REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 27 OF 2015

REPUBLIC…….....PROSECUTION

Versus

JOHN NDUNDA MUTUNGA alias TINGILI….……ACCUSED

RULING

JOHN NDUNDA MUTUNGA alias **TINGILI** was indicted with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code. The particulars of the charge being that on the night of 30/7/2013 at Kitengela Township within Kajiado County accused unlawfully murdered **EUNICE SYOMBUA MUTUNGA** hereinafter referred as the deceased.

The accused pleaded not guilty to the charge. He was represented at thetrial my Mr. Kamolo Advocate while the prosecution was led by Mr. Akula Senior Prosecution Counsel. The prosecution called a total of eight (8) witnesses to prove the case against the accused person. The evidence by the prosecution at this stage can be summarized as follows:

On the 30/7/2013 PW4 Lucy Kavasi Nthiwa and PW5 Rose Wambere Gathiri, who were immediate neighbours of the deceased and accused testified on how each heard the two quarreling inside their house. It was their testimony that prior to the incident accused and deceased in early hours of the evening moved in and out of their house. Their testimony pointed to a particular time on or about 10.00 pm when accused demanded from the deceased a sum of Ksh.500. this demand according to PW4 and PW6 triggered beatings by the accused against the deceased. In the course of the assault PW4 and PW6 feared to intervene due to the threats issued by the accused of consequences to anybody who will make attempts to interfere to what he was doing.

PW4 and PW6 confirmed that the screams from the deceased went silent. PW4 further stated that on or about 6.00 am of 31/7/2013 she said the beatings by the accused continued coupled with demands of Ksh.500 from the deceased. PW5 further testified that on the 31/7/2013 at 6.00 am she went to the deceased house and on calling her name she did not respond. PW6 further stated that the deceased was lying on their bed and in a way and observation lifeless.

On seeking assistance of PW4 and her husband they came to a conclusion that the deceased was no more on the basis they could not fell any breathing from her. PW4 and PW5 also told this court that the accused later locked the house with a padlock and left the plot.

PW1 James Kahiga Mwangi – the Assistant Chief testified that he received a report of the murder of the deceased on 31/7/2013. This made him to take the first step of visiting the scene where other members of the public had also gathered in response to the said needs. The members of the public and neighbourhood had gotten hold of the accused when they surrounded with an intention to lynch him as punishment for his

action. PW1 stated that in order to save the accused life he restrained the mob and escorted him to Kitengela Police Station.

The scene was later visited by PC Leah Wanjiru (PW6) and PW8 Cpl Dickson Mutemi who investigated this incident of murder involving the accused. PW6 and PW8 told this court that they took action by removing the body of the deceased to Machakos Level 5 Hospital Mortuary. A sketch map of the scene was drawn and produced as exhibit 1 (a) (b) to reflect the surroundings and where the alleged murder must have taken place.

PW6 and PW8 made arrangements for a postmortem to be conducted by PW7 Dr. Fredrick Okinyi. The relatives of the deceased PW2 and PW3 were invited to attend the postmortem. In their testimony PW2 and PW3 confirmed attending the postmortem at Machakos Level 5 Hospital Mortuary where they positively identified the body of the deceased to the pathologist.

PW7 Dr. Fredrick Okinyi testified and produced a postmortem reports as exhibit 2 where he opined the cause of death of the deceased as severe head injuries caused by a blunt trauma.

On recommendation by PW6 and PW8 the accused was charged with the offence of murder of the deceased.

In a charge of murder the prosecution must prove the following elements as deduced from Section 203 and Section 206 of the Penal Code:

> **1. That the deceased died.**
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> **2. That the death was due to unlawful commission and or omission by the accused.**
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> **3. That in causing the death of the deceased, there was malice aforethought on the part of the accused.**
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> **4. That the accused person can be positively identified as the person who directly or indirectly participated in killing the deceased**.

