



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO.2 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES KIMANI MBUGUA.....ACCUSED

RULING

The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is specifically alleged that on the night of 25/11/2014 at Kambi Moto Trading Centre within Kajiado County accused murdered John Kihara Njau.

When the accused was arraigned before court he denied committing the offence as alleged. He was represented at the trial by Ms. Kwenah while the state case was conducted by the senior prosecution counsel Mr. Alex Akula.

It follows therefore that by pleading not guilty it became crucial for the state to prove that the accused murdered the deceased John Kihara at Kambi Moto Trading Centre. In the event the state fails to prove any of the elements of the offence the accused would stand acquitted.

In discharging the burden of proof the prosecution summoned seven (7) witnesses in support of their case. At the close of the prosecution case I am mandated under section 306 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya) to make a finding of no case to answer. In the same sub-section (2) if the evidence strikes me as one which does amount to proof in a way to require the accused to answer the charge, I shall proceed to place him on his defence.

The standard of proof in criminal cases like the accused is charged with is precise. This court must be satisfied beyond reasonable doubt. However at this stage of the trial it is enough that the evidence adduced affirms that the allegation is made out to the reasonable satisfaction of the court.

The brief summary of the case for the prosecution:

According to the testimony of PW2 – Simon Njau Kihara, a son to the deceased he alluded to the telephone call from his sister regarding their father found lying beside the road with physical injuries. PW2 stated that he took steps to visit the scene where he assisted to ensure the deceased to Mbagadhi Hospital. In the course of examination the medical personnel referred them to Kenyatta National Hospital for further management. Further PW2 told this court that his father passed away apparently from the injuries sustained on the previous night.

PW3 Isaac Ruo testified as to the owner of the bar where the deceased was drinking beer on the 25/11/2014. In the evidence of PW3 his attention was drawn by one of the workers that the deceased had

taken out too many and required to be taken to his residence. This situation prompted him to call for boda-boda operator who testified as PW5 – Godfrey Nganga to assist in escorting the deceased home. It was the testimony of PW3 and PW5 that due to the drunkenness state of the deceased it proved impossible to carry him on the boda-boda. According to further statement by PW3 and PW5 it became necessary to look for alternative accommodation where he was to spend a night. That alternative accommodation in the testimony of PW3 and PW5 was identified to be the house of the accused. On their part PW3 and PW5 approached the accused whose house is next to the bar to allow the deceased be accommodated there for that night. This request PW3 and PW5 confirmed to this court was acceded to by the accused. PW3 testified that he had only to learn from the landlord that the same man they had taken to the accused house was found naked with injuries lying on the road. The witness PW3 was later to be sought by the police to record the statement on the incident.

PW4 Stephen Kimani testified as the landlord to the accused having rented the house which later became the focus of attention in this trial. PW4 further stated and confirmed that as at 25/11/2014 the accused was still his tenant occupying the premises next to the bar being operated by PW3.

The other prosecution witness was PC Henry Kipng'etich (PW6) of Kandis police post. PW6 testified on the role he played in booking the assault report involving the deceased. He further took action by visiting the victim who was admitted at Kenyatta National Hospital. It was PW6 testimony that the victim later succumbed to death. By this latest development PW6 recorded other witness statements. The statements revealed the identity of a suspect whom he caused to be arrested as supported by the testimony of PW1. In conjunction with other police officers PW6 made arrangements for the postmortem to be carried out by Dr. Walong. The autopsy report by Dr. Walong was produced and admitted in evidence through the testimony of PW7 Dr. Johansen Oduor. Subsequently the accused was detained at Kandis police post and a charge of murder preferred against him.

In the matter before me the prosecution solely based their case on circumstantial evidence. In the case of **Mohammed & 3 Others v Republic [2005] 1 KLR 722** the court stated as follows as to what constitutes circumstantial evidence:

“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis by the one proposed to be proved.”

To establish a prima facie the prosecution must prove the following elements:

- (a) That the deceased John Kihara Njau is dead.
- (b) That his death was unlawfully caused.
- (c) That in causing death the accused had malice aforethought.
- (d) Finally, that the crime of murder which occurred was occasioned by the accused.

When I peruse the evidence of PW1 – PW7 who testified through the senior prosecution counsel for the state, I find in overact that a prima facie case has been made out to warrant the accused to be called upon to answer. In support of this finding is the legal principle in the case of **Bhatt v Republic [1957] 1 EA 332** where the court held inter alia:

“That the question whether there is a case to answer cannot depend 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 such evidence that a reasonable tribunal properly directing its mind to the law and evidence would convict if no other evidence is adduced in rebuttal.”

In exercising discretion on this matter as provided for under section 306 of the CPC the most important constitutional principle to bear in mind is the right of an accused not to be forced into assisting in his or her own prosecution. It therefore means that before a court makes a finding on a prima facie case, the prosecution is under a legal duty to establish that there is a case to compel the accused to answer. My understanding of a prima facie case is not one where this court has to decide the accused innocence or guilt, but to review the evidence and consider whether the prosecution has put up a case and materials to the extent to fairly call the accused to defend himself.

From the foregoing, I have made up my mind and in view of the evidence and the law to come to the conclusion that a prima facie case does exist to warrant the accused to be placed on his defence as provided for under section 306 (1) of the CPC. The rights under section 306 and 307 explained to the accused including the constitutional right to remain silence under Article 50 (2) (1).

Dated, signed and delivered in open court at Kajiado on 25th day of October, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Accused present

Ms. Kwenah for the accused

Mr. Akula for DPP present

Mr. Mateli Court Assistant