REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 15 OF 2017

REPUBLIC...PROSECUTION

VERSUS

1. MWAKA CHIVATSI ....1ST ACCUSED

2. JUMA MWARABU alias **JUMA KAZUNGU.................2ND ACCUSED**

3. RAPHAEL MAITHA KAZUNGU..................................3RD ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the state

Mr. Obaga for the accused persons

RULING

The three accused persons were charged with murder contrary to Section 203 of the Penal Code, punishable under Section 204 of the stated code. At the initial arraignment each of the accused pleaded not guilty. Learned counsel **Mr. Obaga** appeared on their behalf whereas **Ms. Sombo** represented the state.

What evidence did the state provide to proof the charge against the accused persons. The fundamental evidence which came from six the witnesses as their brief summary hereinunder outlines:

PW1 – Bahati Mbitsi testified and drew the court's attention that on 15.8.2017 while in the forest he was called back home where he had a conversation with the deceased in respect of the sale of land to **Mr. Mwarunga.**

On his return from **Mr. Mwarunga's** home it emerged that one **Kache Nyambu** their sister had a sick child admitted at Kilifi Hospital. It was then agreed with the deceased that they visit the child at the hospital and in the course they met with the mother – **Kache Nyambu.**

According to (PW1) a discussion on the cause of the sickness arose, pointing a finger to be witchcraft by the deceased. According to (PW1) in a short while the accused persons joined in the conversation with an escalation of the issue of witchcraft against the deceased. While they were on it, the accused and others not before court armed with clubs assaulted the deceased on the head. In (PW1's) testimony the deceased tried to take flight out of the scene but was pursued by the accused persons accompanied with persistent beatings. On this assault, (PW1) stated that the deceased died soon thereafter.

On cross-examination by **Mr. Obaga** for the accused persons the witness testified that one **Uwezo** was the first to hit the deceased. It would appear from his answer one **Mwaka** was not present at the crime scene.

PW2 James Mwarunga evidence was in respect of the land sale transactions between him, the deceased and **PW1 – Bahati Nyamu.** He alluded to the fact that the full purchase price was yet to be paid, which necessitated the deceased and (PW1) to follow up on the issue prior to him being assaulted.

The next episode in this case was the post mortem report by **Mansoor** provided in Court as exhibit 1 on behalf by **Dr. Ndolo** of Kilifi County Hospital. From the postmortem examination **PW3** gave evidence that the deceased had multiple injuries to the head and eventually he died out of haemorhage secondary to head injury.

PW4 – PC Leonard Muthuri stated in court that the investigations had already been concluded by **PC. Mayaka** when the file was handed over to him on the alleged incident of murder. He admitted not to have conducted any additional investigations. With all that in mind the trial therefore raises a preliminary issue as to whether the prosecution has discharged the burden of proof of a primafacie case against the accused persons or on the other hand a motion of no case to answer to result in favour of the accused persons, to be acquitted of the offence.

Determination

The substantive issue which falls to be decided is as provided for under Section 306 of the Criminal Procedure Code which has two facets inference to be drawn by the court.

The first is a motion of no case to answer when the threshold enquiry aimed at establishing that any of the elements of the offence necessary to prove the charge remains largely non-existent.

The second scope is when the evidence of the witnesses for the prosecution at the conclusion of their case when re-appraised is capable of demonstrating that the accused person, or more of several of them charged committed the offence in question to warrant the court to call upon each of them to answer the charge.

As this has been explained time and time again in **Bhatt v R 1957 (EA) 332** but perhaps given the importance of this subject matter it would suffice to restate the principles:

> ***"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a primafacie 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." A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence 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 property directing its mind to the Law and the evidence could convince if no explanation is offered by the defence."***

The doctrine of a primafacie case does not turn on the question of whether the accused person is guilt of the offence charged, but if in the contentious matter and the evidence considered properly and justly can connect the accused with the offence, in which an independent tribunal may convict at the end of it all.

The essence of this is put in context in the case of **R v Samwel Karanja CR Case No. 13 of 2004 {2009} eKLR** where the court held:

> ***"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 primafacie 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 part is well settled."***

The fundamental jurisprudential question is that at half time submissions under Section 306 of the Code, there should be no detailed analysis of the evidence which might likely prejudice the prospects of the upcoming defence. This is also predicated on the right of presumption of innocence as entrenched under Article 50 (2) (a) of our Constitution.

