written submissions which were highlighted by Mr. Opolo her Advocate on record, while the State through Mr. Okeyo, made oral submissions. It was submitted that the prosecution was able to establish the fact of death and cause thereof, through the evidence of Dr. Ndegwa and as supported by other witnesses, and that the accused was linked to the said death since she was in a relationship with the deceased and both lived together in the same house, where the quarrel which led to the death of the deceased started, over an allegation of infidelity. It was submitted that the relationship between the accused was not good, thereby proving malice.
4. On behalf of the accused, Mr. Opolo submitted that whereas the death of the deceased was proved, the prosecution case against the accused was purely premised on circumstantial evidence including the evidence of PW1 a child of tender age. It was submitted that none of the prosecution witnesses testified of having seen or heard the commission of the offence. It was further submitted that vital prosecution witnesses, include one Roba, who was allegedly seized with the information that the accused stabbed the deceased, were not called to testify.
5. It was contended that the prosecution case was full of inconsistencies and contradicted, with the evidence of PW1 a child of tender age being uncorroborated. It was submitted that there were gaps in the prosecution case, the benefit of which should be given to the accused person. It was finally submitted that the evidence placed before the court was worthless, that should the accused elect to remain silent, no reasonable tribunal can convict her upon the same.

DETERMINATION

6. I have taken into account the submissions by the prosecution, the written submissions by the accused as highlighted in court, together with the authorities thereon and note that to prove a case on a charge of murder, the prosecution is in law required to prove the fact and cause of death, that the said death was caused by unlawful act on the part of the accused person, with malice aforethought.
7. At this stage of the proceedings the court is called upon to make a determination under the provisions of Section 306 (1) and (2) of the Criminal Procedure Code which provides as follows: -

“306 (1) Where the evidence of the witnesses from the prosecution has been concluded the court, if it considers that there is no evidence that the accused or any of one of several accused committed the offence, it shall after hearing, if necessary, any argument 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 considered that the accused person or any one or more of several accused persons committed the offence, shall inform each of such accused person of his right to address the court in his own behalf or make unsworn statement and call witnesses in his defence.

8. What the court is required to do, is to establish whether the prosecution has made out a prima facie case, to enable it call upon the accused person to offer some explanation in his defence, as was stated in the case of **BHATT v REPUBLIC [1957] (supra)** as follows: -

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie 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 could 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 argue 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 may not be easy to define what is meant by 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. (Emphasis added)

9. Justice Nyakundi in the case of **REPUBLIC v ALEX MWANZIA MUTANGILI [2017] eKLR** quoted with approval UDOMA JSC of Nigeria Supreme Court in the case of **DABOH & ANOTHER v STATE [1977] 5SC 122 at 129** when a no case submission may be upheld in the following passage:-

“Before, however embarking upon such exercise, it is perhaps expedient here to observe that it is a well-known rule of criminal practice, that on a criminal trial at the close of the case for the prosecution, a submission of no prima facie case to answer made on behalf of an accused person postulates one of the two things or both of them at once:

Firstly, such a submission postulates that there has been throughout the trial no legally admissible evidence at all against the accused person on behalf of whom submissions has been made linking him in any way with the commission of the offence with which he has been charged which could necessitate his being called upon for his defence.

Secondly, as has been so eloquently submitted by Chief Awolowo, that whatever evidence there was which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing criminal guilt in the accused person concerned; and in the case of a trial by jury that the case ought therefore to be withdrawn from the jury and ought not to go to them for a verdict.

On the other hand, it is well settled that in the case of a trial by a jury, no less than in a trial without a jury however slight the evidence linking an accused person with the commission of the offence charged might be, the case ought to be allowed to go to the jury for the findings as judges of fact and their verdict.

Therefore, when a submission of no prima facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged.

If the submission is based on the discredited evidence, such discredit must be apparent on the fact of the record. If such is not the case, then the submission is bound to fail.”

10. Justice J.B. Ojwang, as he then was, on the other hand in the case of **REPUBLIC v SAMUEL KARANJA KIRIA CR. CASE NO.13 OF 2004 NAIROBI [2009] eKLR** had this to say on prima facie case: -

“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . .

The Court of Appeal Criminal Appeal No. 77 of 2006, the Court of Appeal expressed that too detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court’s ruling could then compromise the evidentiary quality of the defence to be mounted. (Emphasis added).

11. With the injunction by Justice Ojwang in mind, I have taken into account the fact that the death and cause thereof are not in dispute. I have further taken note of the fact that there is evidence placing the accused and the deceased together in a relationship which was not very rosy, so to speak and that the deceased was stabbed in the confines of their house and without saying too much thereon, so as not to compromise the defence the accused is likely to offer, should she opt to testify, I am satisfied that the prosecution has placed adequate evidence before the court, to enable me put the accused on her defence, which I hereby do.

12. The accused through the advice of her Advocate on record, is called upon to make a selection on how she intends to defend herself as provided for under Section 306(2) as read with Section 307 of the Criminal Procedure Code and it is ordered.

Dated, Signed and Delivered at Nairobi This 12th Day of November, 2020 Through Microsoft Teams.

.....

J. WAKIAGA

JUDGE