



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAJIADO
CRIMINAL CASE NO. 12 OF 2015

REPUBLIC.....PROSECUTOR

Versus

BENSON NJOROGE NJOKI.....ACCUSED

RULING

The accused person **BENSON NJOROGE NJOKI** was charged before this court with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code Cap 63 of the Laws of Kenya.

The particulars of the charge as contained in the information are that on 3.3.2012 at Sompet farm in Kajiado District within Kajiado County, jointly with others not before court murdered **PETER KILONZO MAKAU** hereinafter referred as the deceased. At the time of indictment accused denied the charge and particulars hereof. He was represented in his defence of the trial by Counsel Mr. Nyaata. The prosecution was led by Mr. Akula Senior Prosecution Counsel.

A total of six (6) witnesses were called by the prosecution in support of the charge of murder against the accused. They set to prove the following ingredients of the offence against the accused.

1. **That the death of a person occurred.**
2. **That the death was unlawful.**
3. **That the death was caused with malice aforethought.**
4. **That the accused person caused or participated in causing the death of the deceased person.**

This court now proceeds to evaluate the evidence by the prosecution to determine whether it has discharged the burden of proof in respect of the offence in order to turn in a prima facie finding/ruling.

PW1 ZIPPORAH PILLANOI testified and told this court that she owned a motorcycle which was later stolen in 2012. In her testimony she had employed the deceased at the time who, on the motorcycle being stolen, also disappeared from the locality. According to her testimony she reported the matter of theft to Loitokitok Police Station and a search ensued to apprehend the suspect and also recover the motorcycle.

She further testified that on 3.3.2012 she received a telephone call from one **Richard** that the suspect who

had stolen her motorcycle had been spotted. In company of **PW2 Peter Mburu**, PW1 testified that they travelled to the farm where the suspect one **Peter Kilonzo** was working to find out the whereabouts of the stolen motorcycle.

That on arrival at the farm they met the suspect whom they interrogated regarding the stolen motorcycle. As per the evidence adduced by PW1 and PW2 the suspect **Peter Kilonzo** alleged that the subject motorcycle was not physically available as it had been sold in Tanzania.

PW1 and PW2 stated that the suspect who was in their custody who led them to one **Waweru**; who allegedly facilitated in getting the buyer for the motorcycle in Tanzania.

That the two attempted to escape in different directions; but that members of the public who had been attracted to the incident pursued them and effected arrest; that the mob started beating each of the suspects using different tools. PW1 and PW2 told this court that in a little while they saw fire from the deceased, **Peter Kilonzo** but they had not seen who and how it was lit. That they later learnt that the said **Peter Kilonzo** succumbed to death due to the burns occasioned.

On being cross examined by the defence counsel PW1 and PW2 both denied positively identifying the person who set the deceased on fire for reasons that there were many people and from the point they were standing could not clearly point to a single perpetrator. It was the testimony of PW1 and PW2 that they did not see the accused among the members of the public when the suspects were being set on fire.

Following the death of the deceased a postmortem examination was conducted by **DR. STEPHEN MWONGELA** PW3. In his evidence Dr. Mwangela found that the deceased suffered extensive burns to the face, nose, mouth, lips, lower limbs and upper limbs which he assessed at 60% burns of body surface.

The cause of death as opined by PW3 was inhalational burn injuries which caused suffocation and death. He produced the postmortem as exhibit 2.

PW4 GODSON KITHEKA testified that on 5.3.2012 he participated in identifying the body of the deceased during the postmortem at Loitokitok District Hospital Mortuary.

PW5 JOHN WANJOHI also narrated before this court that he accompanied PW1 to arrest the deceased. That upon arrest the deceased was briefly interrogated whereby he admitted having sold the motorcycle in Tanzania. The sale was jointly planned with one **Waweru** whom they sought and arrested alongside the deceased.

He further testified that members of the public gathered before they could reach the police station. In his testimony, the mob started to beat the suspects in order to avail the motorcycle. He narrated how gasoline was obtained from motorcycles within the scene, poured on the deceased and a matchstick lit. It was that fire which extensively burnt the deceased. He has denied positively identifying any person from the mob who poured gasoline and lit the matchstick. On being cross examined by Mr. Nyaata for the accused, PW5 denied that he saw accused at the scene.

PW6 CPL HASSAN ARESSI testified on the investigations conducted and subsequent charge of murder against the accused. He narrated to the court that one **Joseph Waweru** had recorded a statement that accused placed a tyre around the neck of the deceased. He further testified that one **Kimani** brought a jerrican of petrol, poured it on the deceased and lit a match stick. It was on the basis of that evidence that he recommended that the accused be charged with the offence of murder.