It is against this background that the defence counsel moved the court for a no case to answer motion at the close of the prosecution case. Section 306 (1) of the Criminal Procedure Code provides as follows:

> **“When the evidence of the witnesses for the prosecution has been concluded, the court if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary any arguments which the advocate for the prosecution or the defence may desire to submit record a finding of not guilty.**
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> **(2) when the evidence of the witnesses for the prosecution has been concluded, the court if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate if (any) to give evidence on his own behalf, or to make an unsworn statement and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof the judge shall record the fact.”**

The content of these statutory provisions in our Kenyan criminal Law is to enable an evaluation of the evidence by the judge at the close of the prosecution case and approach the case in a two pronged test.

First if there is no evidence that the offence as alleged against the accused or accused person has been committed then the trial should be stopped and a verdict of not guilty recorded with an order of acquittal/discharge in favour of the accused.

Secondly where however at the close of the prosecution case there is sufficient evidence in view of the facts upon which a jury or a tribunal or in this case a judge could properly come to the conclusion that the accused would be found guilty, then the matter should proceed by calling the accused to answer or present his defence as prescribed under Section 306 (2) of the Criminal Procedure Code.

In arriving at any of the decisions under Section 306 of the Criminal Procedure Code the tribunal or judge should bear in mind that the prosecution has the singular duty to prove the ingredients of the offence beyond reasonable doubt. This standard of proof as discussed in the persuasive authority in the case of **Miller v Minister of Pensions [1947] 2ALLER 372 at 373**. Denning stated as follows:

> **"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."**

It is against this backdrop Mr. Komolo learned counsel for the accused made submissions in respect to a no case to answer under Section 306 (1) of the Criminal Procedure Code. The Learned Senior Prosecution Counsel also filed written submissions in reply to the defence counsel's submissions on the issue that the prosecution have not established a prima facie case to warrant accused person to be placed on his defence.

Mr. Kamolo Learned Counsel for the accused reiterated the substance of the evidence by each of the prosecution witnesses. In his submissions Mr. Kamolo submitted that testimony by prosecution witnesses when subjected to cross-examination was contradictory, inconsistent which left gaps with many questions unanswered as to what happened on the night of 30/31.7.2013. Learned counsel urged this court to find that the inconsistencies should be resolved in favour of the accused. The learned counsel contended that the evidence on record does not point who killed the deceased. It was his submissions that testimony by PW4 and PW5 only centered on what they heard but never saw the accused beat the deceased.

In reference to the evidence by PW3 learned counsel submitted that she denied in cross-examination having seen accused beat up the deceased. Mr. Kamolo further submitted that the investigating officer did not produce the photographs of the scene nor record the statement of PW2's husband to corroborate the piece of the evidence by PW2 as the first ones who arrived at the scene.

According to counsel Mr. Kamolo the prosecution failed to establish a prima facie case to warrant accused to put on his defence. The evidence by the prosecution Mr. Kamolo submitted is not sufficient to sustain the offence of murder against the accused.

In reply Mr. Akula the Senior Prosecution Counsel submitted that the eight (8) witnesses tendered evidence which on scrutiny established a prima facie case against the accused. The Learned Prosecution Counsel invited the court to evaluate the nature of the evidence adduced by PW4 and PW5 neighbours with the deceased and accused person. Learned Counsel Mr. Akula placed reliance on the testimony by PW4 and PW5 because of their presence at the scene and knew both the accused and deceased prior to the incident of murder. Counsel further submitted that the evidence on record establishes that accused and deceased quarreled, thereafter she was beaten by accused who inflicted the fatal injuries.

Learned Counsel Mr. Akula further submitted that the actions by the accused are of a nature that malice aforethought can be inferred from the circumstances of the case. Learned Senior Prosecution Counsel invited the court to have regard the conduct of the accused in the night of 30.7.2013 to the early hours of 31.7.2013. This conduced as presented by the Senior Prosecution Counsel in his submissions was the continuous beating from about 22 hours on 30.7.2913 to the morning of 31.7.2013. That the pleadings made by the deceased to the accused not to beat her reached no attention.The learned prosecution counsel further submitted that the deceased suffered serious multiple injuries to the head as confirmed by PW7 Dr. Okinyi who performed the postmortem.