In drawing an inference or conclusion from the evidence so far rendered by the prosecution in **R v Burdett {1820} 4 B 8 ALD 95 106 ER 873.** The entrenchment of a primafacie case is such that:

> ***"It is true that a man is not called upon to explain suspicious things, but comes a time when, circumstantial evidence having enveloped a man in a strong and cogent network of inculpatory facts. The man is bound to make some explanation or stand condemned. It may be that the evidence is very largely circumstantial, but the actual facts are known to the accused, and he has the right under the Laws as they now exist to explain them away by his own evidence."***

From this legal position as to what constitutes a primafacie case it is highly necessary for the court to preserve and protect the right to a fair hearing predicated on the right of an accused person to remain silent, in **(Article 50 (2) (1))** and the right to refuse to give self-incriminating evidence under **(Article 50 (2) (h))** of the Constitution. To hinder any such encroachment, the court in **S v Manamela {2000} 3 SA 1 CC BCLR 491** the court said that:

> ***"The right to silence, like the presumption of innocence is firmly rooted in both Common Law and statute; and is inextricably linked to the right against self-incrimination and the principle of non-computability of an accused person as a witness at his or her trial."***

It is therefore imperative in a trial of an accused person to keep in mind that the right to a fair trial is so critical that its applicability is both vertical and non-negotiable.

This was adverted to in the case of **R v Johnson {1993} 12 O.R. 3 at 340 C.A. Pardu J.** said:

> ***"No adverse inference can be drawn if there is no case to consider. A weak prosecution case cannot be strengthened by the***

failure of the accused to testify, if the crown's case cries out for an explanation, an accused must be prepared to accept the adverse consequences of his decision to remain silent. (In R v Mancher {1990} CR) the court observed that the accused's failure to testify is not an independent piece of evidence to be placed on the evidentiary scale. It is rather a feature of the trial which may assist in deciding what inferences should be drawn from the evidence adduced."

It is well established principle in **Woolmington v DPP {1932} AC** that the prosecution carries the burden of proof throughout a trial of a criminal case as a means of finding the truth in order to draw an adverse inference against the right to the presumption of innocence.

In his book **Professor D. M. Paciocco in Charter Principles and proof in criminal cases {1987} at pg 495** he stated:

> ***"It seems clear that this principle of a case to meet relates to the crown's obligation to present a primafacie case so as to avoid being non-suited by a motion for a directed verdict of acquittal. It does not refer to the crown's ultimate burden of proving guilt beyond reasonable doubt. If this is so, once the crown meets its case, the accused can quite legitimately, be expected to respond, whether by testifying or otherwise and his failure to do so can be used as a basis for the logical inferences without violating the principle."***

Whether an adverse inference can be drawn an action where the accused elects to keep silent upon being placed on his or her defence **Lord Mustill in Murray v DPP {1992} CR Appeal R 15** said as follows:

> ***"This is not of course because a silent defendant is presumed to be guilty, or because silence converts a case which is too weak to call for an answer into one which justifies a conviction. Rather the fact finder is entitled as a matter of common sense to draw his own conclusions if a defendant who is faced with evidence which does call for an answer fails to come forward and provide it. It is however, equally a matter of common sense, that even where the prosecution has established a primafacie case in the sense indicated above it, it not the every …. that an adverse reference can be drawn from silence. Everything depends on the nature of the issue, the weight of the evidence adduced, by the prosecution upon it, and the extent to which the defendant should in the nature of things to be able to give his own account of the particular matter in question. It is impossible to generalize, for defendant upon circumstances, the failure of the defendant to give evidence may find no inference at all or one which is for all practical purposes fatal."***

The issues of burden and standard of proof under Section 306 of the Criminal Procedure Code must be analyzed in the light of the material elements of the crime commonly referred to as *mensrea* and *actus reus* to proof existence or non-existence of facts in a charge against the accused person. In the sense of the evidential burden required of the prosecution to point out against the accused persons for the charge of murder is actually basic to proof the following elements:

(a) The death of the deceased Shoka

(b) That he died out of an unlawful act.

(c) That in causing death, the accused persons formed a common intention to prosecute the murder.

(d) That in all aspects of the commission of the murder each of the accused has been placed at the scene.

In the instant case, the version raised by the prosecution in the strict legal parlance under Section 107 (1) of the Evidence Act substantially strengthens motive behind the death of the deceased. All what (PW1) demonstrates serves to discharge the evidential burden of a primafacie case against the 2nd and 3rd accused persons.

His part encompasses that by a preponderance of evidence there is a connecting factor to show primarily existence of an issue of fact under inquiry on the murder of the deceased and that the 2nd and 3rd accused persons had a hand on it. It can hardly be denied that the seriousness of the allegations made by the prosecution is inherent of the likelihood of an occurrence of the offence of murder contrary to Section 203 of the Penal Code which when taken into account calls for an answer from the 2nd and 3rd accused persons as provided for in Section 306 (2) as read with Section 307 of the Criminal Procedure Code.

