REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL CASE NO. 02 OF 2015

REPUBLIC..... PROSECUTOR

VERSUS

DAVIS MURIUKI KINYUA.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Gekanana advocate for the accused person

R U L I N G

The accused person **Davis Muriuki Kinyua**, is herein facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. In relation to the charge, the state alleges that on the 21.6.2015 at Witu Police Station, the accused murdered **Joseph Mwita Rioba**. The accused who is being represented by Learned counsel **Mr. Gekanana** pleaded not guilty to the charge. By this plea of not guilty, it placed the task of proving the charge upon the prosecution by calling the necessary evidence to disapprove the innocence of the accused.

Regarding the latter obligation, **Mr. Mwangi** for the state had the evidence of the prosecution case. The burden of proof which rest with the prosecution throughout the trial requires proof of the following elements beyond reasonable doubt in order for conviction and Judgment for the offence to be obtained against the accused person that is:

(a). The death of the deceased.

(b). That his death was unlawfully caused.

(c). That in causing death the accused was actuated with malice aforethought.

(d). That the accused in Court through direct or indirect evidence was the one who committed the crime.

At this initial trial to discharge that burden, the following witnesses gave evidence to proof the element of the offence: (**PW1) Masudi Sabur** testified that on 21.5.2015 he was working as a gardener at Witu Police Station. On that particular day, he happened to be at the police canteen in company of the accused. In the course of time, they were joined by the deceased who came from the neighbourhood. It is at that moment accused person who was armed with a G3 rifle ordered the deceased person to stop, but he could not hold to that order of the accused without any further conversation, the deceased entered the reception desk and started to make entries in the occurrence book. With that conduct of the deceased, accused demanded to know from him whether he was the only man. The witness stated that thereafter, he

heard gun shots apparently targeted at the deceased who was rendered motionless. That is when **(PW1)** saw the deceased bleeding from the stomach and lay on the ground unconscious. As for **(PW1)** he saw the accused holding the gun and it is at that moment he must have shot at the deceased.

It was also the evidence of **(PW2) – Esau Baraza** to the effect that on 21.6.2015 he happened to have visited his father at Witu Police Station canteen. According to **(PW2),** the accused asked for a bottle of Tusker beer but before finishing the drink the deceased entered into the canteen. That is when he heard the accused calling for the deceased three times but unfortunately there was no response. The deceased walked straight to the room known as the occurrence book. The accused followed him immediately to that occurrence book room. In the testimony of **(PW2),** all he could hear immediately was a gun shot. Having heard so, on observation **(PW2),** the deceased body lying on the ground. It followed from that incident the accused dropped the gun down and one **Major Mary** effected an arrest of the accused.

(PW3) – Mathew Baraza, who runs the canteen where the incident occurred testified that on 21.6.2015 he sold guiness beer to the accused. As he served him with the drink, he observed that his face was swollen. On inquiry, **(PW3)** told the Court that accused informed him that the deceased had inflicted the injury with a bottle. According to **(PW3),** he left the can beer and in a little while he was informed that a police officer has been killed. He decided to return back to that scene where he saw streams of blood at the occurrence book area but the deceased body had been carried away.

(PW4) – No. 577950 Sgt. Stephen Meli a police officer attached to Witu Police Station testified and recalled that on 21.6.2015 he left the deceased at the report office. While **(PW4)** reached at the gate he saw the accused armed with a gun running away followed by another person's voice ordering him to stop with an explanation that he has killed someone. In a quick action **(PW4)** testified that he effected an arrest upon the accused and took him back to the report office. He repossessed the gun from the accused which he identified as **G3 Serial Number 96083455.**

Further **(PW4)** stated in Court that he was the officer who issued the gun with sixty (60) rounds and three magazines. However, at the time of arrest, the accused had in possession only nineteen (19) rounds of ammunition with one magazine. He produced the arms movement register as **Exhibit – 2.**

(PW5) – NO. 63790 Cpl. John Wambua a gazette scenes of crime officer gave evidence on the documentation of the scene at Witu Police Station. As part of his duties he went to Malindi Hospital Mortuary where he was able to take photographs of the deceased marked as **MFI – 3** and admitted as a set representing various views of the body marked as **Exhibit 3 (i) – (vii)** respectively.

