



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NUMBER 39 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

EDWIN OUMKHOKO ANYEMBE.....ACCUSED

RULING

Edwin Omukhoko Anyembe, the accused, is under trial for the offence of murder. The offence is brought under section 203 as read with section 204 of the Penal Code. It is alleged that he, jointly with others not before the court, murdered Irene Akinyi Nyariaro, the deceased, on 31st January 2015 at Riverside Estate in Ruaraka area of Nairobi County. He pleaded not guilty when the charges were read out to him on 21st April 2015. He is represented by Ms B. Nyamongo, advocate.

The deceased lived at Drive-in Estate in Ruaraka. Her house was number A11 at Neema House. It was situated on the ground floor at a corner. There was no perimeter fence but the houses were built in a way that all the doors were facing inside of the plot. There was a gate that was not guarded. Each tenant had a key to the gate. On 30th January 2015 the deceased was attacked inside her house. Details of this attack are not given. A passer-by, one Esther Wairimu (PW6) is the first person to arrive at the scene. She lived near Neema House where this incident took place. She was on her way to the house of her employer on 30th January 2015 at 10.00pm when the deceased called her through the window. The deceased was inside her house at the time. She called Esther and asked Esther for help. Esther went near the window and noted that the deceased was injured on her neck and was bleeding. The deceased told Esther that she had been attacked by some robbers who had injured her and locked her inside the house taking the key with them. Esther told the court that the door to Irene's house was inside the plot and all she could see through the window was Irene's head and torso. Esther called deceased's neighbours for help. The neighbours called the caretaker of the building.

The caretaker is John Kanyi (PW5). He lived in the same building but was away buying food nearby at the time of the attack. When he arrived at the scene he found the door to deceased's house locked from inside and the key missing. With the help of other neighbours they tried to open the back door to the deceased's house and gained entry. They found the deceased lying on the floor with a cut on the neck bleeding heavily. The deceased was holding a piece of cloth against the wound on the neck. She was calling for help. She was not able to talk and explain what had happened. John noted that the house showed no signs of a struggle.

Attempts to have the deceased treated at a nearby chemist and at Guru Nanak Hospital failed as both places did not want to treat her. Guru Nanak advised that the deceased be taken to Kenyatta National

Hospital. She did not make it to Kenyatta National Hospital. She was pronounced dead on arrival.

The accused before the court was arrested in the connection with the death of the deceased. He was arraigned in court to answer to this murder charge.

The prosecution closed its case after calling ten (10) witnesses in support of their case. Before placing the accused on his defence the law under section 306 of the Criminal Procedure Code, requires that the court examines all the evidence by the prosecution to determine whether a case has been made out against the accused person to require him to be called upon to give his defence.

According to the Black's Law Dictionary Ninth Edition, "***Prima facie***" is a Latin phrase meaning "**At first sight; on first appearance but subject to further evidence or information.**" And "***prima facie case***" according to the same dictionary means "**the establishment of a legally required rebuttable presumption.**" Courts in this country have considered the law in respect of what constitutes a prima facie case as settled. They have held the view that a prima facie case is 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 (see **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335; Wibiro alias Musa v. R [1960] E.A at 186 and Republic v Abdi Ibrahim Owl [2013] eKLR**).

It is the duty of this court, at this stage of the trial, to examine the evidence carefully and determine whether the prosecution has made out a case on which this court, which by any standards is a reasonable court, properly directing its mind to the law and the evidence could convict the accused if no explanation is offered by the defence.

The circumstances leading to the arrest of the accused are that on 1st April 2015 a mobile handset allegedly belonging to the deceased was traced to one Brian Owino (PW1). He was on duty at Premier Foods at the time the police went for him. At the time police were pursuing a lead of a mobile telephone handset identified in court as Techno H5 said to bear International Mobile Equipment Identity (IMEI) number 352644060114140 (Exhibit 9). The handset was traced to Brian. Brian was using telephone number 0716358090. The number had been paired with the handset in issue. Brian told the police that the handset was sold to him by one Nelson Njosi Odanya of telephone number 0705723883. He led police to Nelson who was his workmate at Premier Foods. Upon his arrest, Nelson told the police that the phone had been sold to him by the accused Edwin Omukhoko Anyembe. Nelson led police to some alley within Kariombangi Light Industries in a drinking den. They found the accused and arrested him.

