REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL CASE NO. 17 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

MARTIN THIGUNKU.....ACCUSED

R U L I N G

1. The accused person herein was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code (Chapter 63 of the Law of Kenya)**. The particulars of the offence were that on 01/09/2018 Magutuni Township, Maara Sub-County within Tharaka Nithi County, the accused person murdered one Lewis Muthomi (hereinafter referred to as the **"deceased").**

The accused pleaded not guilty to the charge.

2. The prosecution called a total of six (6) witnesses in support of the case against the accused person before closing it on 22/11/2021. Under **Section 306** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** (hereinafter referred to as "**the Code**"), this court has a duty, upon close of the prosecution's case, to make a ruling on whether the accused person has a case to answer or not.

3. Under **Section 306(1)** of the **Code**, when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is no evidence that the accused or any one of several accused committed the offence should, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

4. On the other hand, Section 306(2) of the **Code** provides that when the evidence of the witnesses for the prosecution has been concluded and the court is of the opinion that there is evidence that the accused person or any one or more of several accused persons committed the offence, the court should proceed to put the accused on their defence and thereby the accused is supposed to present evidence in defense.

5. What is therefore pending before this court at this stage is the role to determine whether the prosecution has presented a *prima facie* case that would warrant this court to call upon the accused person to give their defence.

6. Under **Section 211** of the **Code**, a *prima facie* case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. (See **Ramanlal Trambaklal Bhatt – vs- R [1957] E.A 332 at 334 and 335).** However, it is trite that, where the court is not acquitting the accused person at the close of prosecutions' case, there is no need for a reasoned ruling for a case to answer. Reasons should only be given where the submissions of a no case to answer by the accused are upheld and the accused is to be acquitted. (See **Festo Wandera Mukando –vs Republic [1980] KLR 103).**

Analysis

7. In this case, PW1 was Joy Muthoni. It was her testimony that in 2018, she was working in a club in Magutuni as a bar attendant. She had known the deceased for about three (3) weeks as he used to go and chew miraa outside the club. She also identified the accused person as she had also seen him go to the club to chew miraa outside the premises. She recalled that on the material date at around 7.00 p.m., she was selling alcohol in the said club. She went outside the club and found the deceased sitting with two (2) boys. She recognized the two boys who she had seen before but didn't know their names. They were all chewing miraa. The deceased called her and asked her for a cigarette, and she told him that they did not have any cigarettes at the time. According to PW1, there were no lights outside the club on the material night but there was light where she was standing. She then requested the deceased to buy her rice at a nearby hotel. She gave Kshs. 100/= for the rice and then she went back inside the club. She saw the two (2) boys go with him. At that time, it was around 7.30 p.m. At around 8.30 p.m., the deceased had not yet returned to the club. A customer then came with the news that a young person had been killed at the road near miraa. PW1 then went to the scene of the crime and found many people including the police. She then saw that the deceased had been killed. She witnessed blood on his side. According to her, the deceased was killed before reaching the hotel she had sent him to buy rice. She found the deceased on the side of the road, lying down facing up. She did not identify the boys who escorted the deceased to buy the rice among the crowd that had gathered at the scene of crime. The scene was dark but there were people with torches in the crowd. The following day, the

police found her at the club and recorded her statement.

8. On cross examination, PW1 testified that the accused person was not among the two boys he saw the deceased person leaving with at the club. According to her, she did not recognize the two boys at first instant but as they were leaving, she was able to recognize them from their appearance but did not know their names.

9. PW2 was Fridah Kangai. It was her testimony that she works at the "Baada ya Kazi" club at Magutuni as a bar attendant. She knew the deceased as her nephew by virtue of being the son of her cousin. She also knew the accused person as he was her neighbour back at home. She recalled that on the material day, she was working in the club when she heard people saying that there was blood in the corridor of the club. She then came out of the club with other customers and found that there was a lot of blood on the corridor. According to her, the blood was spreading and then she heard somebody say that there was some lying on the road. She then rushed at the scene where miraa used to be sold and found many people surrounding a dead body. She immediately identified that the body was that of the deceased. She had not seen him on that day. She recalled that the body was covered with blood. she then went back to the club. Three days after the incident, the police came to the club and recorded her statement. On cross examination, she testified that she never saw the accused person at the scene of the crime.

