



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 13 OF 2011

REPUBLICPROSECUTOR

VERSUS

MARK MUTWIRI MBOGO.....ACCUSED

RULING

Through the information 28th March 2011, the accused person Mark Mutwiri Mbogo was charged with two counts of Murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on the 26th March 2011 at Naromoru Police station in Nyeri District within Central Province he murdered, on the 1st Count No. 45897 Senior Sergeant John Koros, and on the 2nd Count, No. 64303 Ag. Inspector Hudson Orwenyo Muranga.

The accused person pleaded not guilty to the charges before Wakiaga J.

The matter was part heard by Mativo J when the trial took off on the 27th September 2016. He heard two witnesses. I took over on 22nd February 2017 and heard 13 witnesses. The prosecution closed its case on the 22nd January 2018.

Section 306(2) of the Criminal Procedure Code provides:

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.(emphasis added)

Clearly the court is expected to consider the evidence and arrive at the decision as to whether there is a prima facie case or not.

The defence chose not to make any submissions on this issue. Counsel for the accused person submitted that upon going through the record, he did not wish to make any submissions as this stage and left it to court. The prosecution on their part responded that they would rely on the evidence already adduced.

What amounts to a prima facie case under s. 306(2) is the *consideration* by the court *that there is evidence that the accused person committed the offence.* How this evidence is to be considered is defined in case law including **Ramanlal Trambaklal Bhatt -vs- Republic (1957) E.A. 332**. In dealing with a similar issue in the **R v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR** case the judge cited from **May v O’Sullivan [1955] 92 CLR 654** where the court stated:

“when at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be answered 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. This is really a question of law” (emphasis added)

And also from the case of **R vs Prazad [1979] 2A CRIM R45 King CJ**

“I have no doubt that a tribunal which is a judge of both law and fact, may dismiss a charge at any time after the close of the case

for prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight that no reasonable tribunal could convict on it.”

These are the same words of the court in the case of **Ramanlal Trambaklal Bhatt -vs- Republic (1957) EA 332** which was cited with approval in by the Court of Appeal in **Anthony Njue Njeru -vs- Republic [2006] eKLR**. Where the court stated:

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, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction... 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 final 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.” (emphasis mine)

Applying these principles what is the position in this case?

The Law:

The Penal code provides:

203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Punishment of murder

Any person convicted of murder shall be sentenced to death.

206. Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances—

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

The Evidence

At this stage the consideration is whether there evidence sufficient to require the accused person to make his defence on the charges facing him. Looking at the ingredients for the offence of murder as have been set out in numerous authorities; for example **Republic -Vs- Andrew Moete Omwenga (2009) eKLR**, and what the 15 witnesses called by the prosecution testified:

1. The death of the victim- the prosecution has established that the two victims died out of gunshot wounds.
2. By an unlawful act or omission – the prosecution has led evidence placing the accused at the scenes of the two murders
3. With malice aforethought as defined under s. 206 of the Penal code which include: - the prosecution led evidence to demonstrate their case that the ingredients of malice afore thought were fulfilled in this case: that is;
 - i. The intention to kill
 - ii. The intent to do or cause harm
 - iii. Knowledge that the act or omission will cause death r grievous harm
 - iv. The intention to commit a felony

Hence on the evidence before me and having put my mind to the same and the law, I am of the view that the prosecution has established a

prima facie case to warrant the accused person being put on the defence.

Dated, delivered and signed in open court at Nyeri this 25th day of March 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Mr. Magoma for state

Mr. Njuguna Kimani for the accused

Court: S. 306(2) CPC complied with:

Mr. Njuguna: Accused will make a sworn statement. He will call no witness. We can take a date for defence hearing.

Court: Defence Hearing on 25th April 2019.

Mumbua T Matheka

Judge

25/3/19