Among the police officers who went after Brian, Nelson and the accused is PC Josephat Otieno (PW4) of Ruaraka Police Station. PC Otieno told the court that he was in company of CPL Waithera, PC Meli and PC Lagat all from Criminal Intelligence Unit.

I have carefully examined this evidence. The law of evidence places the burden of proof on the prosecution in a criminal trial. This burden of proof does not shift to the accused person at any time of the trial. The prosecution must prove a criminal case beyond reasonable doubt. The prosecution must satisfy the court, at this stage of the trial, that the evidence against the accused is one on which this court could rely on to convict even if the accused does not testify.

My careful analysis reveals serious gaps in the prosecution case. I have examined the evidence of Quinto Odeke (PW9). This is the officer attached to Safaricom Law Enforcement Liaison Security Department. He was requested to track hand set bearing IMEI number 352644060114140. This is the handset alleged to belong to the deceased. He was also asked to provide registered owners of telephone numbers 0705723883 and 0727479448. The request to Quinto was done on 27th January 2015. The results showed that number 0705723883 was registered in the name of Nelson Njosi and 0727479448 in the name of Leonard Mwai Gichuru. Evidence by Quinto is that the handset whose IMEI is cited above was paired to the number belonging to Leonard Mwai Gichuru (0727479448) up to 2nd February 2015 at 2.03pm. On the same date, it was paired with number 0705723883 belonging to Nelson Njosi at 4.08pm. Nelson used that handset up to 9th February 2015 at 2.03pm when it changed hands to Brian Owino's number 0716358090. From this evidence it emerges that this court must determine whether there is evidence to

prove that the deceased was the owner of Exhibit 9.

The available evidence casually states that Exhibit 9 belonged to the deceased. I say casually for reasons that will emerge after subjecting the evidence to serious and careful scrutiny. This is what Stephen Onyango Nyariaro (PW2), brother to the deceased, told the court concerning that phone (Exhibit 9).

“Irene had two phones, a white Techno H5 and black Nokia. This is her phone (in reference to Exhibit 9). There is a photo I took of her carrying this phone. I have never used the phone. I used to see her with it. I have never looked inside to see if it has peculiar features. Irene died. We were called but found she had been removed to the City Mortuary. This was on 30/1/2015. We went to her house but found blood stains in the house. She had been killed inside her house at Ruaraka. We did not find her two phones and Irene’s job documents. I explained to the police about the phones. Police tracked the phone. I identified the phone after it was recovered. I know the phone was found with someone but I did not know who it was.”

On cross examination by the defence counsel, Stephen told the court that:

“This phone looks like the one belonging to my sister. I am not able to identify this phone if it were placed together with many other phones.”

This evidence in my view does not prove that the deceased was the owner of Exhibit 9. There is no other evidence on record as far as this court can discern to show that Techno H5 bearing IMEI number 352644060114140 belonged to the deceased. Neither Stephen nor the police told the court how they came to the conclusion that the phone belonged to the deceased. They did not tender evidence to show the telephone number that was registered in the name of the deceased or show documents such as receipts to prove that this phone belonged to the deceased. The number that was paired to this handset up to 2nd February 2015 at 2.03pm is 0727479448. This number was registered in the name of Leonard Mwai Gichuru. Who is this man? This court was not given an answer to that question except what the Investigating Officer told the court as shown below. Leonard Mwai Gichuru was not a witness in this case! Further to this, CPL Waithera, PC Meli and PC Lagat who did not testify to inform this court how they came by the information that led them to track the IMEI of Exhibit 9.