At the close of the prosecution case Mr. Nyaata counsel for the accused filed a motion of no case to answer under Section 306 (1) of Criminal Procedure Code.

Submission by the Defence Counsel:

In his written submissions Mr. Nyaata argued that from the totality of the evidence presented a prima

facie case against the accused has not been established by the prosecution. In support of this he relied on the following authorities:-

RAMANLAL TRAMBAKLAL BHATT v REPUBLIC [1957] EA 332 - 335

REPUBLIC v DERRICK WASWA KULOBA [2005] eKLR

REPUBLIC v AUGOSTINO EMAKWALA LOMUTUNGA [2007] eKLR.

Submissions by the Prosecution's Counsel:

It was his contention that from the evidence adduced there is no evidence to establish a prima facie case against the accused. In absence of a prima facie case he submitted to this court that accused cannot be called upon to answer a case on mere allegations.

In response Mr. Akula, the Senior Prosecution Counsel strongly submitted that the prosecution has established the three ingredients of the offence of murder. He reiterated in his submissions the native and circumstances upon which the offence was committed as narrated by the 6 witnesses. He urged the court to find that the prosecution case is mainly based on circumstantial evidence has been established against the accused to warrant him to be put on his defence. He relied on the case of **LIBAMBULA v REPUBLIC [2003] KLR 683**, on the principle of circumstantial evidence. The case of **CHARLES MAITANYI v REPUBLIC [1986] KLR 198** on the test of the evidence of a single witness in respect to identification.

The burden of proof rests upon the prosecution at all times in criminal cases and it never shifts to the accused. Under Article 50 2(a) the accused's right to presumption of innocence is safeguarded until proved to the contrary.

Given the gravity of the charge of murder for which the statutory provisions are a mandatory sentence of death upon proven guilty the care and standard of proof is even higher than ordinary offences.

Analysis and Resolution:

I now proceed to examine and evaluate the prosecution evidence to establish whether there is prima facie evidence against the accused. The analysis will be contextualized within the ingredients of the offence.

The 1st element is that of death of the deceased.

There is ample evidence from PW1, PW2 and PW5 that the deceased enjoyed good health until the 3.3.2012. The deceased was arrested as a suspect of theft of a motorcycle belonging to the complainant (PW1). The complainant (PW1) in company of PW2 and PW5 were headed to the police station with accused in their custody when they were confronted by a mob, who ordered the deceased and another to sit on the ground at Kiwanjani area.

According to the evidence by PW1, PW2 and PW4 the deceased was set on fire by the angry mob. The deceased sustained burn injuries. He succumbed to death soon thereafter. The body was taken to Loitokitok District Hospital Mortuary. It was identified by PW5. The body was examined by Dr. Mwongela (PW3) who found that it had suffered 60% degree burns of the surface area. The cause of death was said to be inhalational burn injuries which caused suffocation and death. There is evidence which is not disputed at this stage that **Peter Kilonzo** is dead. His death occurred on 3.3.2012.

The second ingredient is whether the death was unlawful.

The testimony of PW3 the Medical Officer testified that the cause of death was due to inhalational burn injuries as a result of extensive burns occasioned when he was beaten and set on fire by a mob.

PW1, PW2, PW5 confirmed that the deceased was lynched by a mob of people because he was suspected of having stolen a motorcycle belonging to PW1. PW1, PW2 and PW5 were at the scene when the deceased was assaulted and set on fire. However in their evidence in chief and cross examination they denied identifying any of the members of the public as the assailant(s).

What can be deduced from the evidence is that the public took the law into their own hands. There are no circumstances to justify the beating and the setting on fire of the deceased. His death was unlawful.

Thirdly the other issue the prosecution has to establish relates to malice aforethought.

The provisions of Section 206 of the Penal Code lays out the circumstances under which malice aforethought is deemed to be established as thus:

- a. **An intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- b. **Knowledge that the act or omission will probably cause death of some person. Whether that person is the person actually killed or not. Although that knowledge is accompanied by indifference whether death or grievous harm is caused or not or by a wish that may be caused or not or by a wish that it may not be caused.**
- c. **An intent to commit a felony.**
- d. **An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

The prosecution evidence presented witnesses PW1, PW2, PW3, PW5 and PW6 whose testimony confirmed that deceased suffered serious burns besides other physical injuries. The multiple burns resulted in the death of the deceased. The injuries were deliberate and repeatedly inflicted upon the deceased.

What the mob intended was to kill the deceased. The deceased was not only beaten but set on fire by use of petrol and a match stick. This was lethal for any victim to survive. I am of the finding that malice aforethought was established.

The issue which begs for an answer is whether the accused person was responsible for the death of the deceased.

