



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL CASE NO.10 OF 2019

REPUBLICPROSECUTOR

VERSUS

BONIFACE KIRIMI MBOGO..... ACCUSED

RULING

The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the **Penal Code Chapter 63 Laws of Kenya**. The particulars of the offence are that the accused on the night of 15th July, 2019 at unknown time at manyatta Willi area within Marsabit County murdered **Kinyanga Benjamin Mwenda**.

Nine witnesses testified for the prosecution. **PW1 Jecinta Aman Kor** is the deceased's widow. On 15.7.2019 she went home and found that the deceased had prepared food. The accused used to do construction work with the deceased. The accused went to their home at around 8.00pm. He talked to the deceased about their work. The deceased told the accused he had some work elsewhere. According to PW1, the accused seemed to have found some work in a different place and wanted the deceased to go with him. The deceased then escorted the accused. Shortly PW4 went to her home and notified her that the deceased had been killed. She went to the scene and found her husband's body. The body had an injury on the neck. PW1 had never seen the accused and the deceased disagreeing. The two had a cordial relationship and used to work together.

PW2 Leyla Abdi sells alcohol. On 15.7.2018 the accused and the deceased went to her den. They took two glasses of alcohol each and left. The two stayed for about 15 minutes. The two were talking about their work. It is her evidence that the two used to visit her place. There was no other customer. It was dark outside. In the morning she heard that the deceased had been killed. The two were not drunk when they left her place.

PW3 David Lomuria Esogom used to live with the deceased. He arrived home on 15.7.2019 and found the deceased with the accused. The two were taking in Meru language. The deceased told them that he was escorting the accused. It was about 8.00pm. Shortly PW4 informed them that the deceased had been killed. The scene is a bit far from where they were living. It is his evidence that when the two left the house they were not fighting.

PW4 Jamal Mohamed went to PW2's drinking den on 15.7.2019 at around 9.00pm. He was told that the alcohol was finished. As he was heading home he saw a body bleeding on the road. The body was lying across the road. He checked and recognized the deceased. He screamed and notified neighbours. He then went to inform the deceased's wife (PW1). The Police went to the scene and he was arrested and placed in the cells. He was later released.

PW5 Douglas Mwiraria Stephen knew the deceased. On 15.7.2019 he met the accused on the road at around 9.00pm. The accused told him that he was heading to town to take food. PW5 told the accused that he had no money. The accused appeared normal and bought him food near the Karare stage. The accused told him that he was with the deceased taking alcohol and the two had separated at the road. The accused also told him that he had gone to talk to the deceased about some construction work. According to PW5 the deceased and the accused were good friends. The scene where the deceased was killed and where he met the accused is a bit far.

PW6 John Mwit Mboroki was informed on 15.7.2019 at night that the deceased had been killed. In the morning he went to the mortuary and identified the body. The deceased had a cut on the neck. PW6 notified the deceased's family members. PW6 also witnessed the postmortem at the mortuary. He knows the accused as a mason.

PW7 Geoffrey Kainga also identified the deceased's body for postmortem purposes on 15.7.2019. **PW8 Hassan Abdi Duba** saw the accused and the deceased talking at about 5.00pm. He greeted them and passed. He lived with the deceased in the same area. The deceased and the accused were talking while standing. The two were not quarrelling. At around 9.00pm he heard that the deceased had been killed. He went to the scene and found many people. The deceased had a cut on the neck. Police went to the scene at around 11.00pm.

PW9 Sergeant Gabriel Komute was based at the Marsabit Police Station on investigation duties. He received a phone call on 15.7.2019 at 9.00pm from his boss chief inspector Ernest and notified of the murder. He went to the scene. PW4 was a suspect and was arrested. No weapon was recovered. The Police went to the deceased's home and were told that the deceased had left with the accused at about 8.00pm. The accused was arrested the following day on 16.7.2019. It is his evidence that the time intervals made him believe that the accused was involved in the killing. The accused did not give a reasonable explanation to exonerate himself. A post mortem was conducted on 17.7.2019 by **Dr. Sereti**. The accused told him that he was with the deceased. He then went to town to get food while the deceased went home. The accused is the last person to be seen with the deceased. His investigations revealed that the deceased and the accused were friends. The Police searched the accused's house and found nothing.

