



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO.4 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

ISMAEL HUSSEIN IBRAHIM.....ACCUSED

RULING

The charge against Ismael Hussein Ibrahim hereinafter referred as the accused person is that of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya. According to the information filed by the state on the night of 20th and 21st day of August 2013 at unknown time at Destiny Bar Elpaso Ngong in Kajiado Sub-County within Kajiado murdered Benson Baraza.

The accused pleaded not guilty to the offence. In addition he claimed that the incident occurred in circumstances where a plea in self-defence and others was applicable on behalf of the state. Twenty one witnesses were summoned to present evidence against the accused to prove the case beyond reasonable doubt.

At the close of the case for the prosecution Mr. Njoroge, learned counsel for the accused moved this court for a motion of no case to answer seeking his discharge in terms of section 306 (1) of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

Mr. Akula, learned senior prosecution counsel opposed the application arguing that the state has placed before court prima facie evidence to warrant the accused person to be called upon to answer.

On the part of Mr. Njoroge while submitting on the matter at this interlocutory stage contended that the defence of self and protection of others lives should apply in this case to exonerate the accused on any blameworthiness. This was on basis of the velacity, consistency and credibility of the prosecution witnesses. Learned counsel argued and invited the court to sift through the testimonies of PW1, PW2, PW3, PW4, PW5, PW10, PW11, PW13, PW18 and PW19. According to Mr. Njoroge the chronology of events as seen together by this specific witness points to presence of some people who emerged from outside the bar. Secondly the men did order the patrons at the Destiny Bar 'lalen chini'. Thirdly in a little while they heard gun shots. Fourthly, there was a struggle between PW10 Jane Nduku and a man outside the bar who in turn started to scream in a distress manner.

On his part Mr. Njoroge submitted that the case for the prosecution fails the threshold of a prima facie case. In support of this proportion he relied on the following cases;

R.T. Bhatt v Republic [1957] EA 332 – 333, Ahmed Mohamed Omar & 5 Others v Republic Cr. Appeal No. 414 of 2012 [2014] eKLR, Joseph Kagai Nyambura v Republic Criminal Case No. 14 of 2015

[2017] eKLR, Republic v Michael Sikura Wekesa & Another [2013] eKLR.

While relying on the legal principles in the above cited authorities Mr. Njoroge submitted and urged this court to acquit the accused person under section 306 (1) of the Criminal Procedure Code in absence of tangible evidence to warrant him to be put on his defence.

ANALYSIS

The legal provisions:

The constitution under Article 50 (2) (a) is very clear that the accused is presumed innocent unless the contrary is proved. Section 306 (1) of the Criminal Procedure Code provides for the accused person to be discharged and a verdict of not guilty entered if at the close of the prosecution case at the trial there is no evidence that the accused committed the offence referred to in the charge sheet or any other offence known in law of which he may be convicted.

While exercising discretion under section 306 (1) the trial court should bear in mind that the evaluation of the evidence is at halftime and not that one envisaged at the end of the trial. In the interlocutory procedure the test as to the interpretation on the phrase prima facie was codified in the land mark classic case in **R.T. Bhatt v Republic [1957] (Supra)**. **“In this case prima facie is defined as that in which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”**

As illustrated in this case law it is prima facie evidence if the prosecution on whom the burden of proof lies has discharged that burden as far as the onus under section 107 (1) of the Evidence Act is concerned. That evidence becomes conclusive and therefore calls for an answer from the adverse party, herein being the accused person.

In adjudicating and interpreting section 306 (1) the standard of proof is not that envisaged by Lord Denning in the case of **Miller v Minister of Pensions [1947] ALL ER 332** on evidence beyond reasonable doubt. The test to be applied according to me is in between beyond reasonable doubt but above the balance of probabilities.

The procedure of law on a motion of no case to answer has been clearly articulated in other various persuasive authorities cited herein below;

In the English case of **Republic v Prasad [1979] 2 A CRIM 45 Viena C.J** held interalia on prima facie case:

“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the 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 and reliability that no reasonable tribunal could safely convict on it.”

In addition the court in the case of **May O’Sullivan [1955] 92 CLR 654** held as follows:

“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 disclosed 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. Unless there is so special statutory provision on the subject, a ruling that there is a case to answer has no effect whatever on the onus of proof, which rests upon the prosecution from the beginning to end. After the prosecution has adduced evidence sufficiently to support proof of the issue, the defendant may or may not call evidence, whether he does or not, the question to be decided in the end by the tribunal 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 applying the above principles to the present case I am reminded of what the state has to prove on a charge of murder against the accused. The charge of murder contrary to section 203 of the Penal Code rests on the following elements:

- (1) The death of the deceased.**
- (2) That in causing the death, the accused acted unlawfully.**
- (3) That in the unlawful acts the accused had malice aforethought.**
- (4) It was the deceased who participated in committing the murder.**

In the instant case up to the close of the state case the 21 witnesses in a nutshell disclosed the following facts;

PW1 Caroline Makau a waiter at Destiny Bar stated that in or about 11.30pm she saw someone wearing Rasta outside the door of the bar. PW1 further told the court that she continued serving customers but was apprehensive of this person who did not enter inside the bar. She was to convey her fears to the owner of the bar PW10 – Jane Nduku and other patrons. Shortly after PW10 stepped out of the bar towards the door, only PW1 to hear screams and gunshots. According to PW1 they were all made to lie down until the police came to their rescue at 1.00 am.