Nelson Njosi Odanya, whose registered mobile telephone number was given as 0705723883, was not called to testify. Police were led to Nelson by Brian who was found using his registered line number 0716358090 in Exhibit 9. Nelson was arrested by the police according to the evidence of PC Josephat Otieno (PW4). Nelson is the one named the accused as the person who had sold to him Exhibit 9 and who identified the accused and led police to arrest him. This court was told that Nelson Njosi was arrested by the police. This was confirmed by PC Otieno who told the court that:

“I arrested three people in connection with this phone. One of them is in court. Brian Owino and Nelson Njosi are not in court. The Investigating Officer can explain why they are not before the court. Edwin Anyembe is in court. He is the third person to be arrested. He is the accused in the dock.”

The Investigating Officer is Senior Sergeant Peter Muigai (PW10). He told the court that Nelson Njosi could not be traced to come to court to testify and that through Njosi’s family he had learned that Njosi had crossed the border to Uganda. SS Muigai did not tell the court how he came to know that Exhibit 9 belonged to the deceased.

SS Muigai told the court as follows in regard to the accused on cross-examination:

“The accused was not found with the phone. The information from Safaricom shows he used the phone on the second day after the murder and on 2nd February 2015 he sold the phone to Nelson Njosi. Accused was using number 0727479448. The report I received was that the registered owner is Leonard Mwai Gichuru. I did not trace Leonard Mwai. The number is no longer available after the accused used it. The accused communicated using this number to the

first witness (PW1.)”

I am not sure I understand what this witness, SS Muigai, was telling the court. From his evidence it becomes clear that this case was poorly investigated. I am not able to understand that the accused is also Leonard Mwai Gichuru. PW10 did not believe that the accused is also Leonard Mwai given his evidence that he did not trace Leonard Mwai. So how did PW10 come to the conclusion that mobile telephone number 0727479448 belonged to the accused? I admit that I have no answer to this question.

In summary therefore, this court has evidence to prove that the deceased Irene Akinyi Nyariaro was attacked by robbers or people whose intention was to injure her. She sustained a penetrating stab wound on the left anterior neck. Her trachea had been slit across at the level of the stab wound. The neck vessels had been severed and in the opinion of Dr. Peter Ndegwa she died of exsanguination due to these injuries. In their investigations, police failed to produce evidence showing how they arrived at the conclusion that Exhibit 9 belonged to her. This phone was traced to Brian, who led police to Nelson Njosi (at large). In turn Nelson led police to the accused. The evidence that Nelson told the police that the accused had sold to him the phone (Ex.9) alleged to belong to the accused is hearsay. Nelson was not available to give first hand evidence to that fact. The evidence by the police that Nelson told them that Ex. 9 was sold to him by the accused is not direct evidence as defined under Section 63 (2) of the Evidence Act (Cap. 80 Laws of Kenya).

Section 306 (1) of the Criminal Procedure Code states as follows:

“When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.”

The prosecution has concluded their case and therefore there are no more witnesses expected. In my considered view, and going by the law and the authorities I have cited above, it would be an exercise in futility if this court were to place the accused on his defence. Short of making a confession to the fact or admitting that he is the one or one of the people who attacked the deceased, the law does not place the onus of proving his innocence on the part of the accused nor does this court expect him to fill the gaps left by the prosecution. In view of this, I will and do hereby make a finding that the prosecution has failed to establish a prima facie case against the accused person to warrant his being placed on his defence. I will and do hereby obey the law and record a finding of not guilty against the accused as dictated by Section 306 (1) of the Criminal Procedure Code. I will and do hereby make a finding that the accused, Edwin Omukhoko Anyembe, has no case to answer. He is hereby acquitted for the offence of murder. He shall be free to go home and enjoy his liberty as guaranteed by the law unless for any lawful reason he is held in custody. It is so ordered.

Dated, signed and delivered in open court this 27th day of February 2017.

S. N. Mutuku

Judge