The issue for determination is whether the prosecution evidence does establish a prima facie case against the accused. None of the witnesses saw the accused killing the deceased. According to PW9, the accused was the last person to be seen with the deceased. PW9 interrogated the accused who admitted that he was with the deceased that evening. The evidence of PW1, PW3 and PW8 does prove that the accused went to the deceased's home on 15.7.2019 in the evening. The three witnesses saw the two talking. It is the evidence of PW1 and PW3 that the two were talking in their Meru mother tongue. All three witnesses testified that the deceased and the accused were not quarrelling and that the two were friends.

PW5 testified that he met the accused that evening. The accused told him that he was with the deceased taking alcohol and that the two went on their separate ways. According to PW5 the accused appeared normal when he met him.

PW2 testified that the accused and the deceased were her customers although they were not regular. The two went to her drinking den before 9.00pm and stayed for about 15 minutes. As they left her place they were not drunk. The evidence show that the accused headed to town and on his way met PW5. It is the evidence of PW5 that the crime scene was a bit far from where he met the accused. The effect of this evidence is that the accused had walked for sometime before meeting PW5. PW5 did not notice anything unusual on the accused. The accused told PW5 that he was with the deceased. This is what the accused told the Police.

The issue of prima facie case has been dealt with by the Kenyan Courts. In the case of **Ramanlal Trambaklal Bhatt V Republic (1957)E.A.332**, the court of Appeal for East Africa held:-

“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 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 any amount of worthless discredited evidence. It may not be easy to define what is meant by a prima facie, 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.”

Section 306 of the Criminal Procedure Code states as follows:

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, 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.

For a Court to place the accused on his/her defense it should be satisfied that should the accused exercise his/her constitutional right to remain silent, then the automatic result would be a conviction. The court should not embarrass itself by placing the accused on his defence and thereafter, upon the accused remaining silent, evaluate the evidence and conclude that he has no case to answer. At this stage the court has to consider whether the evidence on its own would result to a conviction if the defence offers no evidence that may raise doubt on the prosecution case.

In the case of **Republic –V- Samuel Karanja Kiria Nairobi Criminal case No.13 of 2004**, Justice J.B. Ojwang observed as follows:-

“the question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled

The Court of Appeal, Criminal Appeal No.77 of 2006, expressed that too detailed analysis of evidence, at no case to answer stage is undesirable if the Court is going to put the accused onto his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted.”

The above sentiments were also observed by a two judge bench of the High Court comprising of Justices **Trevelyan and Chesoni** in the case of **Festo Wandera Mukando –V- Republic (1976-80)1 KLR, 1626 at 1631** when the two stated:

On an unrelated point we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” is rejected, the Court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is an end to the case or the court or counts concerned.

The evidence on record clearly establish that the accused was with the deceased that evening. However, that on its own cannot lead to a

conviction. The two took alcohol at PW2's place and that is the last time they were seen together. There was no animosity between the two. According to the investigation officer, the timelines given point to the accused. It takes a single blow to cut someone and kill him. The deceased was cut on the neck. The injuries led to his death at the scene. He was killed along the road. No one saw the accused at the scene. The timelines do not specifically indicate that the deceased was killed at a specific point in time and that at that particular time the accused was with the deceased. The circumstantial evidence does not point to the accused's guilt. The deceased's death can be explained in other manner. It is possible that after the two went on their separate ways, someone attacked the deceased while heading home.

The prosecution case is based on the unproved suspicious that being the last person to have been seen with the deceased, then the accused must be the one who killed the deceased. A conviction based on such assumption is not backed by the law. Calling the accused to give his defence is tantamount to asking him to explain how he parted ways with the deceased and suspiciously calling upon him to explain the deceased's death. If he opts to remain silent, then the court withdraws such a presumption and proceed to acquit him. That is not the intention of the law. A prima facie case should stand on its own. The prosecution evidence should be able to clearly establish that the accused has something to do with the offence and that should he fail to give his explanation, he should be convicted.

The accused was with the deceased discussing about their work. They took two glasses each of alcohol at PW2's place and went on their separate ways. The deceased was killed on the road. There is no evidence that the accused was wearing some clothes that would have enabled him to hide his murder weapon. The prosecution case is entirely grounded on suspicion. I do find that suspicion in itself cannot be a ground to place the accused on his defence.

The upshot is that the prosecution evidence does not establish a prima facie case against the accused. The accused is not found guilty and is acquitted of the offence of murder as charged at this stage as provided under Section 306 of the Criminal Procedure Code.

Dated, Signed and Delivered at Marsabit this 4th Day of March, 2020

S. CHITEMBWE

JUDGE