10. PW3 was Linus Gikundi Joseph.he gave a sworn testimony that He works as a security officer in a missionary school in Maua. He knew the deceased as the deceased's mother was his classmate. He also knew the deceased as he was his neighbour. He recalled that on the material day at around 8.30 p.m., he was in a hotel in Magutuni taking tea when he heard noise from outside the hotel. He asked from the people who were sitting around him what the noise was about and he was informed that somebody had been killed outside the hotel. He went to the scene of the crime and found the deceased lying down around five metres from the hotel. According to him, it was a bit dark and there was a crowd of people surrounding the body. According to PW3, the people surrounding the body claimed that it was the accused person who was the perpetrator of the offence. They claimed that the accused person had stabbed the deceased. He could recognize the accused person but did not know his name. He was shocked by the name Martin as he had a nephew called Martin and since there were so many people referred to as Martin in Magutuni, he could not tell which Martin was responsible for the crime. He went together with his brother, one Sylvester and the father to his nephew as well as the accused person herein as they are both named Martin. At the home of the accused person, which is around 600 metres from the scene of the crime, where the accused's mother welcomed them and before they could finish narrating what had transpired, the accused person herein walked in and told them that he had not seen the other Martin (PW3's nephew). They then proceeded to their home where they found the PW3's nephew sleeping. They woke him up and told him what had happened but according to PW3, that Martin stated that he had not been to Magututni that day.

11. On cross examination, it was PW3's testimony that he arrived at the scene of the crime when the deceased had already passed on and that he knew of four people who went by the name "Martin". He denied knowledge of his nephew running away from home or that the police were looking for him and stated his often visits his mother although PW3 could not tell of his whereabouts. According to PW3, he could not tell who killed the deceased.

12. PW4 was IP Gilbert Langat. He recalled that on the incident day, he received a call from the chief of Magutuni informing him of the subject murder incident. he proceeded to the scene of the crime with other police officers where they found the deceased's body on the road from Magutuni to Kathuana. According to him, the deceased had bled profusely and there was a pool of blood. He suspected that deceased had been stabbed with a knife on the neck around one hundred metres from where the trail of blood was coming from. They then removed the body and took it to Chuka Mortuary. According to PW4, members of the public then informed the police that the accused herein was suspected to have been the perpetrator of the subject offence. They then proceeded to the home of the accused person but did not find him. the accused's mother led them to the house of the accused where they found him and also found some washed clothes and shoes drying on the hanging lines. According to PW4, they recovered a pen knife behind the accused's house and the same did not have any blood stains. They took the clothes and shoes for analysis as they them suspected them to have stains which looked like blood. on cross examination, it was PW4's testimony that they interrogated some witnesses and none of them stated that they saw the accused person stabbing the deceased. It further his testimony that they never got information on the source of the stains they have suspected to have been blood stains. According to him, the accused person cooperated with the police.

13. PW5 was Dr. Nkonge Nicholas who works at Chuka Hospital. He produced in evidence a postmortem form filled in by one Dr. Justus Kitiili (now deceased). It was PW5's evidence that he had worked with the said Dr. Nkonge for about six years and that he familiar with his handwriting and signature. It was his evidence that according to the report, the body of the deceased was examined and found to have a stab wound on the neck of the front side. The deceased also had blood on the nasal cavity. It was the conclusion of the late Dr. Nkonge that the deceased herein died from severe haemorrage due to the cut wound on the neck.

14. PW6 was P.C. Amos, the investigating officer. He recalled that on the material day, he received a report of the subject murder incident from Magutuni village. Together with other officers, he was led to the scene of the crime where they found the deceased body lying by the roadside. There was a lot of blood at the scene. On the following day, the interviewed some witnesses and were able to arrest the accused person herein who was suspected to have been perpetrator of the murder. He corroborated PW4's testimony that the next day, they met with mother of the accused person who led them to the house of the accused person. According to him, they recovered a kitchen knife on the table and a washed vest from the clothing line. The vest, according to PW4, had visible blood stains. They then took the vest and the knife for analysis and escorted the family of the deceased for a postmortem examination on the deceased's body. He later received a report that the vests had bloodstains but no D.N.A. could be analysed from it. The recovered knife also did not have any signs of blood stains. He then produced the said vest and knife in evidence.

15. For the offence of murder to be proved, the prosecution is under the obligation to establish the following key ingredients:

a. Proof of death of the deceased, and the cause,

b. Proof of an unlawful act or omission on the part of the accused resulting in the death of the deceased,

c. malice aforethought on the part of the accused.

16. The standard of proof at this stage of the proceedings has at most remained unaltered for many years without any difficulty to be proof beyond any reasonable doubt. The Supreme Court of **Canada in R –v- Morabito {1949} SCR 172** drew the attention on this matter where it held that:

"When assessing the prosecution case in consequence of no case submissions, the question of reasonable doubt does not arise at that stage."

