REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO.3 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

REDEMPTA NTHENYA MWANZIA.....ACCUSED

RULING

On the 11/2/2016 Redempta Nthenya Mwanzia hereinafter referred as the accused person was indicted with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The accused was arrested and arraigned in court upon investigations that on the 23/11/2015 at Ongata Rongai area in Kajiado North Sub-County jointly with others not before court murdered Teresia Wacuka Maina hereinafter referred as the deceased.

The accused pleaded not guilty and was represented at the trial by Mr. Chege advocate while the prosecution was conducted by Mr. Alex Akula, the senior prosecution counsel.

In order to prove the guilty of the accused person prosecution called twenty one witnesses. Their evidence can be summarized as follows:

According to PW2 Monica Wanjiku the mother to the deceased, PW3 Gabriel Gatheca a relative and PW4 Sammy Mwangi a boyfriend to the deceased all testified to have known her and subsequent reports of her missing from the house and place of work. The three witnesses commenced a frantic search of the whereabouts of the deceased including reporting the matter to Ongata Rongai Police Station. This was confirmed by PW11 Sgt Richard Ekuwon of Ongata Rongai Police Station who booked the report of a missing person. In the evidence of PW11 upon booking the report investigations to trace the deceased commenced involving various agencies like Safaricom data call centre, the criminal intelligence and their CID Office. According to the testimony of PW11 the evidence gathering led them to effect arrest against the accused and her mother in connection with the disappearance of the deceased.

PW5 JOHN NJOROGE a cousin to the deceased also stated to have received the report in connection with the disappearance of the deceased on 23/11/2015. As a relative it was PW5 testimony that he joined hands with PW2, PW3, PW4 to have a report made to the police and contact with her friend whom he identified as the accused person in this case. The testimony by PW2, PW3, PW4 and PW5 further confirmed that the body of the deceased was traced inside a septic tank at Ongata Rongai on 14/1/2016. They all participated in the process of recovery and recording statements with the police on the sequence of events since the deceased went missing and discovery of her body.

PW6 JOSEPH RUHIU who owns the property where the septic tank the body was recovered from also recorded a statement. The testimony by PW6 was to the effect that he owned the land and houses upon which the septic tank was constructed and subject matter of this trial, but did not know how the body of

the deceased ended up at the property.

PW7 MARGRET MAINA a government analyst conducted a DNA profile involving samples from PW2 the mother of the deceased with a view to come up with the positive identity of the deceased. In her report PW7 confirmed that PW2 was the mother to the deceased. The analyst report was admitted in evidence as exhibit 5.

PW8 JAMES KYALO a certified digital forensic examiner from the directorate of investigations testified on the analysis done to the following mobile numbers; +254 7037*****. PW8 confirmed that on analyzing the data it was verified that on 23/11/2015 at 17.48 hrs the following message was received, ***"let mi stop kidin u hakuna doo nilikoniwa i just wanted 2 know kama unanipeda bt u dont let mi nijipe shuguli na mtu mwingine."*** PW8 further testified and produced the forensic report as exhibit 6 (a) and (b).

PW9 PC JOHN NGENO a gazetted scenes of crime officer was called in to take photos at the scene where the body of the deceased was recovered. PW9 upon documenting the scene did process and develop the photographs under his supervision and direction. He produced the 15 photos as exhibit 2(a) and the certificate as exhibit 2(b).

PW10 SENIOR SUPERITENDENT BENSON KASYOKI presented evidence on the role he played in recording a charge and cautionary statement by the accused person. The charge and cautionary statement was admitted in evidence as exhibit 7(a) and 6 being the handwritten and transcript as stated by the accused.

PW12 DANIEL MWANGI testified on the efforts made together with other family members to trace the whereabouts of the deceased. In his testimony they moved into various places including the residence, the place of work and other venues just to see whether she could be spotted anywhere. PW12 further confirmed that one person they contacted was the accused who was a friend to the deceased. On 14/1/2016 PW12 was to receive a message that the deceased body has been recovered in a septic tank within a plot in Ongata Rongai. PW12 further was shown a recovered mobile phone Samsung mobile which he positively identified before court as that of the deceased.

PW13 CAROLYNE WAMBUI a secretary who keeps medical records at Afya Frank Medical Clinic testified and denied that the deceased visited their clinic on 23/11/2015 as alluded to by the investigations report.

PW14 FRANK NJUE the operator of Afya Frank Clinic explained the circumstances of his arrest as a suspect to the death of the deceased. In his testimony PW14 denied that he ever attended the deceased as a patient nor had he seen the accused in the clinic. He further informed the court that he did not know how his motor vehicle reg. No. KAS 253J was implicated with transporting the body of the deceased to the septic tank where it was recovered.

