REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 20 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

PASCAL KAHINDI KADENGE.....ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Gekanana for the accused person

RULING

The accused was arrested and charged with the offence of murder contrary to Section 203 of the Penal Code as punishable under Section 204 of the Code.

It is alleged that on 3.11.2018, at Kumbule village, Ganze Town, within Kilifi County, the accused murdered **Kanze Masha**. The accused having pleaded not guilty in a trial conducted in the presence of his counsel **Mr. Gekanana** and prosecution counsel **Ms. Sombo,** four witnesses were called to prove the elements of the offence beyond reasonable doubt.

The duty of the initial trial having been discharged by the prosecution, it is a requirement of the Law that a finding be made on whether accused persons have a case to answer.

Section 306 of the Criminal Procedure Code adopts the headline close of case for the prosecution. These compulsory provisions provide for the authority of the court to draw inferences from the evidence whether the prosecution has a primafacie case on their side for purposes of calling the accused to answer.

In the interpretation of the latitude of the prosecutions, it is to test the degree of cogency of the prosecution witnesses in respect of the charge of murder. To appreciate the essence of the motion, its necessary to summarize the evidence. The evidence as presented is very simple thus:

PW1 – Dr. Nassir of Kilifi Hospital produced the postmortem report on behalf of **Dr. Baasba** in respect of a postmortem examination conducted on 8.11.2018. It was opined in the report that the deceased suffered multiple injuries to the skull, eye and left mandible. Based on the examination **PW1** testified that the cause of death was stated to be head injury.

The new witness – **Mramba Masha Kambe** evidence dwell on the events of 1.11.2018 when he responded to the screams from the scene of the crime. On arrival, he noticed the deceased was lying down having sustained multiple injuries to the head. As they escorted him to the hospital, she died on the way before being attended by any medical doctor or personnel.

In his further evidence **PW2** testified that the murder in question which inflicted physical harm involved the accused person. In reference to the actual assault, PW2 told the court that the accused person used a stool produced as an exhibit to do grievous harm to the deceased. In further support to disapprove the innocence of the accused, the prosecution adduced evidence from **PW3 Nyevu Kenga Mweni** with regard to the deceased death PW3 responded to the screams. It was at that moment he saw the deceased having suffered severe injuries which later caused his death.

The next point of the case was evidence from **PW4- Cpl. Martin Hassan,** who testified as the arresting officer of the accused, for him to face indictment of killing the deceased.

PW5 – Damaris Bahati testified as a niece to the deceased alluding to the circumstances upon which he met his death on 5.11.2018. The exact specifics of the evidence by **PW5** is in respect of the participation of the accused who got hold of the chair to inflict the fatal injuries.

Secondly, PW5 positively identified the murder weapon used against the deceased person. With this background, it will be convenient to make a determination in terms of Section 306 of the Criminal Procedure Code.

Determination

A careful and proper inference cannot be drawn without according the view taken by comparative decisions on this universal canonical doctrine of a primafacie case in the context of Criminal Law.

I take it that what happened in the pronouncement of Lord Lane C.J in **R v Galbraith {1981} 1 WLR 1039** on the sets of principles on a motion of no case to answer is as relevant then as its today. In realistic perspective the court held as follows:

> ***"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 as 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."***

The other astute principles consistent with the legal position in issue is what Lord Parker CJ stated in 1962 on practice directions to Magistrates set in the following words:

> ***"A submission that there is no case to answer may properly be made and upheld: (a). When there has been no evidence to prove an essential element in the alleged offence; (b). When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it. Apart from these two situations a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (<u>If compelled to do so) would at that stage convict or acquit</u> but on whether the evidence is such that a reasonable tribunal <u>might</u> convict. If a reasonable tribunal <u>might</u> convict on the evidence so far laid before it, there is a case to answer."***

In the instant case the duty which is rested with the prosecution endears it under Section 107 (1) of the Evidence Act to proof the following elements:

> ***(a). The death of the deceased.***
>
> ***(b). That the aforesaid death was unlawfully caused.***
>
> ***(c). That in causing death the accused was actuated with malice aforethought.***
>
> ***(d). That in the circumstances, the possession of the prosecution, the accused was positively identified as the perpetrator of the crime.***

Having these elements in mind and the principles enunciated in the above cases the prosecution presented both direct and circumstantial evidence as to the cause of death of the deceased. This can be deduced from **PW1, PW2, PW3, PW4 and PW5**. As such the nature of the injuries and cause of death are independent of **Dr. Nassir's** opinion in his post-mortem report.

Therefore, viewing the evidence, in light of the elements of the crime as charged it points to an existence of a primafacie case to forcibly persuade this court to place the accused on his defence.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MAY 2020

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R. NYAKUNDI

JUDGE