



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 8 OF 2017

REPUBLIC.....PROSECUTION

VERSUS

GONA FONDO KATANA1ST ACCUSED

LENNOX KAZUNGU CHARO.....2ND ACCUSED

CORAM: Justice R. Nyakundi

Ms. Sombo for the State

Mr. Gekanana for both accused

RULING

The two accused persons were arraigned in court on 29.5.2017, charged with the offence of murder contrary to Section 203 of the Penal Code. In the initial appearance each one of them pleaded not guilty of the charge and particulars of the offence that they jointly killed **Changawa Katana Nzao** on 5.5.2017, at Chumani Village.

The trial commenced and the prosecution accordingly summoned eight witnesses. At the close of the prosecution case **Mr. Gekanana** for the accused asked this court to make a finding in terms of Section 306 (a) of the CPC. This submission under the provisions of Section 306 is for the court to evaluate the evidence adduced in support of the incident charge to establish whether it warrants the accused person to be called upon to answer.

The brief facts from the record shows that besides the testimony of the eight witnesses the prosecution also placed reliance on three documentary exhibits namely the postmortem report, the sketch plan, the mental assessment report.

The question which I must consider is whether under Section 306 (1) of the CPC the prosecution has adduced prima facie evidence to satisfy the court that essential elements of the offence have been proved to the standard to require the accused to state his defence.

The case for the prosecution started with the testimony of **PW 1, David Kazungu** a grandson to the deceased. His evidence is that on the material day he had accompanied the deceased to the field for the purpose of checking out the cows. While on the farm they saw the second accused within the same area. According to PW 1 evidence he was sent by the second accused to go to the shop in order to purchase some biscuits and cigarettes. When he came back (PW 1) told the court that the deceased was no longer with the 2nd accused. Only inquiring from the 2nd accused as to the whereabouts of the accused he was to be informed that he had left for home.

PW 2, Samwel Karisa Nyanje, testified that on 5.5.2017 he heard screams. From the record, he went to check the source of the noise and screams. Further PW 2 testified that on arrival, he observed the body of a human being which was later to be identified to be that of the deceased lying along Mombasa – Malindi Highway. In his evidence PW 2 gave evidence that the body and the head had been crushed by a car tyre. The matter was later to be reported to the police.

According to **PW 8, Corporal Ambrose Wambua**, once the police received the report they proceeded to visit the scene. That the investigations later revealed that the intrinsic story of an accident was a cover up.

According to PW8, the deceased body was escorted to Kilifi County Hospital where postmortem was conducted on 11th of May 2017 and the cause of death was opined to be severe head injury.

PW3, Michael Katana testified that on the 5th of May 2017, he received a telephone call that the deceased had been involved in a motor vehicle accident. Acting on information he proceeded to the mortuary confirming severe injuries inflicted against the deceased.

PW4, Johnson Mukanga testified that the accused person was previously suspected of having been involved in various criminal activities. That when he learned of his presence within the village a report was made to the location chief who later informed the police to take appropriate action. Further PW4 gave evidence that on 7th May 2017 he received a message that the deceased had been spotted along Mombasa – Malindi highway he was later to visit Kilifi Hospital mortuary where he identified the body to the pathologist during postmortem examination.

PW5, Gabriel Nzau stated in court that in the year 2016 the deceased had complained that the 1st accused person had threatened her by calling her a witch. As a consequence of the threat a meeting was called to find ways to resolve the matter. It was while the deceased and her grandson David (PW1) were in the field on 5th of May 2017 that he reported that she has gone missing from the scene. Thereafter, what followed was recovery of the deceased body lying along the Mombasa-Malindi highway.

PW7, Alice Mboze testified as a tenant to the deceased, he confirmed that the 2nd accused sent him for cigarettes while he left him in the field with the deceased. On that material day, the deceased was reported missing but her body was later found along the main Mombasa – Malindi highway.

At the close of the prosecution case for the prosecution and the defence, urged me to make a finding on a no case to answer. The task requires this court to evaluate the evidence so far adduced by the prosecution to answer the question whether or not on the evidence accused persons can be called upon to answer the charge in rebuttal. The standard of proof on a submission of no case to answer is not the test set out of beyond reasonable doubt in the case of **Woolmington v DPP 1935 AC**. At this stage the function of the court is to establish whether there is prima facie evidence on which a court may convict as defined in the case of **R. T. Bhatt v R 1957 E.A.** One of the key principles in this decision is that a mere scintilla of evidence or discredited prosecution case cannot be said to establish a prima facie case to prove essential elements of the alleged offence against the accused persons.

For the purposes of Section 306 (1) of the Criminal Procedure Code which I commonly refer to as half time submissions the prosecution must place before court evidence of such a nature as to prove the following elements:

- a). *Death of the deceased.*
- b). *The death was unlawfully caused.*
- c). *That in killing the deceased accused was actuated by malice aforethought.*
- d). *That the accused persons caused the unlawful death with malice aforethought.*

In my Judgment and analysis of the evidence, I am guided by the principles in the persuasive authority in **Viviers and others v the State 1988 BLR** which Luke CJ observed inter alia

“It is important to emphasize that at the stage of the close for the prosecution, the question of proof beyond reasonable doubt does not arise, nor do the questions of the demeanor of witnesses, or credibility or reliability of witnesses arise. The reason for this is simple. At that stage all that the court is called upon to decide is whether there is some evidence on which the accused might be convicted. The court is not at that stage concerned whether the evidence proves the guilt of the accused beyond reasonable doubt. There is a question of fact for the arbiter of facts at the end of the trial. The court is similarly not concerned with the demeanor of the witnesses or their credibility or reliability. These matters are also within the province of the arbiter of facts whose decision therein will be reflected in his verdict at the end of the trial.”

In the instant case I take the view that the events of 5th May 2017 as pieced together by the prosecution witnesses there is sufficient evidence connected with the facts in issue as to form part of the same transaction in circumstances which elevates the prosecution case to that of a prima facie case as defined in **R. T. Bhatt (supra)**. The evidence by the prosecution being purely circumstantial developed sufficient trajectory that the deceased was assaulted prior to her body being found on the highway.

With the above observations and in consonant with the principles in **R. T. Bhatt v R** the prosecution succeeds on a motion of a case to answer made against the accused persons in terms of Section 306 (2) of the Criminal Procedure Code.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 23RD DAY OF DECEMBER 2019

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R. NYAKUNDI

JUDGE