



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CRIMINAL CASE NO.17 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ADAN GODANA GALGALO.....ACCUSED

RULING

The accused person 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 are that on the 14/2/2013 along Loitokitok Outward Bound Centre the accused murdered Henry Irungu hereinafter referred as the deceased. The accused denied the charge. At the trial he was represented by Mr. Tamata and the prosecution was conducted by Mr. Akula, senior prosecution counsel. The prosecution called sixteen (16) witnesses in support of their case.

I have evaluated the evidence in support of the charge and weighed it along the ingredients of the offence of murder. The prosecution is charged with the burden of proof to establish the following:

- (1) The death of the deceased.**
- (2) That it was unlawful for the deceased to be killed.**
- (3) That in causing the death there was malice aforethought.**
- (4) That the accused was identified as the perpetrator of the crime.**

At the close of the prosecution case I have reviewed the evidence by the sixteen witnesses summoned to support the charge against the accused. The stated case commenced with testimony of PW1 Ranger Josephat Wangige and PW2 – Sgt Kasane Ndubi who confirmed issuing the rifle F/N/S.No.1700925 to the accused. Besides the rifle PW1 and PW2 told the court that one magazine, loaded with twenty rounds of ammunition was also issued to the accused as corroborated by the arms movement register. Their evidence was further that when the rifle was recovered from the accused he only accounted for 19 (nineteen) rounds of ammunition instead of the twenty issued.

The next witness was Ranger Lydia Gitonga PW3 a co-worker with the accused at the station. She told the court that she is the one who took over duties from the accused on 14/2/2013. She further testified that at the time of entry the accused was not present to physically sign out in the shift change as its the practice.

It was further the testimony by PW5 Ranger Tobias Kiplimo who testified to the effect that he accompanied the accused to Kilumbero to search for his stolen motorcycle. It was also his testimony that

the search was called off and PW6 Naiyo Ndipo together with PW7 Sgt David Kivuti did pick them from Kulumbero using their station land cruiser. They returned to KWS station Loitokitok where they attended to their normal duties. Later PW1, PW2, PW3, PW5, PW6 and PW7 alluded to commencement of investigations regarding a dead victim who had been shot near their station. At that stage the matter was under active investigations with the police as supported by the testimony of PW15 IP Samburuno.

PW9, Jackson Mwangi, PW10 Leiyan Salash and PW11 – Daniel Irungu Wanjeri who were the first responders to the scene of crime gave evidence on how they found the deceased in pain next to his motorcycle. They told the court that the deceased who was talking seemed to identify the assailant as KWS ranger. Upon realizing this PW9, PW10 and PW11 sort police assistance and having the deceased taken to the hospital the deceased was later to succumb to death from the gunshot wounds. The postmortem report produced in court as exhibit 9 confirmed that the deceased died as a result of penetrating injury (gunshot wound) due to assault.

Mr. Tamata submitted at the close of the prosecution case that the evidence on record has failed to establish a prima facie case against the accused. Learned counsel further submitted that the case for the state is basically based on circumstantial evidence. In furtherance to the submission he cited the Court of Appeal Case of *Abanga alias Onyango v Republic Cr. Appeal No. 32 of 1990* which laid down the requirements to be fulfilled in facts of a case relying on circumstantial evidence. These principles are:

“Such that the circumstances from which an inference of guilt should be drawn must cogently and firmly established

(2) Those circumstances should be of definitive tendency unerringly pointing towards the guilt of the accused person.

(3) The circumstances taken cumulatively should form a chain so complete that there is no room of escape from the conclusion that within human probability, the crime was committed by the accused and no one else.”

Learned counsel relying on this authority submitted and argued that the witnesses who testified against the accused have failed to bring themselves within the scope of circumstantial evidence. He further analysed the prosecution case and came to a conclusion that the elements of the offence under section 203 have not been established to warrant the accused to be placed on his defence.

Mr. Alex Akula, the senior prosecution counsel submitted that the prosecution has discharged the burden of proof to call upon the accused to answer. Counsel further argued that from the evidence of sixteen witnesses the state has proved a prima facie case against the accused and as such he should be placed on his defence. Learned counsel to buttress his arguments referred the court to the following cases: *Libambula v Republic [2003] KLR 683, Abanga alias Onyango v Republic (supra)*.

According to learned counsel for the state there are facts which have emerged which require an explanation from the accused. The conduct of the accused on the night of 14/2/2013 while assigned duties at the KWS sentry gave. His activities and movement on the fateful day while purporting to search for his stolen motorcycle. The fact that the accused was issued with a firearm, a magazine and twenty rounds of ammunition by on surrender to the armoury one round of ammunition was not accounted for. The fact that on the material night the accused seemed to have spotted a motorcycle driving on road outside the KWS gave. Finally if indeed based on the evidence tendered so far used his firearm by firing any ammunition.

It is trite that the burden of making out a prima facie case against the accused person is squarely cast upon the prosecution. The state has therefore the duty to discharge the burden to move these proceedings to a stage where the accused has to be asked to offer his defence under section 306 (2) of the CPC. That is the obvious duty i undertake to perform in evaluating the facts and the evidence to exercise discretion as provided for under the law.

Under section 306 (1) of the CPC at the close of the prosecution case the court is required to scrutinize the evidence to make a finding whether the evidence discloses an offence charged or any other offence as against the accused. What is required is a basis for some positive inference involving wrongful act on the part of the accused as a cause of the deceased death.

In making the finding the court is not applying the standard of proof of beyond reasonable doubt. However the court must be satisfied that there exists a prima facie evidence to warrant accused person be called upon to answer.

I have considered the evidence in its entirety. I am satisfied that the prosecution has made out a prima facie case to warrant accused person to be called to state his defence. As a result section 306 (2) of the CPC explained to the accused.

Dated, signed and delivered in open court at Kajiado on 15/12/2016

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R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Tamata for accused

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant