



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 13 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

HUSSEIN MUHAMUD ABDI.....ACCUSED

RULING

Hussein Muhamud Abdi, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence are that on the 15th day of January 2010 at Eastleigh within Nairobi area murdered Sagal Ahmed Hassan alias Ibtisan Asad Mohamed, the deceased.

The prosecution has closed its case after calling four (4) witnesses. Before proceeding with the trial, the law and procedure requires that this court examines the evidence of the prosecution and determine whether it establishes a prima facie case against the accused person. If so, then the accused is placed on his defence. If not, then the accused is acquitted. In **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 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, the case is merely one “which on full 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”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence..... It is 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.” (Emphasis added).

I have examined with great care the evidence of the four witnesses called by the prosecution to determine if it meets the threshold set by the **Bhatt case** cited above. The deceased aged 3 ½ years old died of multiple injuries due to blunt trauma. Dr. Oduor Johansen (PW4), who examined the body of the deceased, found extensive bruises on the left cheek, the chest and abdomen. The doctor found bleeding on the nose and mouth. Internally, the deceased had multiple rib fractures on both sides of the chest, bleeding on both sides of the chest cavity and bruises on the left lung. The liver was torn and there was bleeding in the abdominal cavity. From this evidence by the doctor I find no dispute that the deceased died and given the circumstances of her death, that death was unlawful. But what led to the death of the deceased?

Muhamud Ahmed, PW1, who operated Makkah Nursing Home in Eastleigh recalled that on 15th January 2012 at 10.00am the accused and his wife went to his clinic to take a female child aged about 3 years. The accused carried the child into the clinic and placed her on the examination bed. Muhamud noted that the child was breathing through the nose and mouth with difficulty and her hands and legs were cold. He told the couple that the child required specialized medical services at a hospital with Intensive Care Unit (ICU). He aided the child to breath by giving her oxygen and some drugs, which he did not specify, and advised the accused and the wife to take her to a hospital with such facilities. Muhamud told the court that both the accused and the wife looked sad and in shock. He did not fill any P3 form in respect of the treatment of the child.

Later that day at about 9.30am Police Constable Benson Obure (PW3) received a group of women from Somali origin at Pangani Police Station. (I find the time not agreeing with that of Muhamud given that the child is said to have died by the time she was taken to the police station. It would appear that she was taken to the police station after Makkah Nursing Home.) The women were carrying a child and sought help from the police. They reported to him that the child had been killed by her father. PC Obure noted blood oozing through the nose and a black mark similar to a mark made by clotted blood on the left cheek. He said he noted that the child was dead and took the body to the City Mortuary where the post mortem was carried out the same day by PW4. He said that among the group of women were Fatuma, Rukia and Halima and that Fatuma was the mother of the child. The women reported to him that the father of the child had hit her. PC Obure was led to a shop in Eastleigh where he arrested the accused.

Chief Inspector Joseph Musembi (PW2) investigated the case. He recorded statements from Hawa and Fatuma on 15th January 2012. Hawa was Fatuma's neighbour. CIP Musembi told the court that he established that earlier that morning Hawa had met Fatuma going to the butchery to buy meat. Hawa had learned that Fatuma had left her child with the child's father who is the accused. Hawa told CIP Musembi that while in her house she heard the sound of a bang in accused's house; that shortly after this the accused went to Hawa's house to seek help. Hawa found the child lying down sweating and blood oozing from the nostrils. Hawa went out shouting for help from neighbours. When she returned to accused's house she found Fatuma had returned and the three of them took the child to the nearby clinic with the accused carrying the child. CIP Musembi told the court that his investigations revealed that the accused and Fatuma had been married for one month before this incident happened and that both had a dispute over the child who was not accused's biological child.

Mr. Nyaribo, advocate for the accused, took issue with the prosecution's failure to bring the mother of the child to testify; he took issue with lack of death certificate or burial permit to support death of the deceased. He urged the court to acquit the accused for lack of evidence and pointed out that the accused sought help when the child was injured and carried her to hospital. As I have stated above I find death proved. There is no requirement of death certificate or burial permit where a post mortem report and evidence of the examining doctor confirm death occurred.

I have carefully considered the evidence tendered. From the outset this case has serious limitations. There is no evidence on what happened in the morning of 15th January 2012. PC Obure told the court that it was reported to him that the accused killed the child. CIP Musembi told the court that he investigated the case and established that Hawa the neighbour to the deceased heard a bang in accused's house and that the accused went to her house and told her to go and see what had happened. There is no evidence to inform this court what happened in the house of the accused. I have no evidence to confirm that the accused was married to the mother of the deceased and that they used to have arguments over the deceased. I have no evidence to show that the accused attacked the child and inflicted injuries on her. I am not able to confirm whether the accused was the only person in the house with the child. In short I there is no evidence, direct or circumstantial, implicating the accused. The evidence of the mother of the deceased and the neighbour Hawa is very crucial to this case but this evidence is lacking.

This is an old case. I took over the proceedings in this case on 6th April 2016 and learned that there were challenges in bringing witnesses to court. This court was told on that date that the Investigating Officer did not bond witnesses and that he had informed the prosecution counsel that key witnesses had gone to America and that one witness who was in Garissa had refused to sign bond to attend court. No effort was

made to have this witness attend the court.

Does the evidence on record establish a case on which this court, while properly directing its mind to the law and the evidence, could convict if no explanation is offered by the defence? I think not. It would be far-fetched and speculative for this court to find that the accused has a case to answer basing this conclusion on the evidence so far tendered. The case was badly handled, firstly by the investigators for not “moving stones” to ensure justice is served by making available witnesses to support this case. Secondly, I note that there have been a number of prosecutors who have handled this case. The danger in this lies in what I would call lack of ownership of the case leading to lack of follow-up to ensure witnesses attend court. The deceased will not get justice from this trial because of those highlighted shortcomings.

The accused, if he is culpable, will go scot-free. This is not what criminal law envisages. Everyone who commits a crime must answer for it. As the matter stands, this court will not be able to tell whether he is guilty or innocent because of the failure to bring witnesses to testify. He has been in custody since 23rd January 2012, four years and six months to date. The law does not require him to prove his innocence. By placing the accused on his defence with the type of evidence, I would be hoping that he will provide the lacking evidence against his guilt which is not allowed under our legal regime. I find that he has no case to answer. He will benefit from the legal technicalities that have arisen in this case. I have no reason to hold him in custody any longer and I hereby acquit him and order his immediate release from custody under Section 306 (1) of the Criminal Procedure Code unless for any other lawful reason he is held in custody.

One more thing, the prosecutor produced a copy of a post mortem report with an undertaking that the original would be made available to replace it. By the time of writing this ruling, the original post mortem has not been brought. Again this shows lack of seriousness in handling this case.

Orders shall issue accordingly.

Dated, signed and delivered this 25th day of July 2016.

S. N. Mutuku

Judge

In the presence of:

Ms Macharia for the prosecution

Mr. Nyaribo for the accused

Mr. Hussein Muhamud Abdi, the accused

Mr. Daniel Ngumbi, court clerk