



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 4 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

WARIO FORA BORU.....ACCUSED

RULING

A. Introduction

1. This is a ruling on whether the prosecution have made up a *prima facie* case to justify the accused being put on his defence.
2. The accused faces a charge of 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 12/02/2017, at Embu G.K. Prison, Itabua location of Embu County murdered Mohammed Said Omar. He pleaded not-guilty to the charge.
3. The prosecution called eleven (11) witnesses in support of their case which is summarised herein.

B. Prosecution Case

4. From the evidence, none of the prosecution witnesses witnessed the deceased's death. PW1 testified that on the material date at around 5am whilst in house, he heard gunshots and upon inquiry was told that they were coming from outside the camp. He further testified that through inquiry, he later established that the accused had shot the deceased on account that he was a terrorist. PW2 testified that on 11/02/2017 he and the accused were deployed on guard duties from 1.00am to 6.30pm, having taken over from their colleagues P.C. Okoth and Mbuthia who had been on duty from 6:30pm to 1:00am.
5. PW1 further testified that he and the accused commenced their duty and took shelter in a bus where at around 5am, the accused's phone rang and he asked to briefly go to his home. It was his testimony that a few minutes later he heard gunshots and walked towards the protestant church where they were coming from. He testified that he was shot in both his legs and that he noticed it was the accused that was shooting. He fell and rolled on the ground where he was later rescued and taken to hospital.
6. PW6, Dr. Samuel Gatei Ngatia carried out a post-mortem on the deceased and concluded that the cause of death was haemorrhagic shock due to penetrating injury likely from a bullet. PW7 was the scene of crime officer who testified that upon examining the accused's gun which normally has 20 bullets had only 2 line bullets and one empty cartridge. PW9 examined the accused and found him mentally stable to plead to a criminal charge. PW10, the armoury officer testified that on the 11/02/2017 he issued the accused with a G3 rifle, serial number 96075345, with one magazine and twenty rounds of ammunition for duty. He further testified that the accused was to return the gun at 6:45am the following day which the accused did not do

C. Analysis of the Law

7. I have considered the charge as well as the evidence by the witnesses of the prosecution. The issue at stake here is whether at the conclusion of the prosecution's case, the court would find that the accused have a case to answer.
8. The burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. Similarly, at the close of the prosecution case under Section 306 (1) of the Criminal Procedure Code the prosecution must satisfy by way of the evidence presented so far that a *prima facie* case exist to warrant the accused person to be called upon to answer.
9. The issue for determination is whether given the evidence and the ingredients of the offence under section 203 as read together with Section 206 of the Penal Code the accused persons have a case to answer or not. The relevant provision to this question falls under the provisions of Section 306 (1) and (2) of the Criminal Procedure Code which provides interalia that;

“when the evidence of the prosecution case is concluded the court shall consider the evidence and any arguments made by either the defence or prosecution case to determine whether a case against the accused has been made on the allegations/or charge. If the court finds that there is no evidence that the accused has committed the offence the court shall record a finding of not guilty and order for a discharge or acquittal.”

10. In the alternative if from the evidence of witnesses for the prosecution the court concludes that there is evidence to support the charge against the accused persons it shall invite them to tender evidence personally or call witnesses in their defence. The court is obligated to exercise discretion under Section 306 (1) of the Criminal Procedure Code to determine the evidence of a prima facie case at these half-time submissions of the trial in a criminal case.

11. 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 EA 332 – 334 & 335**. 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. 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.

12. From the evidence placed before me, I am satisfied that the test of a prima facie case has been met by the prosecution to warrant the accused person to be called upon to answer. 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.

13. It is my considered view that the evidence on record is sufficient to support the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

14. Consequently, I find that the accused has a case to answer and is hereby called upon to make his defence.

15. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of the Accused and Ms. Mati for the State