(PW6) – Patrick Kimathi a businessmen based at Witu testified that on 21.6.2015 he was at Witu Police Station in his pub on that particular day he had customers in attendance whom he identified as the accused and the deceased. According to **(PW6)** in the course of their drinking he witnessed a quarrel had ensued between them but the other police officers in the pub continued drinking. As the quarrel escalated **(PW6)** decided to go to their table where he inquired why the heated arguments. That is when he heard the accused call the deceased *'Kihii'* in Kikuyu meaning an uncircumcised man. That upshot the deceased in retaliation **(PW6)** saw the deceased pour contents of beer on the accused's head. That provoked a physical fight but the other police officers intervened and stopped the conflict. That fight occasioned an injury to the accused but at the same time both of them left the pub.

At around 6 a.m. **(PW6)** received information that the deceased had been killed by the accused person.

(PW7) – No. 85949 PC. Peter Muchai a police officer attached to DCI office Witu told the Court that on 21.6.2015 while in his house he heard gun shots. He peeped through his window and saw **Cpl. Golompo** running towards the police canteen while the accused was also running away from the direction of the canteen armed with his G3 rifle. It was **(PW7)** testimony that he rushed to the scene where he assisted to rush the deceased to Mpeketoni Sub-County Hospital where he was

declared dead.

(PW8) – Dr. Gombe Ramadhan, a medical officer based at Malindi Hospital gave evidence with regard to the postmortem examination report on behalf of **Dr. Stephen Chireah.** The ample evidence deduced from (PW8) testimony was to the effect that the deceased was found to have sustained extensive injuries to the digestive system which ruptured the lower part of the stomach, with complete detachment of the intestines. It followed therefore that the pathologist opined that the deceased death was due to cardiopulmonary arrest secondary to penetrating abdominal injury with severe hemorrhage. The postmortem examination report was admitted as part of the documentary evidence in support of the charge.

(PW9) – George Ogunda testified as a principal chemist based at Mombasa government laboratory. His evidence was an analysis of the exhibits forwarded to him by **Cpl. Kenneth Ngeiywa** namely: - deceased blood swab, shirt, vest, blood swab from accused hair follicles, blood swab, finger nail and his T-shirt. In his testimony **(PW9)** subjected the exhibits to forensic analysts which generated the following DNA profile to the effect that the shirt, vest of the deceased and blood swab from the scene respectively marked the DNA profile of the deceased whereas the accused T-shirt matched the profile generated from the reference blood swab of the accused. The analyst report was admitted in evidence as **Exhibit 6**.

(PW10) No. 231710 Alex Chirchir, testified as the ballistic expert with knowledge and experience on firearm and ammunition examinations. His evidence found on the G3 rifle exhibit recovered from the accused, one fired cartridge, one rifle bullet and nineteen (19) rounds of ammunition. In his examination, **(PW10)** concluded that the G3 rifle and ammunitions were in good working conditions capable of firing and being fired within the definition of the Firearms Act Cap 114 of the Laws of Kenya.

(PW11) – No. 78778 Sgt. Kenneth Ngeiywa formerly of Mpeketoni Police Station testified that he received a report on the murder incident involving the deceased. He visited the scene at Witu, recorded witness statements, recovered the exhibits, G3 rifle, magazine, cartridge, allegedly relevant to the occurrence of the crime. In the course of investigations, he forwarded the ammunitions, cartridge, and G3 rifle to the ballistic examiner. The body of the deceased was also subjected to a postmortem examination at Malindi Hospital Mortuary. **(PW11)** explained that on evaluation of the evidence he recommended a charge of murder be preferred against the accused person.

At the close of the prosecution case, both counsels filed brief skeleton written submissions on the matters ensuing on the charge. The duty of this Court is to rule whether the prosecution so far has discharged the burden of proof in terms of Section 306 of the Criminal Procedure Code to warrant accused persons to be placed on his defence.

Determination

The relevant statutory provision in making a determination of whether the prosecution has made out a *primafacie case* or whether the defence is entitled to a motion of no case to answer is provided for under Section 306 of the Criminal Procedure Code.

