



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO.7 OF 2007

REPUBLICPROSECUTOR

VERSUS

JACOB MBUNJIRO MUKHWANA.....ACCUSED

RULING

1. The accused herein is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the 18th day of January 2008 at Shihungala village, Mundeku sub location Kisa Central location, Kisa West division Butere district within Western province JACOB MBUNJIRO MUKHWANA murdered WELLINGTON OCHILO MUKHWANA.
2. On the 03/02/2015 the Prosecution closed its case after calling six (6) witnesses. The Advocates for the accused M/s E.M. MASHETI & CO. ADVOCATES filed written submissions on the 24/09/2013. In their submissions they claimed that the Prosecution had failed to establish a prima facie case to warrant putting the accused person on his defence and that the evidence adduced lacks credibility and was insufficient.
3. It was further submitted that the accused did not have any intention (*mens rea*) of killing the deceased and that it was the deceased who attacked the accused first while armed with an axe and a panga. They also submitted that PW1 was not in a position to see what was happening between the deceased and the accused as she was 100 metres from the scene. It was also submitted that her evidence was contradictory which clearly and tactically concealed material information.
4. The Defence also maintained that the evidence by PW6, the Investigating officer contradicted that of PW1 and PW4 on the number of cuts the deceased had. They also contented that the investigations by PW6 were shallow and a sham and therefore not sufficient. They also submitted that the evidence of PW5 is full of hearsay and contradicts itself as he has said that the deceased was known as RODGERS OCHILLO MUKHWANA and not WELLINGTON OCHILLO MUKHWANA.
5. The Defence cited two authorities to support their submissions herein. This Court is required under Section 306 (1) of the Criminal Procedure Code (Cap 75) to determine whether the accused has a case to answer. A prima facie case is one where if the accused keeps quiet, the evidence of the Prosecution should be such that a conviction will result. The standard of proof required for establishing a prima facie case was laid down in the celebrated case of **BHATT -VS- R [1957] E.A 332** as follows:

“i) The onus is on the Prosecution to prove its case beyond

Reasonable doubt and a prima facie case is not made out if at the close of the Prosecution, the

case is merely one which on full consideration must possibly be thought sufficient to sustain a conviction.

ii) The question where there is a case to answer cannot depend only on whether there is 'some' evidence irrespective of its credibility or weight sufficient to put the accused on his defence."

6. It was also held that a mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. In

R –VS- JAGJIVAN M. PATEL and OTHERS 1TLR, 85 the learned Judge said:

“All the Court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence. It may be a strong case or it may be a weak case. The Court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether if believed, it is weighty enough to prove the case conclusively beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion in a border line case where the Court though not satisfied as to conclusiveness of the Prosecution evidence is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion.”

7. PW1 testified that on the 18/01/2009 she saw the accused strike the deceased with a panga which led to the deceased's death. The post mortem was done by DR. SAFFORD OCHANGO and PW4 produced the post mortem report which was marked as PExhibit 1. PW2 the village elder of Shihungala village was told that the deceased had been cut by the accused. PW2 assisted in apprehending the accused. PW2 also attended the post mortem examination at Butere district hospital on 19/1/2009 and identified the deceased's body whereas PW6 investigated the case. PW5 assisted the deceased and took him to the hospital.
8. In view of the evidence placed before me by the Prosecution, I am satisfied that the Prosecution has established a prima face case requiring the accused person to be put on his defence. I proceed to put the accused on his defence pursuant to Section 306 (2) of the Criminal Procedure Code.
9. The accused may give sworn or unsworn evidence or elect to remain silent and let the Court decide the case on the evidence that is before it. If he gives sworn evidence, he is liable to be asked questions both by the Prosecution and the Court. If he gives unsworn evidence, no questions will be put to him. In each case, the accused person is at liberty to call witnesses.
10. I now call upon the accused person, either directly or through his Counsel to indicate how he intends to proceed with his defence.
11. Orders accordingly.

Ruling delivered, dated and signed in open Court this 27th day
of October 2015.

RUTH N. SITATI

J U D G E

In the presence of:

.....for State

.....for Accused

.....Court Assistant

