REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 67 OF 2015

REPUBLIC.....RESPONDENT

VERSUS

EZEKIEL MOMANYI ONSONGO.....1ST ACCUSED

DENNISON MOSE MAROKO.....2ND ACCUSED

PHILIP MANYURA MAROKO.....3RD ACCUSED

RULING

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of which were that on 7th day of May, 2015 at 6.30 p.m. at Nakumatt Supermarket Mombasa Road within Nairobi County jointly with others not before the court murdered **JAMES KARANJA MAINA.**

2. They all pleaded not guilty and on 1/3/2016 their trial commenced before me and at the close of the prosecution case, they called and examined a total of twenty-seven (27) witnesses at the end of which the parties were invited to make submissions on whether a case to answer was proved.

3. For record purposes, before this was done, Covid 19 pandemic came leading to the closure of courts and thereafter the matter proceeded virtually. Initially Mr. Mochere for the 1st accused indicated that he would not file submissions but Mr. Onyancha with whom he co-represented the accused indicated that he would file submissions on behalf of the same, same as Mr. Ogeda from the 2nd and 3rd accused and Mr. Okeyo for the prosecution.

4. At the end of the day, it is only Mr. Ogada who filed submissions on behalf of the 2nd and 3rd accused. Both Mr. Mochere for the 1st accused and Ms Ogweno for the State indicated that they shall rely on the evidence on record and left it to the court to make a determination thereon. Mr. Onyancha on the other hand did not attend court for submissions.

SUBMISIONS BY 2ND AND 3RD ACCUSED

5. It was submitted that the prosecution had failed to make a prima facie case against the 2nd and 3rd accused persons and that the evidence available before the court did not merit putting them on their defence. It was submitted further that since no case to answer had been made by the prosecution, it was proper for the two accused persons to be acquitted in conformity with Section 210 of the Criminal Procedure Code and in line with the holding in **BHATT v REPUBLIC [1957] EA 332.**

6. It was submitted that the evidence against the 2nd accused was that he was hired by the 1st accused to drive him to Mombasa road and when they reached a point close to Nakumatt head office, the 1st accused shot the deceased. There was no evidence whatsoever that the 2nd accused knew or was aware that the person he was carrying was going to shoot anyone. It was submitted that seeing a wrongful act and not reporting it may strictly not be an offence. It was contended that he knew the 1st accused as a police officer, who had hired him and that he did not know the circumstances under which he shot the person.

7. On behalf of the 3rd accused, it was submitted that there was no evidence that he was at the scene of crime nor of him ever discussing killing or harming the deceased with anyone including his co-accused persons. It was submitted that the prosecution evidence against him was purely based on suspicion based on the fact that the deceased was his staff mate and that he knew the 1st accused as a family friend and could lend each other small amounts of money, which does not constitute evidence for murder.

8. It was submitted that the prosecution only star witness, only mentioned one Phillip, which led to the arrest of the 3rd accused, but the police did not conduct an identification parade upon his arrest, for him to confirm that he was the Phillip he was talking about. It was contended that he was unable to identify the 3rd accused even at the dock. It was submitted further that the prosecution failed to produce any evidence to link the 3rd accused with the hypothetical motive of the murder, which was that the deceased was undertaking audit to investigate Nakumatt accounts and that there was no report that mention the 3rd accused in respect of the loss at Nakumatt Holdings.

9. It was contended that the prosecution failed to call as a witness the person who conducted the audit at Nakumatt, to produce the said report, which failure created a lacuna in the prosecution case as was stated in the case of **SAID AWADHI MUBARAK v REPUBLIC [2014] EKLR.**

10. It was submitted that there was evidence tendered in court that several suspects were charged with the alleged fraud at Nakumatt and that without the audit documents, it was not possible to connect the 3rd accused with the audit and or to use it as a motive for murder. It was submitted that there was no evidence tendered by the prosecution to rule out the possibility of the death of the deceased being occasioned at the hands of the people who were charged.

11. It was submitted that the case against the 3rd accused was based purely on suspicion and no cogent evidence was presented to connect him beyond reasonable doubt and that none of the evidence collected from his house directly or indirectly connected him with the offence. It was further contended that for a case based purely on circumstantial evidence, a conviction can only be made when it excludes all hypothesis of the innocence of the accused, as was held in the case of **REPUBLIC v PIUS KIKUNGU JOHN [2019] eKLR** and **SAWE v REPUBLIC [2003] eKLR 364**. It was submitted that in this case there were myriads of suspects and it could therefore not be said that no other hypothesis existed other than blaming the 3rd accused.

12. It was contended that there was no evidence that the 3rd accused had sent the threatening e-mails to the deceased and the circumstantial evidence thereon could not be a basis for the court to convict the same as was stated in the case of **REPUBLIC v DANIEL MUSYOKI MUASYA & 2 OTHERS [2014] eKLR** as the case against the same was only based on suspicion. It was finally submitted that the evidence on record did not amount to a prima facie case as was stated in the English case of **REPUBLIC v GALBRAITH [1981] 1WLR 1039.**

13. It was submitted that the case against the 2nd and 3rd accused based on the totality of the evidence, shows that the prosecution had not made out a prima facie case as stated in the case of **BHATT v REPUBLIC [1957] EA 332** and therefore the court should find that they have no case to answer and acquit her.

