



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 21 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

KALUME CHENGO KING'UMBE.....ACCUSED

CORAM: Justice R. Nyakundi

Ms. Wamae for the State

Ms. Ruttoh for the accused

Accused present

RULING

The accused Kalume Chengo King'umbe was charged with the murder of John Mboro Said on 10th November, 2018 contrary to **section 203** of the Penal Code. The accused pleaded not guilty to the charge putting the state on notice to adduce evidence to discharge the burden of proof beyond reasonable doubt.

The right to exercise that burden under **section 107(1)** of the Evidence Act was fulfilled by calling the seven witnesses in support of the charge. At the trial the accused was represented by Ms. Ruttoh while the prosecution was conducted by Ms. Sombo, prosecution counsel for the state.

Factual Matrix on the Prosecution Case

In the testimony of PW1 Neema on 10th November 2018 the accused and deceased had visited her club where she sells palm wine. She left the club for her nearby house leaving the patrons including the accused and the deceased to continue with the social evening. While at home, PW1 testified to have over- heard a quarrel over a millipede. Under these circumstances she walked back to the club, only to find the accused and the deceased making reference to witchcraft due to the presence of the millipede. It did not take long before the deceased was hit on the head with a stone. There were arrangements made to have the deceased taken to the hospital.

PW2, Dhabu Mwangoro told the court that on 10th November, 2018 she was working at PW1's Mnazi Club which sells alcohol among the customers being served that night was the accused and the deceased.

In the course of the night, PW2 stated that both of them started quarrelling over a millipede; implying that the deceased was a wizard. The deceased was hit with a stone and many more people at the club responded to PW1 and PW2 by providing first aid to the deceased while others ran after the suspect.

However, given the circumstances there was no immediate arrest.

According to **PW3, Birya Karisa**, and PW4, Baraka Kasiwa Kahindi, on the fateful night when the deceased was hit on the head they chased a suspect wearing a reflective jacket but never managed to effect arrest. On return they assisted in taking the deceased to the hospital. He however succumbed to death the following day.

PW5, William Saidi, the father to the deceased confirmed that on the night of 10th November, 2018 the deceased happened to be brought home accompanied by some other men having sustained injuries to the head. According to PW5 testimony, the deceased complained of back injury and did identify the assailant to be the accused person.

PW6, PC Moses Parker attached to Kenya Forest Service pursuant to information received he assisted in arresting the accused person. The accused person duly identified by PW6 was taken to Watamu Police Station for further investigations.

PW7, Gideon Mutua testified as the investigating officer who conducted the inquiry and took into account the circumstances in which the murder offence was committed. PW7 testified that he recorded the witness statements together with attendance during the postmortem examination. In his evidence, the quality and quantity of the evidence referred to the accused as the one to be held culpable for the offence of killing the deceased.

Analysis

It goes against this background for this Court to establish whether under **section 306** of the Criminal Procedure Code the evidence presented fulfills the test of a *prima facie* case.

The Law

The sense of a *prima facie* in terms of **Section 306(1)** of the Criminal Procedure Code is an obligatory finding the court must make on the following;

(1) Whether the evidence of the witnesses for the prosecution case as concluded establishes the accused or any one of them committed the offence or any such cognate evidence under the penal code. If the evidence is not sufficient to support the allegations the accused is entitled to a verdict of not guilty and an acquittal or discharge.

In the second sense under the **subsection (2)** of the code if at the conclusion of the prosecution case there is *prima facie* evidence that shows that ingredients of the offence have been proved, the accused would be called upon to adduce evidence in rebuttal.

A *prima facie* case though not defined under the Criminal Procedure Code is a concept which connotes sufficient evidence for the prosecution to proceed further directed at the accused pursuant to section 306(2) of the Criminal Procedure Code. As a general rule courts have defined as to what constitutes a *prima facie* case as can be seen from a plethora of cases.

In **Reddy v Johnson 293 PZD 9451 & Another** the Court stated;

“When a plaintiff has made a prima facie case by evidence, or a presumption given by him by Law, the defendant must meet it with countering proof or suffer whatever Judgment the prima facie proof will support. The burden of proof remains with the plaintiff to establish her right to recover by Fair Preponderance of all the evidence, not by clear convincing evidence.”

It is the legal position that a *prima facie* case is established as articulated in the case of **R.T. Bhatt v R 1957 EA 332-335** where the court held as follows;

“When at the close of the case for the prosecution is made the question to be decided is whether a reasonable tribunal properly directing its mind to the facts and the Law as it stands may convict if no explanation is offered by the defence.”

But if I may use the words of **Lord Lane in R v Galbraith (1981) I WLR 1039** as regards the primary purpose of a motion of the case to answer is expressed most clearly as follows;

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 of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

3. Where the Judge comes to the conclusion that the prosecution evidence taken at its highest, is such that a jury properly directed could properly convict upon it, it is his duty, upon a submissions being made to stop the case.”

Whereas it is true from the above principles that a Judge or Magistrate could convict on prima facie evidence if no evidence is offered in rebuttal, it is not true that at this stage the prosecution establishes its case beyond reasonable doubt. The position of the case is entirely different in which the prosecution must show prima facie evidence necessary to call upon the accused to be placed on his defence.

In the same light, fair hearing rights under **Article 50** of the constitution when dealing with Criminal trials must be held as binding and not departed from in any event. An examination of the question whether or not at a prima facie stage of the proceedings, the right to a fair hearing has been violated remains to be a key factor within which the exercise of discretion under **306(1) (2)** of the Criminal Procedure Code is to be made.

It is also important to analyze the evidence and rival submissions by both counsels and the issues arising for determination in a motion of no case to answer within the scope of **Article 50** of the constitution on the right to a fair hearing. The core principles, including the presumption of innocence, the right to know the nature of the accusations against the accused, and the ability to challenge the accusations effectively in a fair public hearing by an independent tribunal should be tested at the time of invoking the provisions of **section 306 (1) (2)** of the CPC.

The case in which the prosecution sought to establish against the accused appears from the particulars of the charge and the evidence of the six witnesses. The substance of the charge contrary to **Section 203** of the penal code ought to prove the following elements.

(1) The death of the deceased

(2) That he died as a result of unlawful acts or deeds of omission or commission by the accused.

(3) That in causing death the accused did it with malice aforethought.

The circumstantial evidence produced by the prosecution witnesses PW1- PW4 is that on the material day the deceased was attacked by the accused. That the unlawful act of assault as defined under **section 234** of the penal code was an act of the intention to cause grievous harm or death. According to the evidence deduced from the testimonies by the prosecution witnesses, the grave men of a murder charge is the unlawful act of assault and effect of executing it with finality.

Dealing with the question of malice aforethought this Court was invited to appreciate the evidence exhibited in the postmortem report relating to certain specific injuries which culminated in the death of the deceased.

Applying these facts to the principles in **R. T. Bhatt and R v Galbraith (supra)** I hold that a no motion

of no case to answer by the defense fails, but in its place a prima facie case exists requiring the accused to be placed on his defense has been discharged. In the result the accused is hereby given an opportunity to state his case as provided for under section 306(2) as read with section 307 of the code.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT MALINDI THIS 15TH DAY OF JULY 2019.

R. NYAKUNDI

JUDGE