



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL CASE NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS ADEGA.....ACCUSED

RULING

1. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the penal code. The particulars of the offence are that on the 28th March, 2015 at Wangulu Village, Mudete Sub-location North Maragoli location within Vihiga County he murdered Felix Keyombe Nandiema (herein referred to as the deceased).
2. The prosecution case is that the accused was an uncle to the deceased. He was a brother to the deceased's father PW2. Maximilla Khadenyi PW1 was the mother to the deceased.
3. That on the night of the material day the deceased and a sister were sleeping in the house of their grandmother PW3 who is the mother to the accused. The deceased's parents were sleeping in their house which was next to the house of PW3. That at about 2 a.m. the deceased's parents were woken up by shouts that PW3's house was burning. The deceased's parents woke up and went out of the house. They found the house of PW3 burning. The door to the house was locked from inside. They broke a window to the house. They found their two children having received serious burns. They were taken to Mbale County Referral Hospital where they were referred to Jaramogi Oginga Odinga Teaching and Referral Hospital, Kisumu. After two weeks the deceased died. The deceased's father buried the body. The accused was suspected to have caused the fire. He was nowhere to be seen. On 5th July, 2014 C.I. Mwinuki PW4 received a report that the accused had been sighted in the area. He was led to where the accused was and arrested him. The deceased's body was exhumed on 3/4/2015. A postmortem was done on the body by Dr. Mchana PW5. He found the cause of death was due to complication arising from burns. The accused was charged with the offence.
4. During the hearing, Dr. Mchana produced the post mortem report as exhibit, P.Ex1. PW3 turned out to be a hostile witness to the prosecution evidence and was declared so a hostile witness.
5. At the close of the prosecution case, the prosecution counsel **Mr. Ng'etich** submitted that the prosecution had established a prima facie case against the accused. He relied on the evidence adduced in court.
6. The counsel for the accused, **Mr. Ondieki**, on the other hand submitted that there was no case made up against the accused. That PW1 and PW2 stated that they did not know the cause of the fire. That PW3 turned hostile against the prosecution case. That there was thereby no evidence to link the accused with the fire.
7. A prima facie case was defined in the case of **Ramanlal Trambaklal Bhatt –Vs- Republic (1957) EA 332** that:-

“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, the 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 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. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie,” 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.”

8. It was the evidence of the deceased’s mother PW1 that she escorted the children to the house of PW3 at 8 p.m. and left them to sleep there. That PW3 was in the house at the time but that the accused was not there. That when they found the house burning the door was locked from inside and PW3 was not in the house. The witness said that she did not know what caused the fire.

9. The deceased’s father PW2 on his part stated that the accused was working at Kisumu and at Eldoret. That he used to come home after 2-3 months. That whenever he came he would sleep in the sitting room of his mother’s house. That before the incident the accused had stayed at the home for about a month. That on the day proceeding the night when the house burnt down he had been with the accused at their home. That on the evening of the material night he had heard the voice of the accused inside the house of his mother (PW3) around 9 p.m. That when they went to rescue the children they did not find the accused nor his mother in the burning house. His mother went there with other people when the house was burning but the accused was nowhere to be seen. The witness stated in cross-examination that he does not know what started the fire and that it is his mother PW3 who knows about it.

10. The PW3 was declared a hostile witness to the prosecution case. She stated that though she was sleeping in her house with her grandchildren she did not know the cause of the fire. She denied in cross-examination that she had recorded a statement to the effect that the accused is the one who had burnt the house.

11. Though the deceased’s father says that he heard the accused’s voice in the house of his mother on the evening of the night the house burnt down, his wife PW1 stated that she did not find the accused in the house when she took the children to the house for sleeping. This contradictory evidence creates doubt as to whether the accused was at home on the evening of the material night. Though PW2 said that the accused had stayed at home for a month before the date of the incident PW1 never confirmed such evidence. The two witnesses therefore failed to place the accused at the scene of the crime on the material night. Their evidence is insufficient to be the basis of placing the accused to his defence.

12. The accused’s mother turned hostile to the prosecution evidence. Evidence of a hostile witness is of little probative value as was stated in **Batala –Vs- Uganda (1974) EA 402** that:-

“The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables a party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight.”

13. In **Abel Monari Nyanamba & 4 Others –Vs- Republic, Nairobi CA Criminal Appeal No. 86 of 1994 (1996) eKLR**, the Court of Appeal held that:-

“The evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.”

14. The deceased’s mother left PW3 in the house when she escorted the children to the house for sleeping. When the deceased’s parents found the house burning the door was locked from inside and PW3 was not inside the house. PW3 then had to explain how she escaped from a burning house and locked the door from inside. This points to PW3 as being a suspect to the commission of the offence. Though PW3 implicated the accused in her statement to the police, she turned out to be a hostile witness and thus her evidence cannot be relied on.

15. In the foregoing I find that the prosecution has not established a prima facie case against the accused. If the accused were to be placed to his defence and he exercised his right to remain silent there is no evidence on which the court can convict him of the offence. It is for the prosecution to prove the case against the accused beyond reasonable doubt and not for the accused to fill in the gaps left out in the prosecution case. The upshot is that the accused has no case to answer and is thereby acquitted of the charge under the provisions of section 215 of the Criminal Procedure Code.

Delivered, dated and signed at Kakamega this 12th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Ondieki for accused

Mr. Ng’etich for state

Accused - present

Court Assistant - George