



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE NO. 4 OF 2017**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**1. DHAHABU KAHINDI KAINGU .....1<sup>ST</sup> ACCUSED**

**2. JOHN KAHINDI alias JOGOO ..... 2<sup>ND</sup> ACCUSED**

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Sombo for the State**

**Mr. Nyongesa for Accused Persons**

**RULING**

Dhahabu Kahindi Kaingu and John Kahindi alias Jogoo hereinafter referred as the accused persons are charged with the offence of murder contrary to Section 203 of the Penal Code as punishable with death which is prescribed in Section 204 of the Penal Code. The particulars of the charge alleged are that on diverse dates between 26.1.2017 and 28.1.2017 at Ndololo Village, Magarini Sub-County jointly with others not before court murdered Karisa Ngumbao Mwambire. During their arraignment each one of them denied the charge.

The prosecution was therefore put on notice to prove the charge beyond reasonable doubt. In order to discharge that burden seven witnesses were summoned by the state to prove every element of the offence which constitutes of the following:

- a). *The death of a human being.***
- b). *That the death was unlawfully caused.***
- c). *That in causing death the accused had malice aforethought.***

At the close of the prosecution case this court has a duty pursuant to Section 306 (1) of the CPC to make a finding whether the prosecution has discharged the burden of placing before court prima facie evidence to warrant accused persons to be called upon to answer the charge.

According to the provisions of Section 306 (1) if the prosecution fails to succeed to put forward a prima facie case in proving existence of an offence thereof and there is no other evidence for a cognate offence, the accused persons are to be acquitted of any criminal responsibility.

**The law and analysis**

It is trite that the prosecution obviously has the burden to prove its case beyond reasonable doubt. This has provided for under Section 107 (1) of the Evidence Act. Where in a criminal trial the prosecution burden is to prove each of the material facts in the charge, figuratively especially a link in a chain, the chain being the sum of evidence to prove that each of the accused persons committed the offence in order to succeed for them to be placed on their defence.

As for the accused persons there is no real burden of proof for them to prove existence of any fact alleged in the prosecution case the phraseology on the presumption of innocence until the contrary is proved under Article 50 (2) (a) is an inherent right both at the pretrial and trial stages of the criminal proceedings. The only qualification which lies against the accused is for the prosecution to discharge the burden in proving material facts beyond the 50% ratio that a prima facie case is in place that requires him or her to state the defence in rebuttal.

On top of this it must be remembered that the legal burden of proof to be discharged is that of proof beyond reasonable doubt. That is an

indispensable criminal standard which the provisions of Section 306(1) of the CPC has to be tested against.

What is expected of the prosecution is to prove existence of the elements of murder and that the accused persons are responsible in causing the death of the deceased. If the prosecution succeeds, then a prima facie case has been established and a no motion of no case to answer fails. It is also important to refer to the provisions of Section 119 of the Evidence Act on presumptions. The important aspect of this provisions is that the court may presume existence of certain facts. It states:

***“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and published product business, in their situations to the facts of the particular case.”***

This section as it is worded is clear, that the legal burden vested with the prosecution to prove the pre-requisite elements of the offence never shifts. The inference to be made under Section 119 of the Act flows from the existence of proven facts on the case.

The position in Law on the legal burden of proof in respect of establishing a prima facie case was settled by English Court on **May v O’Sullivan [1955] 92 CLR 654** as adopted in the case of **R. T. Bhalt v R [1937] EA** ***“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 decided (by the judge) 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 .... The question to be decided in the end by the tribunal (that is, after all the evidence is in) is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact.”***

In **R. T. Bhalt (supra)** formulation the court held inter alia as to the meaning of ***“a prima facie case to be one which a reasonable tribunal properly directing its mind to the Law and the evidence would convict if no explanation is given by the defence.”***

The emphasis to be laid in considering existence of a prima facie case is whether the evidence as a whole taken or its highest sufficiently proves the elements of the offence against the accused persons. In the case of the **Queen v Bilick and Starke [1984] 36 SASR 321** King CJ expounded the appropriate test on this issue ***“The question of Law is whether or the evidence as it stands the defendant could lawfully be convicted. He could lawfully be convicted on that evidence only if it is capable of producing in the minds of a reasonable jury satisfaction beyond reasonable doubt.”***

In my view the distinctive feature of a motion of no case to answer under Section 306 (1) of the CPC is undoubtedly to mirror into the evidential material to find out whether its capable of supporting the charge.

