



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 17 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL MUNGAI CHEGEACCUSED

A Motion of no case under Section 306(1) of the Criminal Procedure Code.

RULING

The accused person namely Samwel Munagi Chege was on 8th October, 2018 charged before this court with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on or about the 10th January, 2017 at Kibogeni area in Ilbislisi Township, Kajiado County the accused murdered Zacheaeus Senya Lemita. The accused who was represented at the trial by learned counsel Mr. Waiganjo pleaded not guilty. In order to discharge the burden of proof of beyond reasonable doubt. The state called six witnesses who testified to prove the guilty of the accused person. The summary of their evidence was as follows: The first witness to take the witness stand was Dr. Richard Njoroge. He testified being a qualified pathologist at Kajiado District Mortuary where one of his key duties is to perform autopsies. With regard to exhibit 1 which relates to the charge of murder against the accused person he confirmed that the deceased sustained multiple serious injuries to the neck and cervical area. In his opinion the deceased death was due to Haemorrhagic shock due to incised sharp trauma to the neck.

The next witness was Elizabeth Palta. In her testimony she knows the accused as her boyfriend although they are not legally married. It was further her evidence that on the fateful day there were some neighbours fighting a distance away from their house. When the accused stepped out he came back alleging that there are thieves who have invaded his house.

According to pw2 the accused armed himself with a panga and cut one of them occasioning fatal injuries. Later she explained that the police visited the house and collected the deceased body as they sought collected the deceased body as they sought for the accused as a suspect of the murder.

Pw3 Cpl. Benjamin Samoei of the National Police Service gave evidence on the observations he made at the scene of the murder on this case. It was his evidence that while in company of his colleagues he apprehended the accused whom he took for a mental assessment. He further made arrangements for the post-mortem to be carried out by Pw1 at Kajiado District Hospital Mortuary. According to his testimony the murder weapon used to inflict the fatal injuries was never recovered nor submitted by the accused.

Pw4 Inspector Abell Onyapidi testified on behalf of his colleague Nancy with regard to the photographs taken at the scene of the murder incident involving the deceased. The photographs were developed and processed in their Laboratory which he produced as a bundle to this court as Exhibit 3(a) and the report as 3(b)

Pw5 Richard Njenga a neighbour to the deceased told the court that on 10th January, 2017 he fought with his friend Peter over a girl named Nancy. He further stated that in a little while he saw accused armed with a panga ready to intervene and separate them to stop the fight. When they parted Peter noticed someone lying down not far away from where the accused separated them. That incident Pw5 testified caused them to be arrested and later to be released having recorded statements with the police.

Pw6 Pc. Maurice Muli an investigating officer attached to Kajiado police station testified that he was involved in the investigations of this crime against the accused person. Pw6 told court that he recorded witness statements from members of the public and the accused to face the charge of killing the deceased. It was pw6 evidence that the investigations revealed that the accused was the one who came out with a panga and slashed the deceased which resulted in his death.

It is against this backdrop that Mr. Meroka for the state and Mr. Waiganjo for the accused asked me to make a finding under Section 306(1) of the Criminal Procedure Code.

It is trite that the burden of proof under Section 107(1) 108 of the Evidence Act in criminal cases at all times on the prosecution to prove the guilty of an accused person beyond reasonable doubt. It is also their duty to adduce evidence to establish a prima facie case on the nature of the charge they preferred against the accused person. There is no doubt in law that if the prosecution fails to prove a prima facie case against the accused person the court will have no option but to discharge or acquit him or her of the offence absolutely.