PW2 Caroline Njuguna testified that on the material day at about 10.20 pm she was invited by PW4 – Elijah Kingori to go to Destiny Bar for social evening. While in the bar PW2 stated that there was a confrontation between her, Ann and PW4. That is when the owner ordered that the said Ann to leave the premises to avoid causing disturbance and breach of peace to other customers. PW2 further testified that PW1 went to open the door so that Ann can exit the bar. It is at that point PW1 opened the door but in a rush came back swiftly alleging seeing a suspicious Rasta man walking towards the bar. In the said communication PW2 told the court that the accused who was known to them as an Administration Police Officer directed them they keep cool and calm as he calls in the police. Prior to PW2 and other customers seeking safety within the bar it was her evidence that she heard gunshots.

PW3 Paul Gichuki testified that he was also at Destiny Bar when the alleged incident is said to have taken place. In his explanation all was well until the time when one customer by the name Ann was required to leave due to her behaviour of creating disturbance to others patrons in the bar. PW3 further stated that as PW1 went to open the bar door she came back alleging that she has seen Rasta man. According to PW3 the earlier incident in which PW1 reported about Rasta man did not bother anybody as they continued enjoying their beer. In the testimony of PW3 they had the courage not to fear as the accused person whom they knew as a police officer was in their midst. PW3 further testified that hell broke loose when PW10 wanted to leave for her house using the same door. As she approached the door PW3 deposed that she came back screaming.

In this aspect PW3 alludes to a struggle between PW10 and the person outside restraining her from closing the door. PW3 also told the court that the man outside ordered them to lie down and immediately heard two gunshots. According to PW3 they remained inside the bar until when police officers came in and took control of the scene. As they were ordered to board the police vehicle PW3 stated that on his way out he saw a dead person on the door steps of the bar. The evidence of PW1, PW2, PW3, PW4 was corroborated with that of PW5 – David Maina.

PW6 PC (W) Polly Kanana attached to DCI Ngong testified as to her role of registering the postmortem form used in the medical examination of the deceased. According to PW7 PC Emmanuel Ekai a gazetted scenes of crime officer documented the scene by taking various photographs. The photographs taken and processed under his supervision were admitted in evidence as exhibits together with the certificate on explanatory notes.

PW8 Sgt Joseph Mwangi attached to Ngong Police Station as an armourer confirmed that he issued the accused with a rifle Ceska No. F9919 loaded with 15 rounds of ammunition. PW8 profiled the entries made in issuance of the rifle and did identify it positively before the court.

PW11 Cpl David Muthengi, PW13 PC Kamau, PW18 PC Nyakiramba Maraga, PW19 PC Thomas Mwamba, also testified on how they were assigned patrol duties along Vet Lab area and Ngong town in the night of 21st – 22nd August 2015. In their respective testimonies the patrol assignments led them to Destiny Bar where they heard some noises from the patrons. As they considered this to be part of their duty PW11, PW13, PW18 and PW19 under the lead of the deceased Cpl Baraza they approached and knock the door at Destiny Bar. In a tactical evaluation of the situation queuing behind each other after Cpl Baraza they heard gunshots. In their case they had to lie down and were unable to retaliate because they made no individual assessment as to the assailant. PW13, PW15, PW18 and PW19 further explained that they were later to confirm that Cpl Baraza had been shot dead and PC Maranga was also injured. In their case the matter was now under police investigations. It was further explained by the witnesses PW13, PW15, PW18 and PW19 that they recorded witness statements as to how the deceased met his death. Further according to PW13, PW15, PW18 and PW19 though armed during the fateful night none of them used his rifle by firing at the Destiny Bar patrons.

Dr. Ndegwa conducted the postmortem and concluded that the deceased died due to severe cranial injuries as a result of a single gunshot. The postmortem form was admitted in evidence as exhibit 2.

From the evidence of the prosecution witnesses it is without doubt that the deceased met his death on the night of 20th – 21st August 2015 outside Destiny Bar. In their testimonies before court the witnesses have given lengthy explanations on how the incident allegedly must have taken place. The prosecution has further placed before this court that the death of the deceased was due to gunshot injuries. In furtherance to discharge the burden of proof the prosecution did produce the armoury register in which Ceska pistol F9199 was issued to the accused. The photographs documenting the scene adduced through oral testimony of PW7 PC Ekai showed presence of spent cartridges at the scene.

DECISION

That while weighing one factor after another on both direct and circumstantial evidence the prosecution evidence is within the threshold of a prima facie case as codified in various case law.

In the result the accused person is hereby called upon to answer the charge of murder contrary to section 203 as provided for under section 306 (2) read together with section 307 of the Criminal Procedure Code.

Dated, signed and delivered in open court at Kajiado on 30/1/2018.

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R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Njoroge for accused

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant