



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 2 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MUGENDI NJERU.....ACCUSED

RULING

A. Introduction

1. The accused was charged on 15th January 2015 with the offence of **murder, contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the 27th December 2014, at Majengo estate in Embu town within Embu County jointly with others not before court murdered one **Roseline Wanja Mugendi**. He pleaded not guilty to the charge.
2. The prosecution called ten (10) witnesses in support of their case which evidence is summarised herein.

B. Prosecution Case

3. It was the testimony of PW1 that she said that she did not witness the incident but just received a report from PW6 that the deceased had been slashed with a panga.
4. Neither did PW2, PW3, PW5 and PW6 witness the incident but only saw the body of the deceased after the incident. PW3 said that the accused and the deceased who stayed together as husband and wife had serious marital differences preceding the incident which may have led to the accused murdering the deceased.
5. PW7, Dr. Thuo, examined the accused and found him mentally fit to stand trial. The report of PW9, the government analyst was negative on the exhibits sent to him for examination.

C. Accused's Submission

6. The accused submitted that the prosecution had not made out a *prima facie* case as to warrant the accused person being put on his defence as there was no evidence tendered to link the accused with the murder and further that the accused was not in Embu from 25th to 28th December 2014.
7. The accused further submitted the prosecution had not established any motive for the accused to kill the deceased and thus the charge facing him ought to fail. The accused submits that the evidence tendered by the prosecution is circumstantial and the chain of circumstance are not continuous and are unbroken creating doubts that the accused caused the death of his wife.

8. The accused relied on the cases of **Erick Odhiambo v Republic Criminal Appeal No. 84 of 2014**, **Abanga Alias Onyango v Republic Criminal Appeal No. 32 of 1990**, **Sawe v Republic (2003) KLR 364**, **GMI v Republic Criminal Appeal No. 308 of 2011 (Nyeri)** and **Dhalay Singh v Republic Criminal Appeal No. 10 of 1997**, that enunciate the principal that for circumstantial evidence to for a basis of a conviction it must satisfy several conditions which are intended to ensure that the circumstantial evidence points only to the accused and to no one else.

D. Prosecution Submission

9. It is the prosecution case that from the evidence adduced it was evident that the accused person caused or might know what caused the

death of the deceased as the two were living together and their marriage was rocky.

10. It was further submitted that there was circumstantial evidence to prove that the fight between the deceased and the accused witnessed by PW4 later developed to a physical confrontation that led to the death of the deceased. Further the prosecution testified that the evidence of most of the prosecution witnesses was consistent and uncontroverted.

E. Analysis of the Law

11. The issue at stake here is whether at the conclusion of the state's case the prosecution has produced sufficient evidence to establish a *prima facie* case.

12. It is the law in Kenya as entrenched in the **Constitution under Article 50 (2) (a)** that ***an accused person is presumed to be innocent until the contrary is proved.***

13. The **Evidence Act Cap 80 of the Laws of Kenya at Section 107 (1)** provides thus:

“whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”

14. It is worth noting that at this stage of the proceedings the standards applicable on whether a *prima facie* case has been made out is lower than the standard of proof beyond any reasonable doubt which applied at the conclusion of the trial. The strength of the evidence establishing a *prima facie* case, as submitted by the accused, must be the sort of evidence upon whose strength the Court could convict if the defence says nothing to rebut such evidence.

15. The **Criminal Procedure Code section 306 (1)** provides as follows:

“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 recording a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.....”

16. The question on the *prima facie* case has been extensively considered by the courts and other legal texts by scholars. The **Oxford Companion of Law at pg 907** gives the definition as:

“A case which is sufficient to all an answer while *prima facie* evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive.”

17. In furtherance of whether a *prima facie* case has been made, **Lord Parder C.J** in the case of **Sanjil Chattai v The State [1985] 39 WLR 925** stated thus:

“A submission that there is no case to answer may properly be made and upheld:

(a) When there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence.

(b) When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it.”

18. The Courts in Kenya have heavily relied on the legal principles in the celebrated case of R.T. **Bhatt v Republic [1957] EA 332 – 334 & 335** to define what constitutes a *prima facie* case. The court of Appeal of Eastern Africa stated thus:

“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 case, the case is merely one which on fully consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would 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 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 can any amount of worthless discredited evidence.”

19. The legal principles to guide a trial court in making a determination on a *prima facie* case have clearly been stipulated in both the persuasive authorities and in the Eastern African case of **R.T. Bhatt v Republic (Supra)**. The legal principles which run through the cases cited revolves around sufficiency of evidence capable of establishing the ingredients of the offence the accused is charge with. Secondly, a mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence.

20. Thirdly it is evidence adduced by the prosecution such that a reasonable tribunal properly directing its mind would convict the accused in

absence of any explanation when called upon to answer or put on his defence. (See *R.T. Bhatt v Republic (Supra), Daboh & Another v State (Supra), PP v Mohammed Abu Bakar (Supra)*).

21. The test to be applied here is as elucidated under **Section 306 of the Criminal Procedure Code** and buttressed by the legal principles in the cited authorities. It is clear that none of the prosecution witnesses was present at the material, time of the deceased's death.

22. Further, the testimony of PW3 to the effect that the accused and the deceased had marital problems and that the accused had given the deceased **Kshs. 70,000/=** which the deceased misused, is not sufficient, in my view, to link the accused to the deceased's death. Every marriage has its own challenges and that cannot be the basis upon which the accused should be on his defence.

23. On consideration of the matter at this stage, I am persuaded that the prosecution has not made up a *prima facie* case which has resulted in the failure to establish the essential ingredients of the offence of murder.

24. The upshot of the above is that I find that the prosecution has not made out a *prima facie* case against the accused to require him to make a defence.

25. Consequently, the accused is acquitted under **Section 210 of the Criminal Procedure Code**.

26. He is hereby set at liberty unless otherwise lawfully held.

27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the State

Ms. Muriuki for Okwaro for Applicant/Accused