It is within these principles I take into account at half line submissions to consider whether the 7 (seven) witnesses called by the prosecution discharged the burden of proof of a prima facie case against the accused persons. In the charge sheet the prosecution allege that the deceased must have been killed between **26<sup>th</sup> - 28<sup>th</sup> July, 2017** at Ndololo Village. The version by the prosecution all started with the narration of events as stated by **(PW 1) Kahindi Ngumbao**. He gave evidence that on 26.1.2017 while working in the farm with the 2<sup>nd</sup> accused and his brother Katana, an issue arose as to why the deceased had not reported to the farm as it is usually the case. However, the 1<sup>st</sup> accused who is step mother was expected to know but provided no clue on the enquiry. As the conversation was going on between PW 1 and the 2<sup>nd</sup> accused, the second witness **(PW 2) Emmanuel Thoya** who doubled up as village elder and an uncle to PW 1 joined them inquiring whether anyone of them has information on the deceased. It was at that point the 1<sup>st</sup> accused alleged that the deceased might have gone to a social joint to look for alcoholic drinks. It also emerged in that meeting that the 1<sup>st</sup> accused explained that she had left the deceased with the 2<sup>nd</sup> accused quarreling over an illicit affair she had with the 2<sup>nd</sup> accused.

The prosecution further tendered evidence from PW 1 and PW 2 to the effect that upon inquiring and interrogations the 1<sup>st</sup> accused led them to the bush where the deceased body was recovered with multiple physical injuries. The observation PW 1 and PW 2 made on this first encounter was that the deceased had a lesa tied around his neck fastened to a tree.

When **PW 3 Julius Mwamure Kwicha** another village elder received the report from PW 2 on the death of the deceased, they reported the incident to the Assistant Chief. The Assistant Chief together with PW 1, PW 2 and PW 3 reported the matter to the police for further investigations.

**PW 4 Kadzo Karisa** who also testified as a co-wife to the 1<sup>st</sup> accused told the court that the lesa in court marked MFI – 1 belonged to Dhahabu- 1<sup>st</sup> accused in this proceedings.

**PW 5 APC Micah Thuo** of KBC AP camp told the court that relying on the information received from the village elders he arrested the 1<sup>st</sup> accused as a suspect for the offence of murder against the deceased.

**PW 6 – Chief Inspector Justus Kiboi** who testified as the investigating officer told the court that he was one of the 1<sup>st</sup> respondents on 28.1.2017 to the scene of crime involving the deceased. According to PW 6 on arrival at the scene, he saw the body of the deceased inside a bush tied with a green lesa on the neck with a further knot to a nearby tree. The body was retrieved and escorted to Malindi Hospital for post mortem examination.

From the post mortem report produced by **Dr. Farida PW 7** on behalf of **Dr. Mathias** it was opined that the deceased died as a result of ASPHYXIA and hemorrhage.

This critical passage of the evidence seems to cast a doubt to exclude a reasonable possibility that the deceased might have committed suicide.

The prosecution narrative at the close of their case it is evident that the circumstances under which the deceased died were unlawful.

I am on the view that there is correlation between the time the deceased allegedly went missing on 26.1.2017 and the date of 28.1.2017 when his body was discovered tied with leso in the bush with a further knot to a tree. This aspect of circumstantial evidence satisfies the threshold of a prima facie case under Section 203 of the Penal Code. The clear implication of this is that the evidence sufficiently supports the principles and legal proposition in the cases **May (supra) and R. K. Bhalt (supra)** as a precondition of placing the accused on their defence as provided for under Section 306 (2) of the CPC.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019.**

.....

**R. NYAKUNDI**

**JUDGE**