PW15 PC LAZARUS NJUGUNA participated in the investigations. In his testimony he identified a Samsung handset with dual SIM cards being Airtel – IME 8925403152104493524 and a Safaricom SIM card with S/No. 892540210040442608. PW15 further testified that armed with positive information on the two SIM cards he proceeded to Machakos township where he arrested Jane Mwanzia the mother to the accused. According to the testimony by PW15 the mother of the accused and mobile phone in their custody. They sought the whereabouts of the accused. PW15 further stated that the mother telephoned the accused who she made arrangements to be picked from City Cabanas. That is how they effected the arrest of the accused to assist in taking the investigations to another level. PW15 confirmed that on interrogation of the accused she confessed to the murder and the location where body of the deceased was dumped in a septic tank in a private property.

PW16 MWANZIA MATHEKA a caretaker at the property where the body was recovered denied any knowledge of the incident. He denied ever seeing one Frank Njue or the accused in this case. He also confirmed that the property had no watchman to guard the premises to record entries of daily access in

and out.

PW17 PC PETER KIGIA a police officer attached to Ongata Rongai stated that he did participate in the recovery of the body of the deceased from a septic tank at Ongata Rongai as part of initial investigation team.

PW18 JANE MWANZIA the mother to the accused testified that there was a time around November 2015 when she was left some mobile phones by the accused. She further confirmed that she took over the mobile phones and inserted an Airtel and Safaricom SIM cards. According to PW18 she continued using the mobile phones until the police visited her at Machakos and arrested her in connection with the phones. PW18 further stated that it became clear while in police custody that the mobile phones had something to do with the accused and the death of the deceased. PW18 further stated that she was later to be released by the police and asked to record the statement in respect to the possession of mobile phones.

PW19 MICHAEL MUSYOKI MWANZIA the brother to the accused testified as having been asked to participate during the confession statement by the accused. According to PW19 at the close of the test he signed the statement. He further confirmed that the accused gave the statement voluntarily save for the fact it took quite long.

PW20 MARTIN WEKESA the Liason Officer with Safaricom produced the subscribers details to mobile numbers 0703 **** and 0706 ****. According to PW20 the analysis conducted confirmed a communication engagement between the two numbers on 23/11/2015 at 0.657.36 hrs and on 4/12/2015 at 12:1854 hrs. PW20 further stated that he sought a court order to pursue Mpesa details transactions of A/c No. 0716 ****. In his evidence PW20 told this court that the transactions revealed that on 22/11/2015 at 11.57.47hrs the accused received Ksh.25,000 from mobile number 0703 **** of one Teresia Maina the deceased. PW20 further confirmed that the two mobile numbers retained communication through SMS and voice data. The location of the subscribers during the period in question the 23/11/2015 was also indicated to be Ongata Rongai at various points. PW20 cited some of the locations picked as Ongata Rongai quarry, Imani area, Nakumatt, Bomas. PW20 collected the analysis data document which he produced as exhibit 14 (a) (b).

PW21 PC DOUGLAS CHEGE conducted the investigations of the case. The witness laid the sequence of events culminating in the arrest and recommending a charge of murder against the accused. In his role as an investigator he collected a number of exhibits which included mobile phones. The two mobile phones a Samsung and GT were produced in evidence as exhibit 3 (b). Secondly he tendered before court Airtel and Safaricom SIM cards as exhibit 4 (a) (b) (c) (d). The missing report was made in the occurrence book which he produced as exhibit No. 15.

PW1 DR. WALONG who conducted the postmortem with Dr. Ndegwa on the autopsy report dated 31/3/2016. According to PW1 the medical examination revealed that the deceased had a fracture dislocation right wrist joint loose and phalangeal bones ligature impressions along the neck. In the postmortem report PW1 confirmed that the cause of death was asphyxiation due to ligature strangulation and suffocation.

At the close of the prosecution case Mr. Chege learned counsel for the accused moved the court by way of submissions in a motion of no case to answer. Learned counsel for the accused submitted that the prosecution has failed to establish the elements of the offence of murder contrary to section 203 of the Penal Code. Learned counsel took issue with the prosecution for omitting to call one Dr. Ndegwa a co-pathologist with PW1 Dr. Walong who performed the postmortem. Learned counsel submitted that there was no eye witness to the murder and the circumstantial evidence cannot withstand the legal threshold. It was further learned counsel submissions that the evidence adduced by the prosecution was not worthy to be sufficient to draw an inference of a prima facie case against the accused. He relied on the legal proposition on circumstantial evidence in the case of Republic v Kipkering Arap ***Koske & Ano. [1945] EACA*** to urge the court to exonerate the accused of the charge levelled against her.

I have considered the charge, the submissions by the defence counsel and the evidence adduced by the

prosecution. In accordance with section 306 (1) of the Criminal Procedure Code it provides 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 burden of proof to tender evidence to make a finding of a case against the accused is upon the prosecution. This is well illustrated under section 107 of the Evidence Act which provides:

> **"Whoever desires any court to give judgement as to any legal right or liability on the existence of facts which he asserts must prove those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

This provisions resonates well with Article 50 (2) (a) of the Constitution which states that an accused person is presumed innocent unless the contrary is proved. The standard of proof required under section 306 (1) of the Criminal Procedure Code at this stage of the trial is not that of beyond reasonable doubt. What the legislature envisaged by the words enacted under this code is sufficient evidence to warrant an accused person to be placed on his defence. In the event the court appraises the evidence tendered by the prosecution and the same falls short of proving any element of the charge the accused is to be acquitted accordingly. The evidence would only hold if there exist admitted evidence capable of proving an offence as charged or one which can be substituted as per the provisions of section 179 of the Criminal Procedure Code.

