



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 11 OF 2015

REPUBLIC.....PROSECUTOR

Versus

TITUS MUSYOKA MUTINDA.....ACCUSED

RULING

Titus Musyoka Mutinda hereinafter referred as the accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya. The brief facts constituting the offence are that on the night of 12th day of September 2011 at around 12.30 am at Illasit township in Loitokitok District within Kajiado County accused murdered SHOILLA NGINA KANIKI. The accused pleaded not guilty to the charge.

At the trial the accused was represented by Counsel Mr. Onchiri while the prosecution was led by Senior Prosecution Counsel Mr. Akula. The prosecution called nine witnesses in support of the case against the accused person.

The brief summary of the evidence as adduced by the prosecution was that the deceased and accused person lived together. On the fateful night PW3 a neighbour to the deceased heard some commotion from their house which caught her attention. In a short while she was woken up by the neighbour which forced her to go out and check the incident.

On arrival she found PW4 a son to the deceased seated outside alone. PW3 testified that she entered the house and found the deceased lying on the ground in a pool of blood. The matter was reported to Illasit Police Station as confirmed by PW6 IP Jackline Atieno. In her testimony PW6 in company of other police officers rushed to the scene where they collected the body. The deceased was taken to Loitokitok District Hospital Mortuary.

The postmortem examination by Dr. Mutisyo PW8 revealed that the deceased had sustained several stab wounds to the head, neck, back, right arm, face and shoulder. As a result of the injuries the doctor opined the deceased suffered massive haemorrhage resulting from stab wounds inflicted. PW6 the investigating officer compiled the evidence from witnesses and forwarded the committal bundle to the Director of Public Prosecutions for advice and recommendation that accused be charged with murder.

DEFENCE SUBMISSIONS:

At the close of the prosecution case Mr. Onchiri moved a motion of a no case to answer by way of written submissions. Mr. Onchiri argued that the prosecution have not discharged the burden of proving the ingredients of the offence of murder against the accused. He contended that the prosecution failed to present cogent and credible evidence that the accused was the perpetrator of the crime. Counsel took issue

with the testimony of PW4 on the basis that it was unsworn testimony which this court should not rely on to make any finding against the accused.

In support of the submissions on the probative value of unsworn testimony he relied on the case of **MAY v REPUBLIC Cr. Appeal No. 24 of 1979** where the court of appeal held inter alia:

“That unsworn statement is not strictly sparring evidence and the rules of evidence cannot be applied to unsworn statements; it has no probative value, but it should be considered in relation to the whole evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by evidence recorded in the case.

From the onset the defence counsel submitted that there is no sufficient evidence on record to cause the accused to be put on his defence.

SUBMISSIONS BY THE PROSECUTION:

Mr. Akula, Senior Prosecution Counsel vehemently opposed the line of argument by the defence that a prima facie case has not been made out from the evidence adduced. He relied on the written submissions where he gave an overview of the prosecution case as supported by the witnesses who testified.

Arising out of the evidence Mr. Akula argued that the elements of the offence of murder have been established. He sought to restate the ingredients of murder which the prosecution from the onset embarked to prove as:

i. Death of a person.

ii. Unlawful commission/or omission by the accused led to the death.

iii. Malice aforethought on the part of the accused.

iv. That the perpetrator of the offence was the accused.

In his submissions Mr. Akula relied on the following cases:

1. Amber May v Republic [199] KLR 38

2. PNG v Republic [2015] eKLR

3. Nicholas Mutua & Another v Republic MSA Criminal Appeal No. 373 of 2006.

4. Joseph Mburu Irungu v Republic [2007] eKLR

5. Charles O. Maitanyi v Republic [1986] KLR 198

According to the evidence and legal principles in the cited case, Mr. Akula urged this court to find that the prosecution has discharged the standard of proof to warrant accused to be placed on his defence.

ANALYSIS AND RESOLUTION:

The provisions of Section 360 (1) (2) of the Criminal Procedure Code and the Evidence Act contemplate a two way approach in considering a no case to answer submissions.

Firstly, if the court at the close of the prosecution’s case consider that there is no evidence that the accused committed the offence charged in the indictment or information, it should

proceed and record a finding of not guilty.

Secondly, where the evidence of the prosecution witnesses has been concluded and the court considers there is sufficient evidence that accused committed any of the offences charged in the indictment it shall proceed to call upon the accused tender evidence in reply.

The court is also under a duty to comply with Section 179 of the Criminal Procedure Code. Under the provisions of Section 179:

“The court on evaluating the entire evidence by the prosecution must proceed to consider whether there is any other offence, thought not charged in the indictment, charge or information of which the accused might be lawfully convicted and sentenced.”

As to what constitutes a prima facie case under Section 306 of the Criminal Procedure Code was dealt with in the case of **R.T. BHATT v REPUBLIC [1957] EA 332 – 335**. 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 near 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.”

DETERMINATION:

The issue for determination at this stage is whether upon the evidence at the close of the prosecution case a prima facie case has or has not been established in terms of Section 306(1) (2) of the Criminal Procedure. These are all matters of law determinable by the trial court.

Having carefully considered the evidence, submissions by the defence counsel on motion of a no case to answer and the reply by Senior Prosecution Counsel on the matter, it is in my judgement that there is evidence to establish a prima facie case against the accused. Secondly the evidence adduced for the prosecution is sufficient enough that a reasonable court or tribunal directing its mind could safely rely on it to convict.

For these reasons i make a finding that a prima facie case has been made out against the accused person to warrant him to be called upon to open his defence under Section 306(2) of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

Dated, delivered in open court at Kajiado on 9th day of June, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for Director of Public Prosecutions

Mr. Onchiri for accused

Mutisya Court Assistant

Accused present