



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAJIADO
CRIMINAL CASE NO. 19 OF 2015
REPUBLIC.....PROSECUTOR
-VERSUS-
DAVID MUNYUI CHARAGU
SAMUEL MUNGA NG'ANG'A.....ACCUSED
RULING

The accused person before court David Munyui Charagu and Samuel Munga Ng'ang'a were jointly charged of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 of the Laws of Kenya.

The prosecution case is that the above two named accused persons on the night of 25th and 26th January, 2014 at unknown time at Nkama village, Kuku Location in Loitokitok District within Kajiado County jointly murdered Catherine Kanini Muiwa.

Each of the accused was arraigned in court on 7/4/14 where they vehemently denied the offence.

The case was set down for hearing. The accused person was represented by counsel Mr. Nyaata while the prosecution was led by Senior Prosecution Counsel Mr. Akula.

The prosecution case was based on the evidence of eight witnesses.

The evidence by the prosecution needed to prove the following ingredients of the offence beyond all reasonable doubt in order for a court to make an order on conviction.

- i. Death of a person.*
- ii. The death was unlawful.*
- iii. The death was caused with malice aforethought.*
- iv. The accused caused or participated in causing the death of the person.*
- v. That the two accused persons had a common intention to execute an unlawful purpose.*

The burden of proof rests upon the prosecution throughout and never shifts except instances provided by law.

At the end of the prosecution case, Mr. Nyaata for the accused elected to make a submission of a no case to answer and filed written submissions.

The state prosecution counsel Mr. Akula filed his written submissions in reply to the defence.

Submissions by the Defence Counsel

The defence counsel Mr. Nyaata submitted that it is a principle of law that the prosecution must prove all ingredients of the offence of murder. He further submitted that the evidence presented was purely circumstantial which fell short of proving who caused the death of the deceased.

In his submissions counsel poked holes to the case by the prosecution to demonstrate to this court that eight witnesses failed to reach the threshold of a prima facie case.

Additionally he further submitted the star witness (PW1) relied by the prosecution was not corroborated by any reliable evidence to place accused persons at the scene of the murder.

He further submitted that the circumstantial evidence presented was of the nature whose chain of events leaves gaps in the prosecution case as to the participation by accused persons in murdering the deceased.

He cited the case of **ABANGA Alias ONYANGO VS. REPUBLIC CR.A NO. 32 OF 1990 (UR)**.

On the principle of circumstantial evidence, the Court of Appeal stated that the evidence must satisfy three tests:

- “(1) The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established,*
- 2. Those circumstances should be of a definite tendency unerringly pointing towards guilty of the accused;*
- 3. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”*

The defence counsel in his submission argued that applying the above legal principles, the case by the prosecution does not meet the threshold of circumstantial evidence which the prosecution based their case.

In this regard counsel referred to the holding in the celebrated case of **RAMANLAL TRAMBAKLAL BHATT VS. REPUBLIC (1957) EA 332, 334 and 335**.

The court stated inter alia on prima facie case:

“It may not be easy to define what is meant by a prima facie 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.”

In his submission on the case for the defence, the court has no cogent or credible evidence to warrant accused persons to be placed on their defence. He urged this court to acquit the accused persons.

Submissions by the prosecution

In reply state prosecution counsel Mr. Akula submitted that the court should evaluate the testimonies of the eight witnesses in totality. He further submitted that the prosecution has established a prima facie case against the accused persons.

Further he submitted that one accused persons were positively identified on the fateful night on 25th and 26/1/2015 by (PW1). The evidence places the accused persons at the scene of crime.

Counsel invited the court to find that death of the deceased was unlawful basing on the fact of the physical injuries suffered.

According to his submissions prosecution case argued that in tandem with the facts accused persons were the last persons to be seen with the deceased. He submitted that the accused persons by their conduct had both hatched the plan to kill the deceased which they carried to finality by occasioning physical harm.

The state prosecution counsel invited the court to find that the prosecution proved all the ingredients of murder to warrant each of the accused to be placed on their defence.

Therefore given the circumstances of this case the issue to be determined by this court is:

Whether the prosecution has provided sufficient evidence against the two accused persons to require each of them to be called upon to present his defence?

I have paid due regard to the evidence and submissions of the defence counsel. The counter reply and submissions by the state prosecution counsel has also been evaluated.

The essential issue for determination at this stage is whether the prosecution has proved a prima facie case against the 1st and 2nd accused persons.

In this case of **BHATT VS. REPLUBLIC 1957, EA 332** referred to herein it was held 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.

I do recognize that at this stage the standard of proof is not proof beyond reasonable doubt as required for a fully fledged criminal trial. What is essential for the court to determine is whether evidence presented taken literally or on the face of it would establish ingredients of the offence of murder.

The court has also to make a finding whether the accused persons participated therein in committing the offence.

In consonance with the legal principles and test of a prima facie case as stated in **BHATT VS. REPUBLIC SUPRA**, prosecution in this case has proved all the ingredients of the offence of murder to such standard that a reasonable tribunal properly directing its mind to the law and the evidence, would convict if no other evidence is adduced.

Therefore from the foregoing I find that pursuant to Section 306(2) of the Criminal Procedure Code prosecution has provided sufficient evidence establishing a prima facie case against accused one and two to warrant each of them in this case to be placed on his defence.

As a result the provisions of Section 306(2) of CPC read and rights therein explained to the accused in presence of the defence counsel.

Dated, delivered and signed at Kajiado on 23/2/2016.

R. NYAKUNDI

JUDGE

Representation:

Ms Mageto holding brief for Mr. Nyaata for accused present

Mr. Akula Senior Prosecution Counsel

Mr. Mateli – Court Assistant present