



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 12 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

KARANI CHONYA alias TSUWI.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Ms. Aoko advocate for the accused person

RULING

On 3.9.2019, the accused **Karani Chonya alias Tsui**, was arraigned in Court and charged with the offence of murder contrary to Section 203 of the Penal Code as punishable in Section 204 of the same code.

The brief particulars of the charge which he also pleaded not guilty stated that on 21/22.8.2019 at Kilonga village, the accused murdered **Sidi Chonya Lewa**. The defence was being conducted by **Ms. Aoko** whilst **Ms. Sombo** – prosecution counsel appeared for the state.

In the following step, the prosecution adduced evidence from six witnesses to disapprove the innocence of the accused beyond reasonable doubt. At the outset the summary of the evidence comprised of the following statement of facts: **(PW1) Saidi Safari Charo** testified that on or about 22.8.2019, while grazing livestock in the field he saw a body of a human being lying down on the ground.

Further, **(PW1)** told the Court that he returned the cows home so as to inform other relatives and the neighbours about the incident. It was that body which came to be identified with that of the deceased.

Next was the evidence of **(PW2) – Jumwa Kahindi**, apparently he related to the accused. In his testimony, **(PW2)** narrated that the accused was the one who assaulted the deceased, who also happened to be his mother. Further, in **(PW2)** evidence, he gave the chronology of events dating back to June 2018 when the wife of the accused miscarried. At that moment the accused claimed that the deceased had bewitched the wife, in order not to carry the pregnancy to full term. Thereafter, according to **(PW2)**, in 2019 the wife also conceived but decided to go to her parents so as to deliver the baby at their birth home. What followed next stated **(PW2)**, was the accused pursuing the deceased assaulted her inflicting fatal injuries. It was **(PW2)** observations that on receipt of the tragic news, he went to the scene only to confirm the death. In addition, **(PW2)** saw a red lesa tied around the neck of the deceased even as he rushed to inform the neighbours and other members of the family. On arrival at the home of the accused he seemed to be least bothered as he went about with normal chores. The next witness to take the stand to testify on behalf of the state was **(PW3) – Charo Kadenge**. According to **(PW3)** as way back in 2016, the deceased raised concerns with him in regard to witchcraft claims against her spreading within the village. **(PW3)**, having heard the anxiety and concerns of the deceased he advised her to report the incident to the local chief. The matter according to **(PW3)** was amicably resolved by the one **Charo** being asked to pay three goats as punishable for the defamatory remarks.

Next in line was **(PW4) – Fredrick Chengo Charo**, who identified himself among others as a member of the local community policing. His contribution to the case was on the incident of 22.8.2019 when he saw a lady moving and walking very fast. He thought it wise to inquire from her the nature of the problem. That is when she informed him that the mother has been murdered. According to **(PW4)**, other members of the neighbourhood were informed, who agreed in one accord to visit the scene. It is at that scene they confirmed the death of the deceased with a red lesa tied around her neck. The police came and collected the body for the mortuary.

Last but not least was the evidence of the Assistant Chief **(PW5)**. In his testimony, **(PW5)** explained to the Court on the events of 15.6.2016 when the deceased and her brothers reported the threats to her life, on allegations of witchcraft. That complaint necessitated a meeting for

Charo Katana Bare to seek forgiveness from the deceased.

In that same meeting, **(PW5)** told the Court that the elders applying alternative justice system of punishment fined the culprit three goats. Further, **(PW5)** stated that with that conflict settlement he thought the parties had resolved to live in peace. However, on 22.8.2019, information came though that the deceased body had been spotted in the bush.

Finally, **PC Goshi**, a police detective attached to Kaloleni Police Station testified on the issues to do with investigations and final recommendation of holding the accused culpable for the murder of the deceased. Some of the highlights on the investigations as told by **(PW6)** comprising of scene visit, observations of the lesa tied to the neck of the deceased, taking photographs to document the scene. Therefore, the short question which posed for consideration by **(PW6)** at that time was to find out the motive of the murder. In answer to it from the investigations **(PW6)** told the Court that the deceased was killed of being a witch and using magic against the wife of the accused. While considering the cause of death of the deceased both parties agreed to have the postmortem report of **Dr. Mohamed** be produced by consent. It is in that report the pathologist opined that the deceased died of Asphyxiation due to ligature strangulation.

Determination

Now so far as the procedure adopted by the Law is for this Court to make a determination in terms of Section 306 of the Criminal Procedure Code. The appropriate test to be used in considering the merits of a motion of no case to answer or the question of a prima facie case is first, whether there is no evidence upon which a reasonable tribunal of fact could be satisfied that the elements of the offence have been proved beyond reasonable doubt. Second, is whether the prosecution evidence taken at its highest could proof existence of facts for each element of the offence to sustain a conviction.

In this second category, the Law requires that the accused person be placed on his defence. Even otherwise it is required to be noted by the Court that a motion of no case to answer does demand of the Court to evaluate the evidence exhaustively as to its credibility, reliability and probative value of it. Now so far as the two sets of questions are concerned, is to weigh the final deliberations against the backdrop of the elements of the offence. It is only useful to scrutinize the scope of the evidence and the accused responsibility as deducible from the witness statements on oath, only subjected to cross-examination.

More specifically, the approach of the Courts interpretive of Section 306 of the Criminal Procedure Code is dependent upon the following principles in **Curley v United States 160 F 2 d 1947 US Court of Appeals DC Circuit**:

“The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty. {emphasis added}

In **R v Galbraith {1981} 1 WLR 1039** it was held that:

“How then should the judge approach a submission of ‘no case’? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.... There will of course, as always in this branch of the Law, be borderline cases. They can safely be left to the discretion of the judge.”

From the foregoing principles and observations made on the evidence so far presented at the close of the prosecution case certainly the parameters upon which a prima facie case is ruled in favor of the prosecution exist to warrant accused person to be placed on his defence. The significant of this finding is based on the species of circumstantial evidence by **(PW1), (PW2), (PW3)** and as corroborated by the postmortem examination report. There is evidence on proof of essential elements of the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code. The rationale for the accused person to be called upon to state his defence is for exacting the constitutional presumption of innocence in terms of Article 50 (2) (a) of the Constitution. This question becomes relevant when viewed from the perspective that for now the burden of proof of a prima facie case has been discharged, to trigger an application of Section 306 (2) of the Criminal Procedure Code for the accused to offer his defence.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF NOVEMBER 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Mwangi for the state
2. The accused person