According to the learned prosecution counsel the circumstances and evidence establishes all the elements of the offence of murder. The evidence by prosecution as provided is sufficient enough to require the accused to be placed on his defence.

The issue to be determined at this stage is whether the accused person has a case to answer or can be put on his defence as provided for under Section 306 (2) of the Criminal Procedure Code. A submission of no case to answer as submitted by the defence counsel will be sufficient if:

> **1. Where there is no evidence to prove any of the essential elements of the offence of murder facing the accused; or**
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> **2. The evidence adduced in support of the charge for the prosecution is so insufficient or unsatisfactory that no reasonable court or tribunal, or jury could safely rely on it.**

As pointed above the contentious issues between the learned prosecution counsel and the defence counsel is whether a finding of a prima facie evidence can be made by this court to warrant accused to be called upon to answer.

At this stage the provisions of Section 306 (1) envisages not a case established beyond reasonable doubt. It's an inquiry in terms of Section 306 whose purposes is to determine whether there is sufficient evidence to prove that accused person committed the offence in question.

The totality of the evidence by the prosecution at the trial has to provide some reliability, cogency and reasonable with a prospect that if no rebuttal is forth coming the person could be convicted of the offence charged.

Under Section 107 (1) of the Evidence Act the burden of proving an accused person guilt in criminal cases rests with the prosecution. The facts as alleged in the indictment as to their existence are to be established by the prosecution. That proof becomes a prima facie evidence constituting the elements of the charge against the accused.

What therefore I will be looking for on consideration of the matter is existence and availability of prima facie evidence referred to by the Senior Prosecution Counsel. The defence counsel has argued that the evidence as it stands does not constitute prima facie evidence to enable the prosecution to proceed further with the trial.

As to what constitutes a prima facie case was explained in a persuasive authority in the case of **Public Prosecutor v Chin Yoke [1940] 9MLJ 47 at 48. Gordon Smith Ag. JA** stated as follows:

> **"One is quite familiar with the course often adopted by counsel for the defence at the close of the case for the prosecution (particularly in a trial with a jury) 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 that it is 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, and the question arises what is a prima facie case? The court went on to adopt the definition in Mozley and Whiteley's Law Dictionary 5th Edition which defines the phrase thus:**
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> **"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 only by rebutting evidence adduced by the other side."**
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> **The court in reference to Section 180 of Malaysian Criminal Procedure Code which has similar provisions with our Section 360 of the Criminal Procedure Code dealing with a determination of a prima facie case went further to state that:**

> **"This follows very closely the actual wording of the sections referred to but it does not follow, in my opinion, that the magistrate or judge must necessarily accept the whole of the evidence for the prosecution as its fact value….There may be good grounds for rejecting some part, 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's conviction. In such case the accused is then called upon to answer the prima facie case which has thus been made out against him if however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no prima facie case has been made out and the accused should not be called on for his defence."**

In our own jurisdiction in the case of **Bhatt v Republic [1957] EA 332** the East African Court of Appeal stated as follows on a prima facie case:

> **"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 suggestion 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."**

I have considered the submissions for a no case to answer by the defence alongside the reply by the Senior Prosecution Counsel counter arguments that the prosecution has led a prima facie evidence to support the charge against the accused. The Senior Prosecution Counsel placed reliance on the testimony of the eight (8) witnesses who testified in support of their case.

It is trite what ingredients of the offence that have to be proved in an offence of murder. In accordance with the legal principles in the persuasive case of **Chin Yoke (Supra)** and the East Africa Court of Appeal in the case of **Bhatt v Republic (Supra),** I agree with the prosecution counsel that a prima facie case has been made out to warrant the accused to be called upon to state his defence.

For the foregoing reasons the accused is hereby called upon to state his case by electing to utilize any of the options under Section 306 (2) of the Criminal Procedure Code.

It is so ordered.

Dated, delivered in open court at Kajiado on 21st day of November, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Applicant – present

Mr. Itaya for Mr. Kamolo for the accused

Mr. Akula for the Director of Public Prosecutions - present

Mr. Mateli Court Assistant