What is required is evidence which sufficient and tends to establish the guilt of the accused which then calls on the court to give him an opportunity to be heard before making a final determination on the evidence.

17. In the case of **R. T. Bhatt v r {1957} EA 332** the Court observed that:

> **"It may not be easy to define what is meant by primafacie 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." (See also R v Samwel Karanja Kuria {2009} eKLR**

18. In this case, it is not in dispute that indeed the deceased died as a result of an unlawful act. The main question here, in my view, is whether the accused person is the one to be held culpable for the death of the deceased. None of the prosecution witnesses that were brought before this court saw how the deceased died. In addition, neither of the witnesses saw the accused person at the scene of the crime and the evidence of PW3 and PW4 was contradictory on where the suspected murder weapon was found. Furthermore, it is my view that the lighting at the scene of the murder did not favour a positive identification of the accused person herein.

Section 107 and 109 of the Evidence Act, (Cap 80 Laws of Kenya) provides as follows:-

> ***" 107. Burden of proof ;***
>
> ***(1) whoever desires any court to give judgment as to anylegal right or liability dependent on the existence of facts which heasserts must prove that those facts exist.***
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***
>
> ***"109. Proof of particular fact***
> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

The burden of proof in the prosecution case is in the prosecution's backyard and never shifts. This rule is well established by a line of authorities and the locus classicus is the case of ***Woolmington –v- DPP (1935) A.C 462*** where Lord Sankey in the celebrated Golden thread speech stated:

> ***" Throughout the web of English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to.....***
>
> ***The defence of insanity and subject also to any statutory exception. If at the end of the whoel case there is reasonable doubt created by the evidence given by either the prosecution or the prisoner..... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."***

Prove beyond any reasonable doubt means that the prosecution's case must be one which establishes all the ingredients of the charge which are ***mensrea*** and ***actus reas*** also known as criminal liability. The evidence tendered must be convincing and leave no doubt on the guilt of the accused.

In the case of ***Pius arap Maina –v- Republic (2013) eKLR*** **(Criminal Appeal No.247/2011)** the court noted that;

> ***"It is gainsaid that the prosecution must prove a criminal charge beyond any reasonable doubts. As a corollary, an evidential gaps in the prosecution's case raising material doubts must be in favour of the accused."***

In this case there are glaring gaps in the prosecution case. If I can point them out, the deceased was said to be with two other boys. No attempt was made by the prosecution to prove who they were and where they were or where they went after the deceases sustained fatal injuries. No witness was called to say that deceased said it was Mato. Evidence of PW3 who said he heard people say it was Mato is hearsay as none of those he said heard deceased saying it was Mato was called as a witness. It is not clear how PW6 the investigating officer came to know that the deceased and accused had a dispute over a bed. PW6 said he got the information from a witness. This witness was not called. The evidence is therefore hearsay and inadmissible. PW6 testified that the accused was the last person to be seen with the deceased. This was not confirmed by any of the prosecution witnesses. These gaps raise doubts in the prosecution's case. The accused may not be called upon to fill the gaps. In the case of ***Edwin Wafula Keya –v- Republic, Court of Appeal (2005) eKLR***, the court stated that;

> ***" In our view failure to call all or any of the three police officers who arrested the appellant some two months after the offence left unbridgeable gap in the prosecution's case and the appellant must have the benefit of that gap."***

It follows that gaps in the prosecution's case raise doubts and the benefit of the doubts must be given to the accused.

Article 50(2) (a) of the Constitution case provides that-

> ***" Every accused person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved."***

This is a right to fair trial which cannot be limited. It is my view that the evidence tendered fell short and failed to prove the guilt of the accused to the required standard, that of beyond any reasonable doubt. The prosecution failed to discharge the burden of proof.

19. Considering the entirety of the evidence on record as highlighted herein above, I am of the view that the accused person has no case to answer as none of the witnesses tendered sufficient evidence to implicate the accused person herein in the unfortunate murder of the deceased. Suspicion cannot form a basis for a conviction, no matter how strong.

In conclusion

I find that the accused has no case to answer and may not be called upon to defend himself. He is entitled to an acquittal. I therefore acquit him at this stage under **Section 306(1) of the Criminal Procedure Code**.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF DECEMBER 2021.

L.W. GITARI

JUDGE

9/12/2021

The ruling has been read out in open court.

L.W. GITARI

JUDGE

9/12/2021