



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 15 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

ROMA MICHAEL FURAHA...ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms Ruttoh for Accused

Ms Sombo for the State

RULING

The accused person Roma Michael Furaha was charged with the offence of murder contrary to Section 203 as punishable under Section 204 of the Penal Code. The brief particulars alleged against him were that on 2.9.2018 at Kwa Ndomo area in Malindi Sub-County in Kilifi he unlawfully murdered Lawrence Rama.

When entering plea, accused denied any such wrong doing as stated in the charge sheet. In terms of Section 107(1), the prosecution summoned 2 witnesses to prove the charge against the accused person. It follows that after the close of the prosecution case, this court has a duty to consider a motion of no case to answer in terms of Section 306(1) of the Criminal Procedure Code.

The Law Analysis and Resolution

Once the prosecution closes its case under Section 306(1) of the Criminal Procedure Code, the court's jurisdiction is to re-look at the evidence for the purpose of establishing the following: -

Whether at the close of the prosecution case there is evidence

That the accused person(s) committed any of the offence or offences referred to in the charge sheet or any other cognate offence known in Law of which a verdict of guilty and a conviction could be enabled.

Secondly, under the provisions if it is established that there is no evidence that the accused committed any of the offences as charged or any other element of offences recognized in the Penal Code which might be considered.

In a motion of no case to answer the court has discretion to enter a verdict of not guilty and discharge the accused person. In order to justify admission of the accused defence there are clear principles that must be applied to entitle a Judge to exercise discretion under Section 306 (2).

In the case of **R. T Bhatt –vs- R** the predecessor of the court of Appeal formulated the test which the Court would be perfectly entitled to rule an existence of a Prima Facie case: -

1. Where at the close of the prosecution case there is evidence on which an independent tribunal properly instituted may convict the accused in absence of any evidence in rebuttal from the defence.

2. It also follows that the second test involves the decision where at the close of the prosecution case the evidence so far tendered against the accused is partially or basically non-existent to prove any of the elements of the charge or offence charged in the Penal Code, it is effective in this second case to enter a verdict of not guilty and have the accused discharged

as there will be no possibility of a conviction.”

The philosophy behind the aforesaid provisions is the basic rule embedded under Section 107(1) and 108 of the Evidence Act on who bears the burden in a Criminal Case and the duty to prove existence of facts alleged in order to obtain judgment in his favor.

It is necessary even on this half time stage of the Criminal Proceedings the context of rights to a fair trial under Article 50 of the Constitution be fully insulated.

The constitution being the supreme law of the Republic under Article 50 requires an accused person to be presumed innocent until the contrary is proved, the right to be informed of the charge with sufficient details to consider it, to have adequate time and facilities to prepare a defence, to choose and be represented by an advocate and to be informed of this right promptly, to have advocate assigned to him by the state and at the state expense if substantive in justice would otherwise result. The right to remain silent.

It is against this back drop the inference to be drawn in the case submitted in accordance to Section 306(1) of the Criminal Procedure Code must be consistent with the Constitutional rights of an accused person in terms of Article 50. The right to a fair trial governed by Article 50 of the Constitution implies: -

“An enquiry that if no prima facie evidence has been offered by the prosecution, mere suspicion is not permissible to infringe accused’s fundamental right not be called upon to incriminate himself.”

To say that an accused person is to be presumed innocent under Article 50(a) of the Constitution is expressly to state that the burden is on the prosecution to prove every element of the charge against the accused. In a motion of no case to answer under Section 306(1) of the Criminal Procedure Code the accused either expressly or by implication bears no burden of proof save for the burden of disproving such facts as vested in the prosecution discharged. For instance the accused may be called upon to prove the existence of certain facts stated within his knowledge Section 111 of the Evidence Act.

As echoed by The Malaysian Court in the case of **Public Prosecution –vs- Chin Yoke 1940 9MLJ 47** the Learned Judges had this to say on the criteria to be applied on whether a prima facie case has been made out by the prosecution in the following passage: -

“One is quite familiar with the course often adopted by counsel for the defence at the close of the case for the prosecution, when he submits that he has no case to answer, or in other words, that the prosecution has failed to make out a prima facie case against the accused and it is submitted that accused should be called on for his defence.”

It is then the duty of the Magistrate or Judge to consider the evidence already led and decide whether or not to call on the accused for his defence. The question arises what is a prima facie case.

