



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 20 OF 2020

REPUBLICPROSECUTION

VERSUS

SAFARI KATANA LUGO alias RASTA MUGINAACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Alenga for the state

Ms. Mona advocate for the accused person

RULING

The accused person was arraigned in Court charged with the offence of murder contrary to Section 203 and 204 of the Penal Code. The particulars of the charge as pleaded by the state are that on 5.3.2020 at Mrima wa Ndege – village, Ganze sub-county, the accused murdered **Kazungu Lugo Fondo alias Chifu Mwange**.

During the plea, accused denied the offence in terms of Article 50 (2) (4) of the Constitution accused right to counsel was actualized by the state in which **Ms. Mona advocate** appeared on his behalf at the trial.

In support of the ingredients of the offence, it is clear from the record, that seven (7) witnesses volunteered to give evidence on behalf of the state as against the accused. As a matter according to the evidence of **(PW1) – Raymond Salim Masha, (PW2) – Bahati Charo Hare** on the 5.3.2020 they saw accused person armed with a stone which he used to hit the deceased on the head. It is from that act of assault stated **(PW1)** and **(PW2)** that the deceased suffered physical injuries to the forehead and left parietal occipital. This was confirmed by **Dr. Ruth Nyangi, (PW4)** a pathologist based at Kilifi Level 5 hospital who on conducting a postmortem examination identified the deceased to have suffered fracture of the linear skull, left forehead, left parietal occipital subdural, chest sternal bone. Considering the medical findings, **(PW3)** opined that the cause of death was due to head and chest injuries due to blunt force trauma.

It is also discernible from the evidence of **(PW6) – Kitsao Nguma** that on the material day, he saw the accused arm himself with a stone which hit the deceased at the chest and on the head. In the same evidence led by the prosecution, **(PW6)** told the Court that a report was made to the police who executed an arrest of the accused without a warrant. By the investigations conducted on the incident by **Sgt. Martin Wanjana (PW7)**, he attached the motive of the crime to suspicion on witchcraft against the deceased.

It is apparent from the evidence of **(PW7)** – that accused person formed the intention of revenge against the deceased following the sickness of her daughter who allegedly was diagnosed of diabetes. In this context, **(PW7)** testified that the accused while armed with a stone did assault the deceased severally as certified by the pathologist in her postmortem.

At the close of the prosecution case, the real question of Law was whether evidence adduced was sufficient to support proof of the elements of the offence.

Determination

It is settled Law that under the provisions of Section 203 and 204 of the Penal Code, it is incumbent upon the prosecution to prove the following ingredients:

- (a). That the deceased died.**
- (b). That his death was unlawful.**

(c). *That in causing death, accused did so with malice aforethought.*

(d). *That the accused person was placed squarely at the scene of the crime of murder.*

Taking the foregoing together, there are two trajectories with to determine twined as follows:

(1). Whether the case as founded by the state as a whole is capable to establish a prima facie case?

If the answer is in the affirmative the accused would be called upon to answer the charge whereas on the other hand, the evidence before the Court is insufficient and too low to provide a basis for a case to answer, a motion of no case to answer shall be entered in favor of the accused.

One of the most in depth dicta on the doctrine of no case to answer is in the Australian case of **May v Osullivan {1955} 92 CLR 654 at 658** in which the Court stated:

“That mainly the question to be determined after the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not the question to be decided on the evidence before the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt. That the defendant is guilty. That is a question of fact.”

Further, in **Doney v The Queen {1990} 17 CLR at 217 Alow** threshold test on no case to answer was stated to be as follows:

“It follows that, if there is evidence, even if tenuous or inherently weak or vague which can be taken into account by the Jury in its deliberations and that evidence is capable of supporting a verdict of guilty. The matter must be left to the Jury for its decisions or, to put the matter in more usual terms, a verdict of not guilty may be directed duly if there is a defect in the evidence such that, taken at its highest it will not sustain a verdict of guilt.”

See also **R v Waite {1991} 111 AR 318 CA** the Court propounded the so called **Scintilla rule** as follows:

“The Scintilla rule is well settled. The evidence need not be direct evidence but may be indirect evidence from which the crown hopes the trier of facts will draw an inference of the fact in issue. The preliminary Judge is not required to weigh the evidence beyond asking whether, if believed, such inference might be drawn.”

In the instant case governing by the above principles to the Court is satisfied that pursuant to the appraisal of the testimony given by **(PW1), (PW2), (PW3)** and **(PW5)**, there is evidence relating to each of the elements of the offence in question for the accused to be invited to make his defence. Further, the Court considers these evidence alongside the findings and opinion of the pathologist in the postmortem examination report produced as **Exhibit 1**.

Accordingly, the prosecution has discharged the burden of a prima facie case in respect of the charge of murder contrary to Section 203 and 204 of the Penal Code.

The defence shall be at liberty to exercise its rights pursuant to Section 306 (2) as read with Section 307 of the Criminal Procedure Code to elect the option applicable to the peculiar circumstances of the case at bar.

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

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R. NYAKUNDI

JUDGE

In the presence of:

1. The Accused person
2. Mr. Gekanana Advocate for the accused person
3. Mr. Mwangi for the state