



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE. NO 65 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

BENSON NZUKI MUSAU.....ACCUSED

RULING OF THE COURT

Introduction.

1. The accused person herein, Benson Nzuki Musau is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are that on the 16th Day of October, 2014, at Makulumu village Miu location in Kisa in Mwala Sub County within Machakos County the accused murdered Victor Ngunga Makau. The accused denied the charge thereby forcing the prosecution to call 9 witnesses in efforts to prove the charge against him.

2. At the close of the case for the Prosecution, the defence Counsel asked for time to make submissions but later sought to dispense with the same and left the court to do a ruling upon perusal of the evidence. The Court therefore decided to write this ruling on whether or not the accused person has a case to answer.

The Prosecution Case

3. The Prosecution called 9 witnesses and from their testimonies the case for the Prosecution is as follows: On 16/10/2014 at about 6.00p.m Duncan Makau Ngunga, the father to the deceased who testified as PW1 stated that he went to his mother's home and his brother's wife Victoria Kanini Muendo came and told him that his son Victor Ngunga Makau had taken her Kshs 1000/=, and who advised her to have the boy arrested. After a short while Victoria Kanini came back with his wife Benedetta Makau and reported that Victor was at his uncles' place, they left and PW 1 went to sleep.

4. He went on to testify that he was woken up by his younger son who informed him that he was needed by the ambulance personnel He declined and went back to sleep, and woke up the next morning and took a key to his employer and returned home at 9:00am. Upon returning he found the Assistant Chief Mary Nzioka who informed him that they had to wait for the Chief. Upon entering the house he found his son Victor lying down covered by a piece of clothe (lesso) dead. The police came from Masii Police Station and they took Benson Nzioka, Victoria Kanini and Benedetta Makau to the police station. The body of Victor was taken to the Mortuary on 19th October, 2014.

5. Upon cross examination he confirmed that Benedetta was his wife and the mother of the deceased, further he testified that the incident happened at his father's homestead while he was at his home. He did not know what transpired and where it happened, he was only told about it later. He confirmed further that he did not observe the body of the deceased until at the mortuary.

6. It was PW.2's evidence that she was a cook at Mukoso Secondary School and mother to the deceased. That on the day of the incident she left her place of work at 7:30 pm and she met Victoria Kanini, her co-wife who told her that her son, Victor Ngunga had taken her money. They both went to notify her husband (Duncan Makau) and she sought permission to go and find the deceased. They found the deceased at his uncle's place in Kizazani Village and they returned with him. Upon returning they went to Victoria's home where the deceased accepted that he had taken Victoria's money. PW 2 went ahead to confirm that Victoria and herself both slapped the deceased thrice on the cheeks with their bare hands. It was then that the deceased asked for forgiveness. Further Benson Nzuki Musau (accused) hit the deceased with a walking stick on the shoulder, the deceased fell down and the accused stepped on his abdomen until he started vomiting. She testified that she was the one who called the ambulance and the medical practitioner upon arrival pronounced Victor dead, his body was carried the following day by the police and taken to Machakos mortuary.

7. PW.3, Victoria Kanini Muendo, confirmed both in examination in chief and during cross examination that the deceased had been hit using a rubber whip and pushed by the accused. She went on to say that the rubber whip was in her house. Further she clarified that the lighting was sufficient since they were using a lantern lamp, and they could therefore see clearly what was going on.

8. Both the Chief and the Assistant Chief (PW 4 and PW 5 respectively) confirmed that they had found the deceased dead at the home of Victoria. PW 5 stated that she had been told that the deceased had a headache and died as a result but upon conducting investigations she found that the accused was responsible for his death.

9. Ngunga Masika (PW-6), grandfather to the deceased, testified that he was asked to go and get a burial permit from the Assistant Chief but later on the burial permit was retained and the assistant chief went to his homestead with police officers who took the body of the deceased and arrested Kanini, Kamene and Nzuki. Upon cross-examination he confirmed that he did not know what exactly transpired as he learnt of the details later and he was therefore not concealing information about the death of the deceased when he went to obtain the burial permit. Upon re-examination he clarified that his brothers made the decision that he was to go and obtain the burial permit.

10. Cpl Njange Charles No 97086144, PW.7 the Administration Police, confirmed to court that upon arrival at the scene of the crime, he found a black tyre whip besides the body of the deceased, he took the whip and marked it as Prosecution exhibit no 1 and he also saw foam in the mouth of the deceased. The accused persons were at the scene of the crime and they admitted to him that they had beaten the deceased because he had stolen money. He arrested them and took them to the police station.

11. Mr Joseph Muguna, (PW-8) DCIO Mwala Sub- County testified that he visited the scene of crime and he saw the dead body of the deceased, and he also recovered the whip that was used by the accused. Further he confirmed that the body of the deceased was taken from the scene by the police and a post-mortem was conducted thereafter. He produced the whip in court and also identified the post mortem report.

