



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J.)

CRIMINAL CASE NO. 31 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL KAMAU NJIRU.....1ST ACCUSED

STEPHEN KINYANJUI MWANGLI.....2ND ACCUSED

JUDGMENT

Background

1. This case comes up for determination as to whether the accused persons have a case to answer. Samwel Kamau Njiru and Stephen Kinyanjui Mwangi, the accused herein, are charged with the murder of Moses Waruingi Ndinguri contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on the night of 26th and 27th September 2016 at Kinja Area, North Kinangop Sub County within Nyandarua County the accused, jointly with others not before court, murdered Moses Waruingi Ndinguri.

2. Four prosecution witnesses adduced evidence in support of the charges. Plea was taken on 14th October, 2016, and the hearing commenced a year later on 11th October, 2017, before Meoli J. All four prosecution witnesses were heard by Meoli, J. prior to her transfer. When the matter first came before me on 10th July, 2018, Mr Ngunjiri for the 1st accused and Mr Wandaka (whose brief was held by Ms Wamaitha), for the 2nd accused, consented to the matter continuing with me from where it had stopped.

3. Mr Koima for the prosecution indicated he had three witnesses remaining, namely, the Government Pathologist, the Arresting Officer and the Investigating Officer. The matter was adjourned for failure of the prosecution witnesses to attend on 2nd October, 2018, 28th November, 2018 and 7th March 2019, despite the court bonding the witnesses and signals being issued.

4. Exasperated by the long delays in prosecuting the case, the defence opposed further adjournments. The court therefore granted the prosecution a final adjournment on 7th March, 2019, and issued peremptory orders requiring continuation of the hearing failing which the prosecution would close its case and submissions would be made. On 30th April, 2019, the prosecution again failed to avail the remaining witnesses. In accordance with the earlier orders, they closed their case, and sought to rely on evidence adduced. The defence filed their submissions which were highlighted on 30th May, 2019.

5. **Section 306** of the **Criminal Procedure Code** requires the court, after closure of the prosecution case, to make a considered determination on whether an accused person has a case to answer. The 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 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 on his own behalf or make unsworn statement and to call witnesses in his defence.....”

6. What constitutes a prima facie case was defined in **Bhatt v R [1957] EA 332**. where the Court of Appeal held:

“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.”

7. Since giving reasons for a finding that an accused has a case to answer would be prejudicial to an accused person, it is essential that the determination be made without giving reasons.

8. If, however, the court makes a determination that the accused has no case to answer, the proper course is for the court to give reasons for its determination leading to the acquittal of the accused person. The prosecution, as a party to the case, and having an embedded interest in the case, will need to know the basis on which all its evidence was found incapable of proving the charge despite putting its best foot forward.

9. I now turn to the evidence in the case.

The evidence

10. PW1 David Kinyanjui Mungai testified that on the night of 26th September, 2014 he and his wife (PW2) were asleep when they heard someone calling from outside saying that people were pursuing him. It was about 11.00pm. When he opened he found that it was the deceased. When he asked who was pursuing him, he replied that there were four men pursuing him. The 1st accused appeared and complained that the deceased had stolen a woman from him and that he would kill either the deceased or the woman if he did not get the woman back. He saw that 1st accused was adamant and so told his wife to call the headman (PW3). When accused 1 saw PW2 calling the headman, he relented and opted to go home. PW1 escorted accused 1 out of his compound and waited a few minutes before he advised the deceased to leave the compound using a different path from the one accused 1 had used. According to PW1, a lady by the name Monicah also appeared from the bushes in PW1's compound after the two men left and she left after them. He confirms that both gentlemen were drunk.

11. Further, PW1 testified that he noticed the body of the deceased the following day almost half a km from his place with head facing down and covered with a *shuka*. He did not see any injuries or blood stains. In cross examination, PW1 stated that he stood between Accused 1 and the deceased to forestall a fight.

12. PW2, Micah Wangari Kinyanjui reiterated the evidence of PW1. She added that when PW1 escorted accused 1, the deceased was left at the door with her. She also saw a village girl emerge from the darkness, and she left. The next day she reported to the Assistant Chief, PW3. In cross examination, she said that Accused I and deceased exchanged vulgar words.

13. PW3, the Assistant Chief, testified that on the morning of 7th September, 2104, he received a call from one Lucy Njeri Mwai who said that there was a body lying close to her gate. As he made his way to the scene, he met PW2 who related the incident that occurred at her home the previous night. She named the persons who were involved including the deceased. They went to the scene and saw the deceased's body. He then rang the Chief, DO and OCS. He then went to make a report to the AP post to look for the suspects. First they arrested accused 1 who named accused 2, who they also arrested when they met him standing near the road to his home.

14. In cross examination PW3 stated that accused 1 cooperated in the arrest. He confirmed that the body of deceased did not have any visible injury neither was there any sign of struggle or blood at the scene.

15. PW4, Ndinguri MututaMungai, was the deceased's father. On 5th October, 2014 he received a call that his son had a problem he went there and found that his son had died. He stated that he went to identify body of the deceased for post mortem, and saw a wound on his son's chin. He did not see any other injury. Later, he buried his son.

16. The foregoing was the total evidence availed by the prosecution, alleging the murder of the deceased by accused 1 and 2. The circumstances of the deceased's death can be speculated upon based on the argument that had occurred on the material night. The prosecution had a duty to prove that the accused persons caused the death of the deceased in this case through unlawful acts. Proof could be either by direct evidence or circumstantial evidence. Here, there is no direct evidence of the alleged murder.

17. In the case of **Joan Chebichii Sawe v Republic [2003] eKLR** the court held that:

“[B]efore a court of law can convict a person/accused upon circumstantial evidence, such evidence must be where the inference of guilt, the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. That such evidence must be so mathematically accurate as a basis of conviction in exclusion of any other co-existing circumstances weakening the chain of circumstances relied on by the prosecution. These principles articulate the position in law that the question as to the cause of death may either be answered by way of medical or circumstantial evidence.”

18. Here, none of the prosecution witnesses even mentioned the name of accused 2, except by PW3 when he said that Accused 1 is the one who implicated accused 2. He did not indicate in what way accused 1 specifically implicated accused 2.

19. None of the accused persons are stated to have been at the scene of the crime or involved in planning or executing the alleged murder. Other than the evidence of PW1 and PW2 that there was an argument between accused 1 and the deceased concerning a woman allegedly “snatched” by deceased from accused 1, there is no link made between any of the accused persons with the alleged murder. After the argument, the two parted from the couples’ compound in different directions. No evidence shows what happened thereafter.

20. There was a critical failure on the part of the prosecution to avail crucial witnesses in this case. The pathologist would have been able to identify the cause of death: and explain whether it occurred by natural means or otherwise; the investigating officer would have been able to piece together evidence concerning the events leading to the death, and why the state concluded that the death was due to murder. There was no evidence adduced of a material ingredient of the offence of murder. Further, none of the circumstances under which the court will hold an accused person liable for the death of another as provided for under **section 213** of the **Penal Code**, are disclosed by the evidence availed by the prosecution.

21. Accordingly, in line with the holding in **Bhatt v R** I am unable to find that the prosecution has made out a prima facie case that any of the accused persons committed the offence of murder, and they have no case to answer.

22. Accordingly, the prosecution case is dismissed, and the accused persons are acquitted pursuant to **sections 210** and **306(1)** of the **Criminal Procedure Code**, and shall be freed forthwith unless otherwise lawfully held.

23. Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of July, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1.for the State

2.for the 1st Accused

3.for the 1st Accused

Court Clerk.....