The principles behind the determination of a prima facie case at the conclusion of the prosecution case is in relation to the rights of a fair trial under Article 50(a) of the constitution. From the wording of this section every accused person charged before any court of law is presumed innocent unless the contrary is proved. Given all these the accused person who has no case should be acquitted. This principle was echoed by the renowned **Jurist William Blackstone**. In his work commentaries on the law of England where he stated: ***“It is better that this guilty persons escape than one innocent suffer”***

The criteria to be used in establishing whether a prima facie exist against the accused person was considered in the case of **S. v Marlhebul and another 1997 1 SACR** where the claisen, J. held:

“The duty to prove an accused’s guilty rests fairly and squarely on the shoulders of the state”

As I said previously, the accused need not assist the state in any way in discharging this onus. If the state cannot prove any evidence against the accused at the end of the state case, why should the accused be detained any longer and not afforded his constitutional rights of being regarded as innocent and thus being acquitted and accorded his freedom? Can it be said that he was given a fair trial, if, at the close of the state’s case wherein no evidence was tendered to implicate him in the alleged crimes, the trial is then continued owing to the exercise of discretion in the hope that some evidence implicating him might be forthcoming from the accused himself or his co-accused?

To my mind being a discretionary power to continue the trial would fly in the face of the accused’s right to freedom, his right to be presumed innocent, to remain silent, not to testify and not to be a compellable witness unless the state has prima facie evidence to prove the elements of the offence. To take into account possible future evidence which may or may not be tendered against the accused either by himself or by other co-accused and for that reason decide not to set him is not sufficient to place the accused on his or her defence. See Article 50(2) (b), (c)

In the case of **R v Morris Karani Alando 2012 eKLR** the court quoted with apparent the celebrated case of **Bhatt v R 1957 332** where the court observed that: ***“A prima facie case is not made out if at the close of the prosecution case, it is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near 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, implicative 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 may not be easy to define what is meant by a prima facie case but at least it must mean one which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence”***

Further in considering the sufficiency of the evidence on the onerous task placed upon the prosecution the court should factor in it the rights to a fair hearing in Article 50 of the constitution. That the accused right to challenge the evidence by the state through cross-examination of the witnesses was not impeded in any way, his right to be supplied with the relevant information on the case was not impugned, the right not to give self-incriminating evidence which would be prejudicial to the fair administration of justice is protected.

From a practical point of view the focus of crucial decision on a prima facie case should be to leverage the compelling interest between the state and constitutional rights of an accused person. As rightly clothed by the supreme court of Canada in **Republic v. P.M. B 1994 1 SCR 577 -579** where the court stated inter alia that:

“Perhaps the single most important organising principle in criminal law is the right of an accused not be forced into arbitrating in his or her own prosecution. This means in effect that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case against him or her. In other words, where crown establishes that there is a case to meet an accused is not compellable in a general sense as applied to the narrow testimonial sense and need not answer the allegations against him or her -----“

It follows therefore that at half time submissions under Section 306(1) of the Criminal Procedure Code the state case ought to prove that a human being died as a result of the accused action. Secondly, that there is evidence the accused committed the offence referred to by means of unlawful act. Thirdly, that the killing of the deceased was accompanied with.

Therefore in examining the evidence of the seven witnesses the following minimum evaluation reveals that: (a) The deceased Zachaeus Sereya Lemita is dead. (b)The unlawful acts of assault are traceable to the injuries he sustained on the night of 10th January, 2017 at Kibogeni area in Illbilisi Township, Kajiado County. (c)The accused was placed as suspect thereafter on ground that from the circumstantial evidence he was seen armed with a panga in close proximity to locality, date and time that presupposes he may have played a role in the victim injuries.

What kind of evidence do we have against the accused?

Shortly before pw5 discovered the body of the deceased while the accused had passed through his house to quell an imminent fight between

him and his friend Peter. It is also to be noted in respect to the present case pw2 saw the accused armed with a panga which he acknowledged he had used to attack some thieves outside their house. The post-mortem report indicates that the cause of death was haemorrhagic shock due to incised sharp to the neck. Thus I hold the view that a prima facie case necessary to call upon the accused to answer the allegations has been made out by the prosecution. I bear in mind that the version of the accused is yet to be received in reference to the charge. The burden of proof applicable under the doctrine of a prima facie case therefore is not that of proof beyond reasonable doubt.

For all these reasons I am of the conceded view that the state case succeeds in proceeding further by calling upon the accused to offer his defence under Section 306(2) as read with Section 307 of the criminal procedure code.

Dated, signed and delivered in open court at Kajiado this 30th day of November, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Waiganjo for the accused

Mr. Meroka the Principal Prosecution counsel.