



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 7 OF 2020 [MURDER]

STATE.....PROSECUTION

VERSUS

MICHAEL WAHANDA ABIDHA.....1ST ACCUSED

BONIFACE OTIENO.....2ND ACCUSED

NICHOLAS OWAGA WAHANDA.....3RD ACCUSED

KELVIN OTIENO OGEJO.....4TH ACCUSED

KELVIN OTIENO ONJIKO.....5TH ACCUSED

RULING ON CASE TO ANSWER

1. The five accused persons herein are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the offence are that on or about the 27th and 28th February 2020 at Wichlum, Sakwa location within Siaya County the accused persons murdered one **Jackton Odhiambo Ojuok**. The accused persons pleaded not guilty to the charge. The prosecution called a total of ten (10) witnesses in a bid to establish a prima facie case against the accused persons.

2. Under Sections 107-112 of the Evidence Act, the burden of proof lies on he who alleges. In criminal cases, the burden of proof lies with the prosecution throughout the trial and does not shift. In addition, the standard of proof in criminal cases is one beyond reasonable doubt.

3. However, the question that must be answered at this stage is not whether the prosecution has proved its case against the five accused persons or any one of them beyond reasonable doubt, but whether a prima facie case has been established against the five or any of the accused persons herein. A prima facie case is however not necessarily one that must succeed.

4. At the close of the prosecution case, counsel for the accused persons, except the 2nd, 3rd and 5th accused person have filed written submissions urging this court to find that the accused persons have no case to answer and acquit them. I have carefully considered the said submissions.

5. Section 306 of the Criminal Procedure Code provides:

“(1) 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 recording a finding of not guilty.

“(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 on his own behalf or make unsworn statement and to call witnesses in his defence.....”

6. The test of prima facie case has been settled in the case of **Bhatt –v- R (1957) E. A 332**. This was cited with approval in the case of **Republic v Benson Ochieng Oyungi [2016] eKLR** where the Court held:

“A definition as to what amounts to a prima facie case was given in the case of Bhatt –vs- R [1957] EA 332. In that case the Court of Appeal expressed itself on this issue:

“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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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. It is true as Wilson J said that the Court is not required at that stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively: That determination can only properly be made when the case for the defence has been heard. 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.”

7. At this stage of the proceedings, the standard applicable on whether a prima facie case has been made out is lower than the standard of beyond reasonable doubt which applies at the conclusion of the full trial after an accused person has been heard. The strength of the evidence establishing a prima facie case must be the sort of evidence upon whose strength the Court could convict if the defence says nothing to rebut such evidence. However, as earlier stated, a prima facie case is not necessarily one that must succeed.

8. In the instant case, I have evaluated the testimony of each of the ten (10) witnesses called by the prosecution, against the charge of murder facing the accused persons and as earlier stated, the standard of proof required at this stage is not that of beyond reasonable doubt as the court has not had the advantage of the defence case.

9. The court must however be cautious not to delve into the depths of the evidence adduced and the merits of that evidence as that would prejudice the accused persons should the court be of the view that the accused persons be placed on their defence.

10. The evidence presented by the prosecution implicates the 1st, 2nd, 3rd, 4th and 5th accused persons with the planning and execution of a killing which was aimed at eliminating PW7, the brother to PW5 and who had a land dispute with the 1st accused but in the process, as the 2nd, 3rd, 4th and 5th accused persons in the company of PW1 went to execute the task of eliminating PW7, they were prevented by security lights and barking dogs at the home of PW7 so the four accused persons retreated and decided to go to the home of PW5 where they attracted a watchful watchman and in the process, the deceased watchman was killed.

11. The 1st accused was mentioned by PW1 on the basis that it was he who had sold land to PW7, in which land gold deposits were found and thus necessitating the land disputes between the family of the 1st accused and PW7. PW1 testified that it is at the 1st accused’s residence that the other co-accused congregated and had lunch as they prepared to proceed on the arranged mission. From the evidence placed before this court as a whole, I am satisfied that the test of a prima facie case has been met by the prosecution to warrant the 1st, 2nd, 3rd, 4th and 5th accused persons to be called upon to answer to the Information of Murder. It is also my finding that whereas there is no evidence that the 1st accused was at the scene of the alleged murder and therefore he did not strike the deceased, prima facie, Section 20 (1) of the Penal Code would apply. **Section 20 (1) of the Penal Code** states:-

“20. Principal offenders

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence;

and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.”

12. The upshot of all these is that the 1st, 2nd, 3rd, 4th and 5th accused persons are hereby found with a case to answer and are all placed on their defence as stipulated in section 306(2) as read together with section 307 of the Criminal Procedure Code. Section 306(2) and Article 50 (2) (i) (j) and (k) of the Constitution are hereby complied with.

13. Orders accordingly.

Dated, Signed and Delivered at Siaya this 1st Day of March, 2021

R.E. ABURILI

JUDGE

In the presence of:

All accused persons and their counsel

Mr. Kakoi Principal Prosecution Counsel

CA: Modestar and Mboya