The analogy of the provisions is that if the close of the evidence in support of the charge. It appears to the Court that the prosecution has availed sufficient evidence to prove the elements of the offence, then a *primafacie case* exists against the accused to be called upon to answer in rebuttal; whereas on the other hand if at the close of the prosecution case, there is not sufficient evidence to establish any of the elements, the Court will be required to discharge the accused of the charge or and have him acquitted all together.

The test on the applications of these two phrases *primafacie* and a no case to answer was explicitly stated by **Niki Tobi JCA in Onagoruwa v State {1993} 7 NWLR C49** where he stated as follows:

"The overall burden of proof in criminal cases is beyond reasonable doubt whereas the burden at the level of invoking existence of a primafacie case is not as high as at the final closure of the entire evidence. The Judge went on to state that the terms no case submission and primafacie go together in the administration of criminal justice. They do not however go together like Siamese twins. As a matter of Law, there is no blood relationship between them. They are rather enemies, fighting each other in opposing directions, with a view to devouring each other. They are enemies perpetually at war with each other. They never see eye to eye. They speak two different and distinct languages in opposition of each other. As a matter of Law and fact, two different persons in the criminal justice system are involved in calling the Court's attention to them while the accused person submits to the Court that he has no case to answer, the prosecution makes the contrary submission that a primafacie case is made out against the accused and that he should be called upon to make his defence. Hence the suggestion is that whereas no case submission is a weapon of defence, primafacie case is a weapon of attack."

Lord Parker C. J. Practice directions held interalia as follows on this issue:

"For a person to be convicted of a criminal offence, the prosecution must prove their case beyond reasonable doubt. This degree of proof, is however, not required where a submission of no case has been made because justice at the stage, as a rule, only heard the prosecution case."

Similarly, in **Abacha v State {2002} 7 SC at 12**, The Court observed that:

"For the Court to dispassionately attend and rule on the two twin issues, the best way to do this is to read all the dispositions made by the potential witnesses and accused persons so as to find if there is a prima facie case for the accused to answer."

Essentially, a *primafacie case* is an early screening of the evidence at the close of the prosecution case to determine whether the prosecution can proceed to call upon the accused to offer his defence. In this regard all what is required of the prosecution is credible evidence in support of each element of the same preferred in the information against the accused person. The burden of rebutting the *primafacie case* this made out by the prosecution shifts upon the person charged with the criminal offence. Notwithstanding that legal position, there is no attempt in Law to shift the burden of proof to the accused person. As **Roger Salhany in Comba {1938} 70 CCC 205** and in **Walker {1939} 71 CCC SCC** observed:

"If the Judge is satisfied, as a matter of Law, that the crown has failed to establish a primafacie case, he or she must direct the jury to return a verdict of not guilty, if the Judge is the trier of fact, he or she must acquit the accused. The Judge must rule immediately on the question of whether there is a primafacie case. It is improper for the Judge to reserve his or her decision and put the accused to his or her election as to whether the accused intends to call evidence." **(See Seamans {1978} 41 CCC 2d 446 CA).**

In the instant case, the prosecution to proof culpability of the accused person summoned the eleven witnesses to support each of the elements of murder as premised under Section 203 of the Penal Code. The defence counsel **Mr. Gekanana** argued and submitted for a no case to answer while **Mr. Mwangi,** the prosecution counsel canvassed and urged the Court to find existence of a *primafacie case* for the accused to be placed on his defence.

In this regard, I have had the advantage of reviewing and evaluating the evidence on record as well as the principles governing the threshold of the twin issues of a *primafacie case* and a motion of no case to answer as outlined in Section 306 of the Criminal Procedure Code. It is my Judgment that the prosecution has laid down sufficient evidence against the accused to warrant him to be put on his defence. This is to point out that the submission of no case to answer by Learned counsel **Mr. Gekanana** for the accused fails.

This finding is in line with the principles elucidated above and also as set out in **R. T. Bhatt v R {1957} EA 332**; with a rider that

"a primafacie case does not mean a case proved beyond any reasonable doubt since at this stage, the Court has not heard the evidence for the defence." **(See Uganda v Mulwo Aramathan CR Case No. 103 of 2008).**

For those reasons, the accused will be at liberty to adduce evidence in rebuttal to the charge pursuant to Section 306 (2) as read with Section 307 of the Criminal Procedure Code.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Gekanana for the accused person

2. Mr. Mwangi for the state