



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL CASE NO. 1 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

PASCAL KITHI JOHN.....ACCUSED

Coram:

Hon. Justice R. Nyakundi

Ms. Sombo for DPP

Mr. Kariuki for accused person

RULING

The state through the Director of Public Prosecution charged the accused with the offence of Murder contrary to Section 203 of the Penal Code. It is alleged in the indictment that the accused on 26.11.2018 at Mkunguni village in Kijiwetanga Sub Location, jointly with others not before court unlawfully murdered **Kadzo Chengo Kithi**.

On being arraigned in court, the accused pleaded not guilty and the prosecution was therefore put on notice to discharge the burden of disapproving his innocence.

The trial commenced in earnest and the prosecution in terms of Section 306 of the Criminal Procedure Code. The defence Counsel **Mr. Kariuki** premised his submissions on a motion of no case to answer. In support of the submissions to have the accused acquitted of any wrong doing and unlawfully killing of the deceased, Learned counsel urged the court to consider the discrepancies within the four witnesses relied upon by the prosecution. Further, point the Learned counsel took up and argued at length is on the poor investigations of the case which failed to establish any particular of the accused in committing the offence.

Mr. Kariuki further informed the court that the prosecution having relied upon circumstantial evidence has failed to prove that the accused unlawfully and with malice aforethought murdered the deceased. Learned counsel contended that there is no evidence a reasonable tribunal could make a finding of guilt in respect of the charge in the event accused is placed on his defence and elects to offer no evidence in rebuttal.

Analysis and resolution

One of the fundamental notions of English Law on a motion of no case to answer was stated by the Learned Authors of **Black Stones Criminal Practice 2002** at Section D14, where in dealing with this question, the following principles were laid down:

(i). If there is no evidence to prove an essential element of the offence, a submission must obviously succeed.

(ii). If there is some evidence which taken at face value, establishes each essential element, the case should normally be left to the jury. The Judge does, however, have a residual duty to consider whether the evidence is inherently weak or tenuous if it is so weak, that no reasonable jury properly directed could convince on it, then a submissions should be upheld.

Weakness may arise from the sheer improbability of what the witness is saying, from intentional, inconsistencies in the evidence or from its being of a type which the accumulated experience of the court's has shown to be of doubtful value.

(c). The question of whether a witness is lying is nearly always one for the jury (Read Judge in our jurisdiction) but there may be exceptional cases (such as Shippey 1988) (ALL ERLR 767, where the inconsistencies, (whether, in the witnesses' evidence viewed by itself or between him and other prosecution witness) are so great that any reasonable tribunal would be forced to the conclusion that the witness is untruthful. In such a case, and in the absence of other evidence capable of finding a case, the Judge should withdraw the case from the jury, or in terms of Section 306 of the Criminal Procedure Code have the accused acquitted of the charge.

See the principle in **Daley v R** where the court held that:

“The trial Judge has power to withdraw the issue of guilt against the accused if he considers that the evidence is insufficient to sustain a conviction.”

With reference to **R v Shein {1925} AD, Rex v Herhold & 8 others {1956} 2 1 SA 722** The court clearly set out that at the close of the prosecution case when considering the phrase no evidence, does not mean no evidence at all but rather no evidence on which a reasonable court acting carefully, might convict.

In support of what constitutes a prima facie case the foundation in **S v Shipping & Others {1993} 2 SA 119** the court held:

“At the close of the state case, when discharge is considered, the first question is:

(i). Is there evidence on which a reasonable man might convict, if not

(ii). Is there a reasonable possibility that the defence evidence might supplement the state case? If the answer to either question is yes, there should be no discharge and the accused be placed on his defence”

In this context I have reviewed the prosecution evidence and submissions by the defence counsel as a basis to determine whether a motion of no case is in existence under Section 306 (1) to direct a discharge or an acquittal. For present purposes, I have considered the circumstantial evidence holistically surrounding the deceased death the accused was the last person stated to have been with the deceased before the act of causing death occurred.

The test conditions being in daylight and with circumstances of the deceased death within the compound.

As to the evidence by the prosecution does lay a foundation that the accused was with the deceased and that the attack occurred soon afterwards, the bottom line or killer have thrown the accused within the ring of the offence.

In this regard, I find that a motion of no case to answer fails and in its place the prosecution evidence provides discloses a prima facie case to call upon the accused to state his defence.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF DECEMBER, 2019.

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R. NYAKUNDI

JUDGE