In contrast with regard to the first accused and adopting the test in **R v Bhatt (supra),** that if a submission is made that there is no case to answer, the decision should depend not so much, on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. The test is also similarly enunciated in **R v Galbraith {1981} 1 WLR 1039 where Lord Land C. J** said: ***"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."***

The penultimate question to be answered by the prosecution at the end of the legal race to effect and cast the burden of proof is that: The first accused having been charged with murder of the deceased **Shoka,** he did so unlawfully and with malice aforethought. The emphasis here should be on relevance and admissibility of evidence that has been produced by the prosecution.

In the textual of Section 206 of the Penal Code malice aforethought is deemed to be proven or manifested by evidence if any of the following circumstances are established:

(a) 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 person is the person killed or not, accompanied by indifference whether death or grievous injury occurs or not or by a wit that it may not be caused.

(d) An intent to commit a felony.

In **Tubere case {1945} 12 EACA 63** the principle malice aforethought

"is deemed to be established in determining the weapon used, the manner in which is used and part of the body injured."

Looked at from this point of view what the prosecution advanced to this court is in effect evidence that on his arraignment the main prosecution witnesses failed to implicate the first accused. Secondly, as their case is based on a single identifying witness of (PW1), an examination of it as set out in **Roria v R {1957} E.A. 583** fails the watertight scale. It follows that the first accused was neither recognized nor identified as one of the principal offenders or an accessory to the murder of the deceased.

Further, on a positive note when it comes to the 1st accused person is the consideration of the so called conspiracy to commit a crime under Section 10 of the Evidence Act. The actions of the 1st accused person are to be considered as such with the other co-accused.

In **R v Ramji {1946} 13 EACA 127, Ozia v R {1957} EA 36** the court held interalia that:

"There was no conspiracy reasonably to be believed to exist between the 1st accused with the other two accused persons that anything done and said or entertained each of them acted or conspired to kill the deceased."

The other most important ground in this case touches on the doctrine of common intention under Section 21 of the Penal Code in **Wanjiro d/o Wamar Co. v R 22 EACA 521**, the court held:

"Common intention generally implies a premediated plan but this does not rule out the possibility of common intention developing in the course of events though it might not have been present to start with."

The expression common intention under Section 21 of the Penal Code connotes that the prosecution has to lead evidence to distinguish accused's intention from the common intention of the doer of the act and his co-accomplices. It may be identical with common intention or it may not depending on the facts and sufficiency of the evidence of the witnesses.

Comparing the evidence by the prosecution, witnesses presumably the issue whether the 1st accused was in joint enterprise and had signed up to the goal of killing the deceased at this stage of establishing a primafacie case remained a mirage.

The most authoritative legal statement on this element of intention under Section 206 and 21 of the Penal Code is to be found in **Mewett & Manning on Criminal Law 3rd Edition {1994} at page 520** where **Manning** explained:

"Mensrea has more than one meaning. It can entail a purpose, a desire to achieve an objection: It can entail merely knowledge, that consequences will follow or that circumstances exist, it can entail only recklessness, that is, some advertent or perhaps inadvertent disregard of the consequences or circumstances. What suffices for liability depends upon the particular offence with what we are dealing. If a person is compelled to do an act which he does not wish to do, and therefore does it against his will, why it may be asked, does he have a defence not of compulsion but simply of lack of mensrea? The answer is that this is quite true, but only if the mensrea required for the particular offence in question is of the sort that is regaled by a person being compelled to do something against his will."

This therefore is a crucial factor. On the material before the court the evidence of all that circumstances on the allegation of the 1st accused participating in the murder of the deceased is inconsistent with a primafacie case as defined in **Bhatt case (supra),** and **Galbrath guiding principles (supra).**

To sum up and in the foregoing reasons, the basis of criminal liability against the 1st accused is not exactly clear and cannot be ascertained, from the prosecution narratology. Even if it be held that the accused was seen elsewhere in the vicinity of the scene, the common intention which requires some meeting of minds before or during the killing is lacking.

As a consequence, the 1st accused shall be acquitted, and to have no opportunity to be placed on his defence. There is no evidence that if the accused is called upon to state his defence and he elects to remain silent the character of the evidence is of such quality for the Court to convict him of the offence of murder contrary to Section 203 of the Penal Code. That question for a reasonable tribunal properly directing its mind to the evidence might not convict the 1st accused for failure of the prosecution to lead any iota of evidence at this stage on culpability, is in contrast with the evidence filtered against the 2nd and 3rd accused persons. What does this mean for the 1st accused? The answer is simple to be released unless otherwise lawfully held.

In the end its my view that the 2nd and 3rd accused be placed on their defence under Section 306 (2) as read with Section 307 of the Criminal Procedure Code.

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

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R. NYAKUNDI

JUDGE