REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 9 OF 2019

REPUBLIC...PROSECUTOR

VERSUS

DANIEL KAZUNGU KARISA..ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for State

Ms. Aoko Advocate for Accused person

RULING

On 17.6.2019 the state charged the accused with the offence of murder contrary to Section 203 of the Penal Code as read with Section 204 Cap 63 of the Laws of Kenya. It is alleged in the indictment that on 11.3.2019 at Mtangani area in Malindi Sub-County accused jointly with others not before Court unlawfully murdered **Katana Karisa.** In response to the charge accused pleaded not guilty and the trial which ensued the state summoned the evidence of four witnesses.

At the close of the state case the defence counsel **Ms. Aoko** sought a determination by this Court on a motion of no case to answer pursuant to the provisions of Section 306 (1) of the Criminal Procedure Code.

This aspects of the doctrine raises a question where the Court exercises jurisdiction to determine whether the evidence presented by the prosecution establishes a primafacie case for the accused to answer or one evidence exist for it to proceed further in what is commonly referred to as a motion of no case to answer. The significance of the case at that level is to have the accused acquitted of any wrong doing.

Analysis

The starting point of my discussion of the state case is to recognize the combination of elements to be proven by the prosecution for the offence of murder contrary to Section 203 against the accused person inorder to secure a conviction thus:

(a) That the deceased Katana Karisa is dead.

(b) That his death was unlawfully caused and at the time of the murder accused person did so with malice aforethought.

(c) That the accused person has been positively identified and placed at the scene of the crime.

With that in mind this leads me to the point where I fundamentally have to look at the position of the Law on this area. The approach which was favoured by **the Canadian Court as instructive in the commentary of Judge Roger Salhany, Criminal trial Handbook (Toronto) Carswell 1992 (See also R v Monteleone {1987} 2 SCR 54)** as he stated in the following passage:

"If the trial Judge is satisfied, as a matter of Law, that the crown has failed to establish a primafacie case, or she must direct the jury to return a verdict of not guilty, if the Judge is the trier of fact, he or she must acquit the accused. The Judge must rule immediately on the question of whether there is a primafacie case."

It is improper for the Judge to reserve his or her decision and put the accused to his or her election on defence so as to supplements the state

case. **(Seamans 1978) 41 CCC 2d 446).**

The standard of proof at this stage of the proceedings has utmost remained unaltered for many years without any difficulty to be proof not beyond 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."

This principle is reinforced at the heart of the dictum in **Hays v United States 231 F 106 {1916} US Court of Appeals; 8th urc** where the following threshold was set:

"At the conclusion of the plaintiff's case a motion was made for directed verdict and its denial is one of the principle errors now retied on. While it is conceded that there is substantial evidence to establish all the elements of the offences charged in the indictment, it is urged that such evidence is insufficient to convince the jury beyond reasonable doubt. This assignment of error is without merit.

Where there is substantial evidence tending to prove each element of the offence charged, the verdict of the jury is final. Whether the evidence is of sufficient probative force to convince the mind beyond a reasonable doubt is addressed solely to the Judgment of the jury. The Court can do no more than accurately state the rule of Law. There is no way by which the doctrine of reasonable doubt and presumption of innocence can be properly used to create a new zone of error or devolve upon appellate Court duty to examine evidence its probative force."

The **Court of Appeal in England and Wales** followed its reasoning and in a large measure laid the guiding principles to demonstrate certain conclusions that could safely be drawn on the assessment of the evidence at the close of the prosecution case in **R v Galbraith {1981} 1 WLR 1039 Lord Lane C. J.** 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 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 convince 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 taken of a witness 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."***

Taking into account the nature of the charge, the documentary exhibits available and what the prosecution set out to proof in the eventual trial, can this Court place the case under the context of a primafacie case or in the accused motion of no case to answer?

An examination of this question and answer has to find its inspiration wholly in the words of Section 306 of the Criminal Procedure Code which provides interalia:

"That the Court after hearing the evidence of the prosecution against the accused or any of several accused persons is not sufficient to justify a continuation of the trial may record a finding of not guilty in respect of such accused and shall there upon be discharged. In the Subsection (2) if the Court satisfies itself that the evidence required is manifestly strong to exact the test of a primafacie case it shall then call upon the accused to enter upon the defence."

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)**

In **Regina v Coker & other {1952} 20 NLR 62** the Nigeria Court of Appeal drew a distinction between the term primafacie and no case to answer as follows:

"That a submission that there is no case to answer meant that there was no evidence on which the Court could convict even if the Court believed the evidence given whereas in the primafacie the Court is obliged to rule that there is a case for the accused person to answer and to prove with the trial by asking the accused person to enter into his defence." **(See Adeyemi v State {1986} 3 NWLR 340)**

Specifically am the foregoing it follows that this Court has to subject the evidence to some level of scrutiny to establish whether the case as submitted discloses a primafacie case or motion of no case to answer the charge such is the course of events to guide the Court in exercise of discretion.