In **Mozley and Whitleys Law Dictionary 5th Edition** it states:

“A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called to answer it. A prima facie case then is one which established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side”

“This follows very closely the actual wording of Section 180 of the code with similar provisions referred to in order Section 306(1) of the Criminal Procedure Code but it does not follow, in my opinion, that the Magistrate or Judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that if it is rebutted, it would warrant the accused’s conviction. In such a case, the accused is then called upon to answer the prima facie case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convince upon such evidence standing alone, then no prima facie case has been made out and the accused should not be called on for his defence.”

These principles are relevant to the facts surrounding the charge of murder against the accused person which is dependent upon the seven prosecution witnesses:

PW 1 Zawadi Charo, the grandchild to the accused testified that prior to 2.9.2018 they had a relationship which resulted in her conceiving and one child herein referred as V.R. was born. In the course of their engagement, they lived separately and the minor(deceased) revealed with (PW1). However, on a date not signed, the minor fell ill and on the accused being contacted he adopted that PW1 took him to his home apparently to provide the necessary medicare.

In the morning of 2.9.2018 PW1 learnt from the neighbours that the minor she took to the accused house has been poisoned and was admitted to Trafique hospital. At that stage, PW1 left for hospital where she found the minor in poor health condition. She further came to know that the accused was admitted at Malindi General Hospital.

It did not take long as the following day the minor was pronounced dead. When PW1 went to the police station to report, she found already information was booked with the police.

PW 2 Peninah Karisa the mother to the accused testified that she used to live with the deceased for about 1 ½ years while accused went about his daily chores of operating a motorcycle rides. On that fateful day, 2.9.18 PW2 testified that the accused picked the minor as usual

from her house at about 2.00 p.m. It did not take long before PW2 was informed by another Boda Boda rider that the accused and the minor were in bad state likely to die from what he had observed.

When she followed to the house of the accused, it was confirmed that he was frail and a mucus substance came out of his mouth. The minor was calling for the accused. According to PW2, she fainted and found herself at the hospital. At a later Stage, the doctor's examination reviewed that the accused and the minor had ingested poison.

PW 3 Dr. Swaleh's evidence was that the probable cause on examination was suggestive of poisoning. The post Mortem report was admitted in record and marked as exhibit.

PW 5 Yahya Hamisi was the government analyst who carried out Toxicology examination of the human samples from deceased body comprising of the heart, lungs, liver, stomach, spleen and kidney.

On examination at the laboratory, it was confirmed that a maroon substance stated to contain pesticide chlorophyte for pesticide was present in the liver, stomach and kidney.

PW 6 PC Percy Musyoka, the police officer who investigate the case in his testimony told the court that he received the report of murder, in which he took necessary steps of collecting the evidence. He also testified to have visited the scene, participated in the post mortem and recording statements from witnesses.

At the scene, he collected some samples which were later to be subjected to forensic analysis in conjunction with body parts taken from the deceased when the accused got discharged from the hospital he preferred charge of murder of killing his own child.

In the instant case, Section 203 of the Penal Code defines murder to be where any person who of malice afterthought causes death of another person by an unlawful act or omission.

The essential elements of the offence as stated in the case of **Republic –vs- Mohamed Koran 2014 EKLK** constitute the following:

- 1. The death of another human being**
- 2. That the death was unlawful**
- 3. That in causing death the accused had malice afterthought.**

I have reviewed the evidence of the seven witnesses; it is perfectly clear that there was no eye-witness to the commission of the offence. My view of the matter is a prosecution case based on circumstantial evidence.

To avert my mind to the provisions of Section 306(1) of the Criminal Procedure Code the determination of a prima facie case on the following principles: -

- i. Whether at the close of the prosecution case there is no evidence that the accused committed the offence charged on the information filed by the state, the other consideration would be to proceed and establish whether there is any cognate other offence though not charged but proven by the evidence adduced by the prosecution which the accused may be convicted.**

In the above first and second limb if the court finds no satisfactory evidence it should proceed to enter a verdict of not guilty and discharge or acquit the accused person.

Whereas on the other hand, where it's evident that the prosecution evidence is such that a reasonable tribunal or court directing itself to the specific offence or any other cognate offence might convict, the answer would be to call upon the accused to offer his defence in rebuttal.

In light of the holding in **Bhatt (supra), Public Prosecution v Chin Yoke (supra)**, there is in fact a prima facie case that arises which I exercise discretion to call upon the accused to be placed on his defence as outlined under Section 306(2) of the Criminal Procedure Code. The motion of no case to answer as advanced by the defence would seem not to be the probable outcome of this case. The motion is therefore lost.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF SEPTEMBER, 2019.

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R. NYAKUNDI

JUDGE