DETERMINATION

14. At this stage of the proceedings the court is called upon to make a determination under the provisions of Section 306 (1) and (2) of the Criminal Procedure Code which provides as follows: -

> ***"306 (1) Where the evidence of the witnesses from the prosecution has been concluded the court, if it considers that there is no evidence that the accused or any of one of several accused committed the offence, it shall after hearing, if necessary, any argument which the advocate for the prosecution or the defence may desire to submit record a finding of not guilty.***
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> ***(2) when the evidence of the witnesses for the prosecution has been concluded the court if it considered that the accused person or any one or more of several accused persons committed the offence, shall inform each of such accused person of his right to address the court in his own behalf or make unsworn statement and call witnesses in his defence.***

15. What the court is required to do is to establish whether the prosecution has made out a prima facie case to enable it call upon the accused person to offer some explanation in his defence as was stated in the case of **BHATT v REPUBLIC [1957] (supra)** as follows: -

> ***"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie 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 could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue 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."***
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> ***A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence… <u>It may not be easy to define what is meant by prima facie 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</u>." (Emphasis added)***

16. Justice Nyakundi in the case of **REPUBLIC v ALEX MWANZIA MUTANGILI [2017] eKLR** quoted with approval UDOMA JSC of Nigeria Supreme Court in the case of **DABOH & ANOTHER v STATE [1977] 5SC 122 at 129** when a no case submission may be upheld in the following passage:-

> ***"Before, however embarking upon such exercise, it is perhaps expedient here to observe that it is a well-known rule of criminal practice, that on a criminal trial at the close of the case for the prosecution, a submission of no prima facie case to answer made on behalf of an accused person postulates one of the two things or both of them at once:***
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> ***Firstly, such a submission postulates that there has been throughout the trial no legally admissible evidence at all against the accused person on behalf of whom submissions has been made linking him in any way with the commission of the offence with***

which he has been charged which could necessitate his being called upon for his defence.

Secondly, as has been so eloquently submitted by Chief Awolowo, that whatever evidence there was which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing criminal guilt in the accused person concerned; and in the case of a trial by jury that the case ought therefore to be withdrawn from the jury and ought not to go to them for a verdict.

On the other hand, it is well settled that in the case of a trial by a jury, no less than in a trial without a jury however slight the evidence linking an accused person with the commission of the offence charged might be, the case ought to be allowed to go to the jury for the findings as judges of fact and their verdict.

Therefore, when a submission of no prima facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged.

If the submission is based on the discredited evidence, such discredit must be apparent on the fact of the record. If such is not the case, then the submission is bound to fail."

17. Justice J.B. Ojwang, as he then was, on the other hand in the case of **REPUBLIC v SAMUEL KARANJA KIRIA CR. CASE NO.13 OF 2004 NAIROBI [2009] eKLR** had this to say on *prima facie* case:-

"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, the Court of Appeal 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." (Emphasis added).

18. With the injunction by Justice Ojwang in mind, from the evidence present before the court, it is clear that the 1st and 2nd accused person have been put together with the deceased at the scene of the offence through the evidence of PW1, whose evidence further linked the 1st accused with the 3rd accused, who was working with the deceased at the time of his death. I have further without saying much thereon, looked at the evidence of PW4 Cpl. Timothy Chege and **PW5 NEWTON OMONDI OSIEMO, PW13 MUTHUI NDIMA and PW14 ISAAC KATHURIMA** on the alleged murder weapon and how it was recovered through the evidence of **PW5 INSP. NICHOLAS MEMUSI** and the subsequent arrest of the accused person.

19. I have further taken into account the fact that the death and cause thereof are not in dispute and that the said death was unlawful with the evidence so far placed before the court pointing at the involvement of all the three accused persons, noting that the standard of proof at this stage is not beyond reasonable doubt but only a requirement of sufficient evidence, to enable a reasonable tribunal to call upon the accused person to offer some explanation if they so wish, taking into account their right under Article 50 of the Constitution of Kenya 2010.

20. I am therefore satisfied that the prosecution by way of evidence from the prosecution witnesses and the circumstantial evidence thereon established a prima facie case to enable me put all the accused persons on their defence, which I hereby do and therefore through the advice of their Advocates on record called upon the same to make a selection on how they intend to defend themselves as provided for under Section 306(2) as read with Section 307 of the Criminal Procedure Code and it is ordered.

Dated, Signed and Delivered at Nairobi This 7th Day of October, 2020 Through Microsoft Teams.

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J. WAKIAGA

JUDGE

In the presence of: -

Mr. Naulikha/Mr. Okeyo for the State

Mr. Mochere for the 1st accused

Ms Hamba for the 2nd and 3rd accused

Accused present

Court clerk Karwitha