



02REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 17 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

MARRY WANGUI MAKUMI.....ST ACCUSED

EZOEKE SUNDAY JEREMIAH...^{2ND} ACCUSED

RULING

Background

1. The above-mentioned accused persons were arraigned in court charged with the offence of murder contrary to **section 203** of the Penal Code. At the time of the alleged offence it was particularized that on the night of 8th August 2017 and the wee hours of the morning of 9th August 2017 at Dawal Apartments within Ongata Rongai Township, Kajiado County, jointly with others not before court murdered Joseph Nganga Mwangi.

2. The two accused persons pleaded not guilty to the charge. The prosecution was therefore under a duty to prove the charge beyond reasonable doubt. Consequently, the prosecution called a total of 14 witnesses and produced a bundle of documentary evidence in support of its case.

Undisputed Facts.

3. The brutal murder of the deceased is not in dispute. The deceased met his untimely death in the morning hours of 9th of August 2017. Various photographs were taken at the crime scene by the investigating officer which shows the fatally injured body of the deceased. The same was admitted as evidence and marked as exhibit **1(a)** and the report as exhibit **1(b)**. All the prosecution witnesses confirmed the death of the deceased.

4. The 2nd undisputed fact is that the 2nd accused, Nigerian National is the boyfriend to the 1st accused. The 1st accused was found in possession of a Lenovo mobile phone which belonged to the deceased.

Whether there is a Case to answer.

5. The Criminal Procedure Code **Section 306** provides as follows:

(1) 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.....

6. A definition as to what amounts to a prima facie case was given in the case of **Bhatt –vs- R [1957] EA 332**. In that case the Court of Appeal expressed itself on this issue:

“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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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 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 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."

7. At this stage of the proceedings the standards applicable on whether a prima facie case has been made out is lower than the standard on beyond reasonable doubt which applies at the conclusion of the full trial after the accused person has been heard. The strength of the evidence establishing a prima facie case must be the sort of evidence upon whose strength the Court could convict if the defence says nothing to rebut such evidence. (*see Republic v Laban Muchira Muriithi & another [2019] eKLR*)

8. The important points to note are that the deceased was murdered between the night of 8th August to the morning hours of 9th August, 2019 according to the charge sheet.

9. PW11 testified that the 2nd accused who resides in Nairobi travelled to their home in Molo on 7th August, 2017 for purposes of voting. Further that the accused spent time within family home until 11th August, 2017. Thus, the said evidence removes the 1st Accused from the scene of the crime despite the fact that she was found in possession of the deceased's property.

10. The 2nd Accused is said to have left behind when his girlfriend the 1st Accused left for Molo. It is indicated that he followed her to Molo on the 9th of the August and went back to Rongai together on the 11th August, 2017. Thus, the whereabouts of the 1st Accused on the material date are not known.

11. In summation, the 1nd Accused says that the mobile phone that was found in her possession was a gift from the 2nd Accused. There is need for the 2nd Accused to clear the air how acquired the mobile phone. Further that the 2nd Accused was not with the 1st Accused in Molo on the material date, is evidence which requires an answer. There is also allegation laid by the investigation officer that the shoe recovered with the 2nd Accused had identical marks which were found in the house of the deceased, thus placing him at the crime scene. I had the privilege to look at the documentary evidence of the same and I am of the view that the Accused persons deserve an opportunity to respond to the allegation laid against them.

12. I have carefully considered the evidence tendered by the prosecution and placing reliance on the decision in **Bhatt –v- R (Supra)**, I find that the prosecution has established a *prima facie* case to warrant them to address the court on oath or give unsworn defence and or call witnesses as provided under **Section 306 (2)** as read with **section 307** Criminal Procedure Code.

Dated, signed and delivered at Kajjado this 7th day of June, 2019.

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REUBEN NYAKUNDI

JUDGE

Representation:

Mr. Ms. Nkirote for Meroka for the state

Mr. Naikuni for the 1st accused person

Ms Mageto holding brief for Mr. Itaya for the 2nd accused person