It will be recalled that **PW1 Samwel Safari** told the Court that on 10.11.3.2019 at about 1.00 a.m. while in his house he heard some screams from the directions of his late father's homestead. He therefore armed himself with a torch stepped out of his house towards the scene of the screams. That is when he came into contact with three people one of whom he describes to be of short in physique on inquiry from the accused and simultaneously did observe the deceased had already suffered multiple injuries to both the upper and lower limbs. In the same vein (PW1) also gave evidence that **(PW2) Changawa Mueli** appeared to have been assaulted as the bodily injuries on her body confirmed. Further, (PW1) testified that given the circumstances of the victims he made arrangements to have them escorted to Malindi Hospital. However, notwithstanding his efforts the deceased succumbed to death.

In cross-examination by the defence counsel it is helpful for the Court to remember that the witness gave a description of the scene indicative of non-existence of any electricity or other source of light in place for a positive identification to capture sequence of events that night. He also confirmed that in identifying the accused he basically relied upon the source of light from his torch.

In the summary of his evidence (PW1) told the Court that prior to the criminal incident of death there existed a family land dispute with the accused person. Secondly, there were also murmurs of witchcraft against the deceased. There was no suggestion however that any of these contributed to his death on the night of 10.3.2019 and wee hours of the 11.3.2019.

On the other hand the prosecution case is dependent upon the evidence tendered by **(PW2) – Changawa Mueni.** In effect of **(PW2)** testimony in that role against the accused she provided a basis of having positively identified him at the scene from tin lamp source of light. Throughout the hearing of her evidence (PW2) stated that the attackers made entry into their timber house where she lived with the deceased.

As indicated in her testimony with regard to the 1st accused she appropriately had a conversation with him inquiring why they were cutting her with the panga. It is at that time **(PW2)** testified the accused left with the deceased and on a second turn to the house he met with **(PW1).**

The prosecution factored in expert evidence as to the cause of death of the deceased as manifested from the evidence of **(PW3) Dr. Fadiya** of Malindi Hospital Mortuary. The doctor concluded that the deceased was assaulted and suffered multiple injuries as documented in the post-mortem examination carried out on 21.03.2019. **(PW3)** went on to state that the cause of death was hemorrhagic shock, due to the severe injuries to the right hand, right guiteous and deep cut wounds exposing the muscles.

Finally, the evidence for the prosecution case rested on the testimony of **(PW4) No. 84109 PC Robert Langat.** In summary therefore, **(PW4)** told the Court that following the death of the deceased he visited the scene of the murder at Mtangani area. One of the key role played was to interview the witnesses and effect an arrest against the accused person.

Thus as adverted to earlier the basic requirements of proof that must be met before a primafacie can be said to be established is weighing the evidence within the context of the elements of the offence. While evaluating the evidence on record, its not disputed that the deceased **Katana Karisa** is dead. It was the testimony of **(PW1)** and **(PW2)** that in the middle of the night between the 10.11.3.2019 assailants entered the home of the deceased and thereafter occasioned fatal injuries which caused him to succumb to death.

There is credible evidence from the evidence by (PW1) and (PW2) that points to a prior assault upon the deceased where he suffered serious fatal injuries. The evidence by **Dr. Fadiya** captured from the post-mortem examination tends to attach the gravity of multiple injuries as a contributory factor to the cause of death of the deceased. The evidence of these witnesses which has already been outlined elsewhere in this Ruling is consistent in a number of ways that the death of the deceased was unlawful. I accept the evidence of **(PW1)** and **(PW2)** that they saw cut wounds on the body of the deceased to be truthful. This was corroborated by the post-mortem examination report dated 21.3.2019.

In the absence of any evidence showing that the deceased died of some other causes different from those cut wounds, it is reasonable to draw an inference that he died as a result of the bodily harm inflicted on the night of 10.3.2019.

This is in consonant with the principle in **R v Guzambizi Wesonga {1948} 15 EACA 65** where the Court held interalia that:

"all homicides are unlawful unless committed in circumstances excusable under the Law like in execution or advancement of justice, in reasonable defence of person or property, and as a result if an accident or misadventure. The evidence qualifies this ingredient of the death of the deceased being unlawful."

