REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: D. K. Kemei - J)

CRIMINAL CASE NO. 2 OF 2018

REPUBLIC.....STATE

VERSUS

GEORGE KITHINZI MUSYOKA....ACCUSED

RULING

1. The accused herein **George Kithinzi Musyoka** is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The particulars of the offence are that on 7th January 2017 at Katangini village in Matungulu Sub-County within Machakos County, he murdered **Samuel Mbithi Mukosi**.

2. The prosecution called four witnesses in support of its case. The prosecution was represented by Mr. Machogu and later Mr. Mwongera while the defence is represented by Mr. Kituku.

3. The hearing started in earnest on 17/1/2019. **Mary Mwanzia (PW1)** testified that on 8th January 2017, a few minutes to 7.00 am, the accused herein who is an in-law informed her that the deceased had attacked him with a stone. She stated that the accused informed her that he had met the deceased at Kona place. She further testified that the deceased arrived at 10.00 a.m. and saw that he had some injuries on his body and who informed her that the accused had waylaid and attacked him. She testified that she confronted the accused person who implicated one Bamua. She added that the deceased was taken to Kangundo District hospital for treatment and later Kenyatta National Hospital where he passed on. In cross-examination, she stated that her son informed her that the deceased and accused person had been drinking together at Katangi. According to her, the accused person had informed her that the deceased had wanted to kill him. She denied being present in hospital and further stated that she did not witness the incident.

4. Cosmas Mukosi Mbithi (PW2) stated that he received a call while in Nairobi from PW1 that the deceased who was his son was sick. He stated that the deceased died before he could see him. He also stated that he witnessed the post mortem examination and he identified the post mortem examination report shown to him in court. On cross examination, he stated that the deceased and accused had been in good talking terms prior to the incident.

5. Daniel Musau Mwanzia (PW3) testified that on 8th January 2017, the deceased informed him that he had been hit by the accused person with a stone on the head. He testified that he organized for him to be taken to hospital at Kangundo but did not accompany him to Kenyatta National Hospital where he died. On cross examination, he confirmed that both the deceased and the accused had been on good terms.

6. Makau Mbithi (PW4) stated that he received a report from the accused person that he had been assaulted by one William Mbithi a son of Mukosi, PW4's brother. He stated that William Mbithi is the deceased herein. He stated that he visited the deceased in his room and found that he had injuries on his body and that he organized for his treatment. On cross examination, he stated that the deceased and the accused lived peacefully prior to the incident. He also stated that he could not tell how the alleged fight took place.

7. The prosecution closed its case. Parties were directed to file and exchange written submissions on whether a prima facie case had been made out by the prosecution. It is only the defence counsel who filed submissions.

8. Mr. Kituku, counsel for the accused vide his written submissions dated 26th May 2021, submitted that the case against the accused person had not been proved beyond reasonable doubt on the grounds that the doctor and investigating officer were never called to testify; the date when murder was committed was 7th January 2017 as per the charge sheet and not 9th January 2017 as stated by witnesses; no single exhibit was produced to corroborate the witnesses' statements or prove death and that the cause of death is unknown. It was finally submitted that the evidence adduced is not sufficient to prove the charge of murder beyond reasonable doubt and hence the accused should be acquitted.

9. At this juncture the court is being called upon to establish whether a prima facie case has been established by the prosecution against the accused herein that would warrant the court to call upon him to answer to the charge of murder. The court's duty at this point is provided for under section 306(1) and (2) of the Criminal Procedure Code.

10. In the case of ***Republic vs. Abdi Ibrahim Owl [2013] eKLR*** a '***Prima facie'*** case was defined as follows: -

> **"Prima facie" is a Latin word defined by Black's Law Dictionary, 8th Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "Prima facie case" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption". To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, 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…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."**

11. PW.1 testified that both the accused person and deceased informed her that they had attacked each other. PW1 was informed by Samuel that the deceased and accused person had been drinking together. PW3 stated that the deceased informed him that the accused had hit him with a stone on the head. None of the witnesses gave evidence that they witnessed the incident.

