REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 31 OF 2013

REPUBLIC…….……PROSECUTOR

VERSUS

BERNARD OBUNGA OBUNGA…….....…….ACCUSED

RULING

After calling evidence of seven witnesses, the prosecution closed its case against Bernard Obunga Obunga, the accused, after which submissions were made. Mrs. Gulenywa for the accused submitted that the prosecution has not proved its case beyond reasonable doubt. She urged this court to acquit the accused. She submitted that the accused is alleged to have beaten the deceased using a belt causing him superficial injuries that could not have caused the death. She submitted that the doctor who performed the post mortem did not ascertain what caused the death of the deceased.

The prosecuting counsel Ms Macharia submitted that the prosecution has established a prima facie case and demonstrated that the accused possessed malice aforethought; that he beat the deceased with the belt causing him grievous harm. She asked the court to place the accused on his defence.

The accused is charged with killing Dan Odero contrary to section 203 read with section 204 of the Penal Code on 24th February 2013 at Mwiki, Kayole Division in Nairobi County. I took over this case after two witnesses had testified before Hon. Lady Justice Florence Muchemi who was not able to proceed with the case due to her transfer to another station. I took evidence of five witnesses after the parties agreed to proceed with the case from where it had reached.

At the close of the prosecution case, the trial court must consider the evidence so far tendered by the prosecution to determine whether a prima facie case has been established in order to call upon the accused to defend himself. If no such case has been made out at this station, then the trial court must acquit the accused as provided for under section 306 (1) of the Criminal Procedure Code.

What constitutes a prima facie case is clearly stated in **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335,** where 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……. <u>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</u>" (emphasis mine). See also **<u>Wibiro alias Musa v. R [1960] EA 184</u>**.

Does the evidence in this case reach the threshold set by the above cases? This is what this court intends to determine.

George Owuor Otieno (PW1) received information from one Dorothy Achieng (not a witness) that his nephew Dan Omolo had been found dead near his (Dan's) house. PW1 went to the home of the deceased and found him with injuries on his back and face. PW1 went to Mwiki Police Station where he was informed that the suspect, whom PW1 identified as the accused, was in custody at the Police Station. PW1 did not know who had inflicted the injuries on the deceased.

Patrick Wesonga (PW2) told the court that he arrived at the scene at around 8.00pm and found the accused beating the deceased using a belt (produced in court as exhibit 3). PW2 sought to know why the accused was beating the deceased. He said that the accused held the deceased's head and hit it against the wall. The accused claimed that the deceased had stolen his shirt and long trousers and he wanted him to return them. PW2 testified that the accused caused serious injuries on the deceased on the face and head. PW2 said he told the accused to stop which he did and went to his house in the same compound. On deceased's request PW2 assisted him and took him outside his house. Thereafter PW2 went to his house in the same compound to prepare food and sleep. In the morning he found the deceased at the same place he had left him the previous evening. He was dead. PW2 went to report to the police. He handed the belt to the police and led them to the scene where the body lay. Police collected the body and took it to the mortuary.

Corporal Leonard Ngeiywa (PW3) was the duty officer who received the accused at Mwiki Police Station who was taken their by members of public. He also received a belt from PW2. The other police officers, **PC Robinson Maina (PW5)** and **SS Samuel Gitau (PW6)** attended the post mortem examination and investigated the crime respectively. PW6 also visited the scene and saw the body of the deceased. He called scenes of crime who took photographs. He said the body had injuries on the head and back. He said the injuries on the back were multiple and looked as though a whip had been used to cause those marks.

The remaining two witnesses are the doctors. **Dr. Joseph Maundu (PW4)** examined the accused and found him fit to stand trial while **Dr. Dorothy Njeru (PW7)** conducted the post mortem on the body of the deceased.

The evidence of PW7 is that the body of the deceased had abrasions on the face which she termed superficial. She said that the deceased did not have any internal injuries. PW7 does not mention any injuries on the head and back. She said the injuries were superficial and could not cause death. Her opinion was that the cause of death could not be determined. Because of this finding she took liver, kidney, blood and stomach as samples which she handed to the police to take to the Government Laboratory for examination with the aim of determining toxicology and perhaps cause of death. She told the court on cross examination that she did not receive the report back and did not know what the outcome of the examination was.

The report from the Government analyst produced as exhibit 4 was produced by PW6 with consent from the defence. I have read the report. It did not determine the cause of death. It shows no presence of chemically toxic substances but showed ethanol (alcohol) content equivalent to 6 half liter bottles of beer or 14 tots of whisky. The report does not indicate whether this alcohol level in the blood is fatal or not.

In a murder trial the prosecution bears the onus of proving the case against the accused beyond reasonable doubt. The prosecution must prove that the deceased died; that the accused before the court is the person that caused that death and how that death was caused and that the accused intended to cause that death.

Where malice aforethought is lacking, the offence committed becomes manslaughter and not murder.

Before me, there is evidence showing that the deceased died. The cause of that death has not been determined. PW7 was categorical that the abrasions on deceased's face were superficial and could not cause death. PW7 did not find any other injuries, not even the back injuries described by PW6 as resembling whip marks. She did not find head injuries that PW2 as having resulted from the deceased's head being hit against the wall by the accused. PW2 described the injuries inflicted on the deceased by the accused as serious ones. These injuries were not seen by PW7 during post mortem that was conducted five days after.

If I may summarize the evidence of the prosecution: it shows that the accused beat the deceased using a belt; the deceased sustained injuries on his face and may be on his back and head (evidence does not agree on this); he later dies; a post mortem examination fails to determine what caused his death and obviously not the injuries alleged to have been inflicted by the accused; his liver, kidney, stomach and blood are examined and found to contain ethanol and no chemical toxins; the analyst does not go as far as determining if the alcohol content was lethal and the matter ends there!

What is obvious is that the beating of the deceased by the accused is not the cause of death. This is so because this court must be guided by the evidence adduced before it. That evidence, specifically the expert opinion of the doctor PW7, is clear that the injuries could not have caused the death. The alcohol content in the deceased's blood has not been identified as the cause of death and even if this were so, the accused is not involved because there is no evidence to show he was.

A court of law must work with the tools provided. The tools provided to this court (the available evidence) are incapable of assisting this court to make a finding that the case for the prosecution warrants the accused to be put on his defence. The law protects the accused and at this stage of the trial the court does not expect any other evidence apart from the accused if he were to be placed on his defence. As stated in the **Ramanlal** case above, the defence cannot be expected to fill in the gaps for the prosecution. In my considered view the evidence tendered at the close of the prosecution case is very weak and no matter how one views it, it cannot be relied on to base a conviction on if no evidence is offered by the defence. The prosecution has failed to establish a prima facie case in terms expressed in the **Ramanlal** case and this court, which by any standards is a reasonable court, properly directing its mind to the law and the evidence cannot convict on this evidence if the accused opts to remain silent given that there is no further evidence expected from the prosecution.

I think I have said enough to demonstrate that the evidence is weak and does not establish a prima facie case requiring having the accused called upon to defend himself. I find I have no alternative but to acquit the accused Bernard Obunga Obunga, at this stage of the trial for having no case to answer which I hereby do. I make orders accordingly.

Dated, signed and delivered this 20th day of April 2015 in the presence of:

Miss Ikol for State

Mrs Gulenywa for accused

Accused - Bernard Obunga Obunga

S. N. Mutuku

Judge