The other critical element to be evaluated towards establishing existence of a primafacie case or a motion of no case to answer is to decide whether evidence shows that the killers had malice aforethought, within the meaning of Section 206 of the Penal Code. It bears emphasis that under the provisions malice is said to be proved by prosecution evidence when any of the following circumstances are proved:

(a) An intention to cause the death of another.

(b) An intention to cause grievous harm to another.

(c) Knowledge that the act or omission causing death will probably cause death or grievous harm to some person, whether that is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wish that it may not be caused.

(d) An intent to commit a felony.

(e) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.

In **Lokoye v Uganda {1968} EA 332 and R v Tubere s/o Ochen {1945} 12 EACA 63** the Court held:

> ***"That it is the duty of the Court in determining whether malice aforethought has been established to consider the weapon used, the severity and multiple injuries inflicted, nature of the injuries and parts of the body inflicted, the conduct of the accused before or after the attack must be considered."***

In the case before this Court the prosecution set out to prove from the evidence of (PW1), (PW2), (PW3) and (PW4) that the assailants who caused the death of the deceased had malice aforethought. Reviewing the evidence generally and applying the principles in the cited authorities, I am of the considered view that the deceased killers did so with malice aforethought.

That leads me to the most significant element as to who actually killed the deceased. The Law on identification is well settled as can be seen from the principles in the case of **James Tinega Omwenga v R CR Appeal No. 143 of 2011, R v Turnbull & Others {1976} 3 ALL ER 549, Abdalla Bin Wendo v R 20 EACA 166. In Anjononi v R {1980} KLR 59 the Court of Appeal** observed that:

"Recognition of an assailant is more satisfactory more assuming, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailants in some form or another."

Further in **Joseph Ngumbao Nzaro v R {1991} 2 KAR 212** the Court stated that:

"Before accepting visual identification as a basis for conviction, a trial Court had a duty to warn itself of the inherent dangers of such evidence and that a careful direction regarding the conditions preventing at the time of identification and the length of time for which the witness had the accused under observation together with the need to exclude the possibility of error was essential."

I have considered the evidence by correlating the features on the identification of the accused from the testimonies given by (PW1) and (PW2). According to (PW1) and (PW2) the incident occurred on or about 1.00 a.m. with no evidence of moonlight. The record shows that (PW1) identified the accused positively by use of a torch which was never produced as an exhibit for the Court to make inferences to it. On consideration of the evidence one cannot rule with certainty the existence of the alleged torch and the strength of the light likely to be illuminated to enable the witness identify the accused.

The sequence of the evidence by the prosecution went further to corroborate identification of the accused vide observations made by **(PW2)** through the source of light from a tin lamp. I find it puzzling that the prosecution did not deem it fit to produce the torch and the tin-lamp being the underlying exhibits in support of identification evidence.

From the assessment of this part of the case, it is evident that the prosecution failed to answer the following pertinent questions. The position of the light vividly described by (PW1) and (PW2) and how they positively identified the accused person.

> ***1. How long did the witnesses have the accused under observation?***
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> ***2. At what distance?***
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> ***3. Was the observation impended in anyway?***
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> ***4. Had the witness ever seen the accused before?***
>
> ***5. How often?***
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> ***6. If only occasionally had they any physical reason for remembering the accused?***
>
> ***7. Why was the identification parade conducted in view of the fact that the crime was committed at night?***
>
> ***8. What was the description of the accused given to the police immediately after the incident by the witnesses?***
>
> ***9. Was the possibility of mistaken identity likely to have occurred in recognition of the accused as a to close neighbor or relative? (See Turnbull (supra).***

For reasons which were never explained by the witnesses this factor on crucial evidence on identification was such that there is a likelihood of the witnesses to be mistaken and rely on an erroneous assumption particularly given the obscurity of the prevailing source of light. It falls on me to weigh the evidence with meticulous care and certainty. I have no hesitation that the identification was imperfect and not free from any possibility of error or mistake. All these matters of a torch and tin lamp not even produced in Court go to affect the quality of identification evidence. It's even applicable under the ambit of recognition to be of little probative value and should be rejected outright.

In my view for the prosecution to demonstrate existence of a primafacie case under Section 107 (1) and 108 of the Evidence Act as read with Section 306 (2) of the Criminal Procedure Code, it would require evidence of a much higher quality than there is on record as stipulated by (PW1) and (PW2) respectively.

In view of the doubt entertained, I consider the facts and circumstances of the case to lean towards a motion of no case to answer in line with Section 306 (1) of the Criminal Procedure Code. In the result the charge discloses an offence committed contrary to Section 203 of the Penal Code but falls short of identifying the accused and placing him at the scene of the crime.

Accordingly, the charge stands dismissed and accused set free and at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state

2. Ms. Aoko advocate for the accused person