The issue before this court therefore is whether the prosecution has fulfilled the legal mandate to enable exercise of discretion in their favour to call upon the accused to answer. The scope of section 306 (1) (2) of the Code does not define what is meant by a prima facie case. However this has found its way in a number of case law commentaries as illustrated here-in-below:

In the case of ***Exparte the Minister of Justice, Republic v Jacobson & Levy [1931] AD 466 at 468*** **Stratford JA** defined prima facie evidence as follows:

> **"Prima facie evidence in its usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus. It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue; it depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue if the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence "calls for an answer" then, in such case he has produced prima facie proof and in absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given, it is equivalent to no answer and the prima facie proof being undestroyed, again amounts to full proof."**

Closer the Court of Appeal for Eastern Africa in deciding a similar application in ***R.T. Bhatt v Republic [1957] EA 332 at 334*** the court stated as follows:

> **"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 is made out if, at the close of the prosecution case, the case is merely one which on fully consideration might possibly be thought sufficient to sustain a conviction. This is perilously rear 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, described evidence…….it may not be easy to define what is meant by a prima facie case, but atleast 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."

In the instant case I have gone through the evidence by PW1 – PW21 regarding the various aspects of this charge against the accused. The prosecution is enjoined to prove the following ingredients:

(a) The death of the deceased.

(b) That the death of the deceased was unlawful.

(c) That whoever killed the deceased had malice aforethought.

(d) That from the evidence the prosecution can positively identify the accused as the perpetrator or one of the accused persons to the crime.

For purposes of section 306 (1) of the Code the consideration is on the evidence adduced by the prosecution to establish whether the accused as charged could be held accountable for the offence of murder.

By consideration of the provisions of no case to answer under the first limb in section 306 (1) has to be construed within the legal principles set out in the classic case of ***Bhatt and Exparte Minister of Justice cases (Supra).*** In exercising discretion to warrant a finding of no case to answer as stipulated under section 306 (1) key guiding principles stated out are:

First there would be no case to answer at the conclusion of the prosecution case; if the evidence adduced does not prove the essential elements of the offence facing the accused. Secondly, if the evidence so far placed before the trial court as tested through examination has been so discredited that no reasonable court/tribunal could safely convict on it.

Under the definition of what constitutes a prima facie case is in my view the prosecution discharging the burden of proof of producing evidence sufficient to render reasonable conclusion in favour of the allegation that a crime has been committed. This standard to me is very critical to be satisfied given the constitutional provisions under Article 50 (2) (8) where an accused person has the right to remain silent, and not to testify during the proceedings.

As a matter of law the accused is not required to offer any evidence in reply to the case prosecuted by the prosecution. It should be borne in mind that in a prima facie case decision the burden of evidence never shifts to the accused. That is why trial courts must make it explicitly clear if the prosecution has met the test of a prima facie case before calling upon the accused to answer. This is necessary in order to avoid the risk of expecting the accused to offer evidence to offset the prima facie case but in the end opts to remain silent.

How does one then proceed if there is no prima facie evidence which needs to be rebutted. In my view section 306 of our Code should be read alongside with Article 50 (2) (1) (Supra) in order to protect the constitutionality of the right to a fair hearing. To me adopting this approach would be a positive step to avoid an unfortunate error where accused persons when called upon to answer elect to remain silent. That indeed will place the court in an awkward position in the event no prima facie evidence existed in the first place.

As demonstrated in the event there was no sufficient clarity as to the prima facie. The trial court would have no option but to order for an acquittal. That decision as to what circumstances constitutes a prima facie case cannot therefore be handled casually. The provisions of section 306 (2) of the Code shall not

apply unless the court is satisfied that the offence which the accused is charged of bears a reasonable relationship with the evidence offered by the prosecution.

In considering the evidence at this stage under the provisions of section 306 I observe that I am satisfied the prosecution has laid a claim against the accused person to call upon her to answer the charge. I therefore being guided by the principles in the ***R.T. Bhatt and Exparte Minister of Justice cases (Supra)*** find existence of a prima facie to warrant putting the accused on her defence pursuant to section 306 (2) of the Penal Code. The provisions of section 306 (2) as read with section 307 of the Code explained to the accused person.

Dated, delivered and signed in open court at Kajiado this 19th day of April, 2017.

……

R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Mateli Court Assistant

Mr. Nyaata holding brief for Mr. Chege for the accused present

Mr. Akula for Director of Public Prosecutions - present