12. The evidence adduced by the prosecution witnesses is circumstantial since none witnessed the incident. Both the accused person and deceased claimed to have hit each other with a stone. It was a case of one against the other. The accused implicated one Bamua in the murder of the deceased. The police seem not to have pursued that line of investigations so as to leave no doubt that it was none other than the accused who is responsible for the death of the deceased.

13. Counsel for the accused person faults the prosecution for not availing the doctor and investigating officer to testify. Further that the exhibits were not produced to buttress the prosecution witnesses' evidence. It transpired from the evidence that the deceased and the accused had fought leading to injuries sustained by both of them. In my view the prosecution witnesses have not sufficiently placed the accused person at the scene of crime as the main suspect in the murder of the deceased. Most of the witnesses claimed that the accused informed them that the deceased had attacked him and it would thus appear that the prosecution wishes that the accused offers an explanation regarding the alleged fight via his defence. It has been held that a prima facie case is not one that must succeed but one that requires an explanation from the defence. Suffice to add that at this stage the court is yet to get the benefit of the defence evidence so as to determine the guilt or otherwise of the accused.

14. ***Odunga J*** was of the above view in ***Republic v Robert Zippor Nzilu [2020] eKLR*** when he held that:-

> **"Whereas upon consideration of the totality of the evidence at the end of the trial, the court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a prima facie case has not been made out. As has been said time and again a prima facie case does not necessarily mean a case which must succeed. In other words, despite finding that a prima facie case has been made out, the Court is not necessarily bound to convict the accused if the accused decides to maintain his silence. At the conclusion the Court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a prima facie case for the purpose of a case to answer."**

15. However, I am of a different in that it is noted that none of the prosecution witnesses had witnessed the incident as all they have stated merely dwelt on hearsay. Further, the deceased did not make a dying declaration to any of the witnesses at his bed before he breathed his last. Even though the accused happened to have been the last person seen in company of the deceased, the failure by the prosecution to call the doctor who conducted the post mortem as well as the investigating officer weakened the prosecution's case. The evidence of the doctor was crucial to establish the cause of death and to produce the post mortem report while the investigating officer could have given the extent of investigations pointing to the accused as the likely suspect behind the death of the deceased. It is trite law that a prima facie case is established when the evidence adduced is such that a reasonable tribunal properly directing its mind to the law and evidence would convict the accused if no evidence or explanation was set up by the defence. (See the case of **Ramanlal T. Bhatt V. R [1957] EA 332** where the East African Court of Appeal held that a prima facie case could not be established by a mere scintilla of evidence or by any amount of worthless discredited prosecution evidence).

Also in the case of **State Vs Rajinath Ramadhan, Amoy Chin Shue Sunnil Ramadhan and Rabindranath Thampaul H.C.A No. S 104/1997** J P Moosali while quoting Lord Parker CJ in Sanjit Chaittal Vs the State [1985] 39 WLR 925 stated as follows;

> **"A submission that there is no case to answer may be properly made and upheld;**
>
> **a. Where there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence.**
>
> **b. When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it.''**

16. Looking at the entire evidence presented by the prosecution, I find that the same is not sufficient to sustain a conviction against the accused were he to elect to remain silent in defence. Hence, putting the accused on his defence will amount to requiring him to fill gaps in the prosecution's case yet the burden of proof is always upon the prosecution to discharge. I am satisfied that the evidence availed does not meet the threshold of a prima facie case to require the accused to be called upon to make a defence.

17. In light of the foregoing observations, I find that the prosecution has not established a prima facie case against the accused herein to require him to make a defence. Consequently, I find that the accused has no case to answer for the charge of murder and is hereby acquitted therefor. He is ordered to be set at liberty forthwith unless otherwise lawfully held.

It so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 6TH DAY OF JULY, 2021

D. K. KEMEI

JUDGE