



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO 7 OF 2012

FORMERLY NAIROBI HIGH COURT CRIMINAL CASE NO 63 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

HASSAN MOHAMUD OSMAN.....ACCUSED

RULING

Hassan Mohamud Osman, the accused, was arraigned in Court to answer charges of murder on 19th September 2011. This was in the High Court of Kenya at Nairobi. On 1st February 2012 the file was transferred to Garissa High Court for trial. The trial began on 9th July 2012. Two witnesses testified, Omar Suyan Hassan, PW1 and No. 218209 Senior Sergeant Hassan Lohas, PW2. On 2nd October 2012 a third witness testified, No. 230245 Superintendent Lawrence Nthiwa, PW3, a firearm examiner. From October 2012 to 25th July 2013, there has been no witness in court. There are numerous applications by the prosecution for adjournments on account of lack of witnesses, either because they cannot be traced or have been relocated to other parts of the world. This case is not unique in respect to the many applications for adjournment. Similar cases, mostly originating from the Refugee Camps or remote areas of this region, have faced similar fate. On 25th July 2013 this court brought this game to an end and disallowed further adjournment necessitating the prosecution to close its case. It is only people who have worked in this region who can appreciate the frustration faced by courts and the prosecution in handling cases where tracing and bonding witnesses is not a priority to the officers mandated to do so, either because of the circumstances under which such officers work or by reason of sheer negligence and laxity on their part. Justice is elusive to many in this region because the courts can do so much and require facilitation from other stakeholders in the administration of justice sector in order to deliver justice.

It is alleged that the accused murdered Abdirizak Mohamed Abdi, deceased, on 19th August 2011 at Ifo Refugee Camp. He denied committing this offence. The prosecutor called three witnesses in support of the case. At this stage this court is mandated to make a finding whether the evidence on record establishes a strong case to require the accused person to give a defence in his favour. To make that finding, this court must examine what materials have been placed before it. It is the evidence of the three witnesses which will give the court the answers it is seeking.

PW1 was in company of the deceased on 19th August 2011. The time was 11am on a Friday and people were going for prayers. It is the testimony of PW1 that people were gathered in groups chatting before going into the mosque for prayers. He was standing next to the deceased talking to him. PW1 had his hand on the deceased's shoulder listening to the deceased telling them a story. PW1 was to state on cross examination that the deceased was telling them of a certain man from a certain tribe who had threatened his life. PW1 testified that an assailant, a tall man, whose head was covered with what PW1 called

Muslim headgear approached them from his (PW1) behind. The person was described by PW1 as wearing blue jeans and a red T-shirt. He shot the deceased twice and walked away holding his pistol. His evidence is that the deceased shouted to the people to arrest the assailant but no one did it because of fear. The deceased was taken to hospital but he died.

PW2 arrested the accused. He testified that the accused was identified to him by one Mohamed Olow who was one of the people who had gathered at the side of the road. This was on 19th August 2011 around 3pm. At the time PW2 was on escort duties and on reaching Hagadera Refugee Camp he was stopped by members of public and told of an assailant who had killed someone at Ifo Camp and escaped to Hagadera Camp. PW2 testified that he found the accused in a block that had been burned down. PW2 said the accused was wearing a *Kikoi* and dotted shirt and had a Somali turban on his head.

PW3 testified on behalf of Chief Inspector Hassan Maningo who was not available. PW3's evidence was in respect of firearm examination. He said that Chief Inspector Hassan Maningo had examined on 23rd August 2011 two spent cartridges submitted to him by one Corporal Bashir of Dadaab. He was required to determine if the two exhibits were firearms under the Firearms Act. It was confirmed that the two exhibits were ammunition of 7.62 caliber and both had been fired from the same gun. These could either be used in a Tokarev pistol or a machine gun.

In **Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335**, the court stated, *inter alia*, that:

“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.”

PW1 was emphatic that he was not able to identify the person who shot the deceased. The learned State Counsel attempted to have PW1 identify the accused on the dock but PW1 said he was not able to do so because he did not see the face of the assailant. The defence counsel also told PW1 to look around the courtroom to see if he is able to identify the person who shot the deceased. PW1 did so and told the court that he could not identify anyone.

PW2 was shown the accused by Mohamed who did not testify to tell the court how he was able to identify the accused as the person who shot the deceased. PW2 told the court that after he arrested the accused, members of public became hostile and started stoning the police. There is no evidence as to why the public behaved the way they did. PW2 denied on cross examination that it is not because he had arrested an innocent man.

PW3 did not tell the court where the spent cartridges, Exhibit '1' and '2', were recovered from and who had recovered them. He did not tell the court whether the exhibits were connected to the shooting of the deceased.

The burden of proving a criminal case lies with the prosecution and never shifts to the accused unless where the law specifically provides the same. Even where the court calls upon an accused person to testify in his defence, it is not so as to prove himself innocent. Courts do so with a view to allowing an accused person to have his day in court and perhaps adduce evidence that may rebut the prosecution evidence and raise the much valuable doubt. Even in cases where the defence of insanity or other statutory defence available to an accused person exists the accused is only required to prove such defence on a balance of probability and not beyond reasonable doubt.

The accused was not identified as the person who shot the deceased. There is no other evidence that can lead this court to find the accused implicated in the fatal shooting of the deceased. There are no circumstances that can be said, even remotely, that the accused shot the deceased. In shot there is no direct or circumstantial evidence pointing to the accused as the person who shot the deceased. For this court to put the accused on his defence would only 'eat' into valuable judicial time for this court in the long run to come up with a not guilty verdict.

In R. v. Jagjiwan M. Patel and Others (1) T.L.R. (R) 85 the court stated that:

“.....all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his 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 the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.”

The above statement cannot be said to obtain in this case. There is no case made out against the accused that can be said to fit the description of the statement cited above. It is the finding of this court therefore that the accused has not case to answer. The prosecution has failed to establish a prima facie case for this court to call upon the accused to testify in defence of the allegations. It is my duty to acquit the accused person at this stage order his immediate release from custody forthwith unless he is otherwise lawfully held which I hereby do. I make orders accordingly.

S.N. MUTUKU

JUDGE

Dated, signed and delivered this 18th day of September 2013 in open court.