12. PW. 9 was Dr Waithera Githendu who performed the post mortem on the deceased and confirmed that the deceased had died as a result of multiple fractures; he had a fracture on the head which bled. She also clarified that the cause of death was head injury due to blunt force. Upon cross examination she affirmed what he had earlier stated in examination in chief and also testified that it was possible for a person to die due to a violent fall. She produced the post mortem report as Exhibit 2.

13. The Prosecution closed its case after Dr. Waithera testified. The issue that now arises for determination is whether the evidence so far on record establishes a prima facie case requiring the accused person to be put on his defence. To determine this question this Court must define what a prima facie is.

What is a prima facie case?"

14. The definition as to what amounts to a prima facie case was given in the case of **Bhatt –vs- R [1957] EA 332**. where the Court of Appeal expressed itself on this issue:

“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.”

15. Besides the dicta in **R.T. Bhatt Case (Supra)** Udoma JSC of Nigeria Supreme Court in the case of **Daboh & Another v State [1977] 5SC 122 at 129** discussed the issue when a no case submission may be upheld in the following passage:

“Before, however embarking upon such exercise, it is perhaps expedient here to observe that it is a well known rule of criminal practice, that on a criminal trial at the close of the case for the prosecution, a submission of no prima facie case to answer made on behalf of an accused person postulates one of the two things or both of them at once:

Firstly, such a submission postulates that there has been throughout the trial no legally admissible evidence at all against the accused person on behalf of whom submissions has been made linking him in any way with the commission of the offence with which he has been charged which could necessitate his being called upon for his defence.

Secondly, as has been so eloquently submitted by Chief Awolowo, that whatever evidence there was which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing criminal guilt in the accused person concerned; and in the case of a trial by jury that the case ought therefore to be withdrawn from the jury and ought not to go to them for a verdict.

On the other hand, it is well settled that in the case of a trial by a jury, no less than in a trial without a jury however slight the evidence linking an accused person with the commission of the offence charged might be, the case ought to be allowed to go to the jury for the findings as judges of fact and their verdict.

Therefore, when a submission of no prima facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence

with which he is charged.

If the submission is based on the discredited evidence, such discredit must be apparent on the fact of the record. If such is not the case, then the submission is bound to fail.”

16. It is important therefore at this stage for this Court to critically look at the evidence on record and determine whether it meets the threshold set out in the Bhatt case (above) as to what constitutes a prima facie case. The strength of the evidence establishing a prima facie case must be the sort of evidence upon whose basis the Court could convict if the defence says nothing to rebut such evidence. It is also worth noting that at this stage the Prosecution does not have to prove its case beyond reasonable doubt; for proof beyond reasonable doubt is required when the defence has also given its evidence, or has closed its case.

Analysis of the Evidence and Findings .

17. It is now time for me to analyse critically the evidence adduced before this court by the prosecution. I note that the Prosecution case herein is based on first hand evidence from the perpetrators of the offence in the sense that it is not pivoted on circumstantial evidence and suspicion. My reason for the above is that the prosecution witnesses are mostly eye witnesses who gave an account of what they saw and heard at the scene and before and after the deceased met his death.

18. In the instant case, and considering the totality of the evidence on record I have reached the conclusion that the Prosecution has established a prima facie case requiring the accused person to be put on his defence. PW 2 and PW3 all witnessed the incident and confirmed that it was the accused who hit the deceased. PW 4 and PW 5 saw the deceased's body lying lifeless at the scene of the crime and they identified the alleged weapon of murder, marked Exhibit 1 before this court. PW 1 also identified the body for post- mortem. Further the report as produced by PW 8 and PW 9 confirmed that the deceased's death was caused as a result of being hit by a blunt object.

19. The Prosecution has proved that the deceased died and that he died as a result of head injury, due to blunt force. The Prosecution has also shown that the said injury could have been caused by an unlawful act or omission on the part of the accused person; further it has proved that the accused committed the act with malice aforethought. The effect of this therefore would be, if the accused said nothing in his defence, it would be reasonable for me to convict the accused based on the evidence already produced by the prosecution. Hence with a proper analysis of the evidence on record and considering the law It would not be hard put to convict the accused person even if he said nothing in his defence.

Conclusion

20. The upshot of the foregoing is that it is the finding of this court that the Prosecution has established a prima facie case against the accused to require him to make a defence. I find he has a case to answer and is called upon to elect to conduct his defence in line with the provisions of Section 306(2) of the Criminal Procedure Code.

It is so ordered.

Dated, signed and delivered at Machakos this 20th day of March 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Machogu for the State

Mbuvi for Muema for the accused

Kituva - Court Assistant