The prosecution relied on the evidence of **PW6 Cpl Hassan Aressi** the investigating officer. All the other witnesses' testimony was in the negative as to who committed this offence among the mob of people at the scene. According to PW6 he was not at the scene on 3.3.12. He was instructed to deal with the case after the incident. He compiled and recorded statements from the witnesses. In his testimony there was the crucial statement of **Joseph Waweru** who allegedly saw the accused and another by the name **Kimani** participating directly in the lynching of the deceased.

The sad thing about PW6's testimony is that one **Joseph Waweru** was never called as a witness. The defence could have had the opportunity to challenge his testimony at the trial and test its veracity. PW6 learnt of the death soon thereafter. The accused was named as one of the suspects. He was arrested and indicted with the offence of murder. The witness who saw the accused at the scene was never called as a witness.

At this juncture I wish to remind myself that the duty of the court is to establish whether a prima facie case has been made out against the accused.

The question arises what is a prima facie case?

In *Mosley and Whiteley's Law Dictionary 5th Edition* it states:

“A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called to answer it. A prima facie case then, is one which established by sufficient evidence, and can be overthrown by rebutting evidence adduced by the other side.”

A determination as to whether a prima facie case has been made out was considered in the persuasive case of **Public Prosecutor v Chin Yoke [1940] 9th HJ 47 at pg 48**. **Gordon Smith Ag. J.A** stated as follows:

“One is quite familiar with the course often and opted by counsel for the defence at the close of the case for the prosecution case....., when he submits that he has no case to answer, or in other words, that the prosecution has failed to make out a prima facie case against the accused and it is submitted that accused should not be called on for his defence. It is then the duty of the magistrate or judge to consider the evidence already led and decide whether or not to call on the accused for his defence,..... The magistrate or judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some parts; or all of it and, therefore it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused, conviction. In such case the accused is then called upon to answer the prima facie case which has thus been made out against him.”

Closer home in the case of **R. T. Bhatt v Republic [1957] EA 332 – 335** the court spelt out the meaning of the phrase “Prima facie case”. It held inter alia:

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

The Federal court in Malaysia in **Balachandran v Public Prosecutor [2005] 2RD HJ 301** elaborated further on the phrase at **pg 315** of prima facie case:

“The result is that the force of the evidence adduced must be such that, if unrebutted it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out, it means that there is no material evidence which can be believed in the sense as described earlier.

In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of Section 306 (1) and (2) of the Criminal Procedure Code.”

I have weighed the totality of the prosecution evidence in respect to the ingredients of murder to be proved against the accused. It is clear that the evidence of PW1, PW2, PW4, PW5 and PW6 has not placed the accused at the scene of crime. PW1, PW2 and PW3 were at the scene where the mob lynched the deceased by inflicting injuries and setting his body on fire. This direct evidence of the three witnesses never identified the accused among the perpetrators of the crime.

PW6 the investigating officer was the only one who introduced the angle of the presence of the accused at the scene. PW6 relied on the statement of **Joseph Waweru**. The prosecution never managed to trace **Waweru** to appear before this court and adduce evidence on what he knew about the death of the

deceased. That failure to link the accused with the death of the deceased occasions the collapse of the case for the prosecution at this stage.

In this case the evidence presented against the accused is not sufficient for any tribunal or court directing its mind properly to make out a prima facie case against the accused to be called upon him to answer to the charge.

This court has judiciously considered the testimony adduced by PW6 the investigating officer. In my view, reliance on one **Joseph Waweru's** recorded statement remains baseless and unsubstantiated. It is highly doubtful what could have happened had the witness submitted himself to the jurisdiction of the court and his evidence tested as per the requirements of the law.

Accordingly the piece of evidence by PW6 on this issue cannot be taken as direct or circumstantial to place the accused positively at the scene of the murder on 3.3.2012. Infact the evidence on oath by a witness is to test the veracity of his statement recorded by investigating officer at the trial. There would be prejudice caused and a miscarriage of justice if this court was to agree to admit in evidence the assertion by PW6 of the accused's presence at the scene.

RESOLUTION

The legal principles in the cited authorities and legal text have been applied to the facts of this case. The celebrated case of **Bhatt v Republic (Supra)** and persuasive authority of **Balachandran v Public Prosecutor (Supra)** lay bear the test of prima facie case. In my judgement I find that a prima facie case has not been established to warrant placing the accused person on his defence under Section 306(2) of the Criminal Procedure Code for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He is at liberty unless otherwise lawfully held.

It is so ordered.

Dated, delivered in open court at Kajiado on 23rd day of June, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for the Director of Public Prosecutions

Mr. Masese holding brief for Nyaata for the accused person

Accused present

Mr. Mateli Court Assistant present