



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL CASE NO. 18 OF 2018

REPUBLICPROSECUTOR

VERSUS

GEORGE OWINO ADHOCH.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms Sombo for the State

Ms Mwanja for the Accused person

RULING

On 25th October, 2019, the State preferred a charge of murder against the accused person, **George Owino** alleging that he murdered **Juma Boi Jindwa** at Mnarani Sub-location. When he was arraigned before this court he denied any wrong doing under Section 203 of the Penal Code.

In the circumstances the prosecution under Section 107(1) of the evidence Act had a duty to call for the evidence to proof the contrary view held by the accused person.

In the succeeding trial learned counsel **Ms. Mwanja** appeared for the accused and learned prosecution counsel **Ms. Sombo** represented the State.

The prosecution called a total of five (5) witnesses to prove the following ingredients of the offence:

- 1. That the deceased Juma Boi Jindwa died;***
- 2. That his death was unlawful;***
- 3. That whoever caused the death, in this case the accused did so with malice aforethought;***
- 4. That the evidence so far available to the State places the accused at the scene of the crime.***

At the close of the prosecution case as outlined under Section 306 of the Criminal Procedure Code, the task requires an evaluation of evidence the face value to establish the existence or non-existence of the essential elements of the offence.

Prosecution Case

It was the case for the prosecution by **PW1 - Riziki Charo**, that on the material day she did serve some alcoholic drinks to both the accused and deceased person. After discharging her duty she checked out of the club leaving the accused and deceased proceeding to enjoy the social evening. She only learnt in the morning that one of those customers left behind at the club was found dead.

PW2 – Noah Agunya a boda boda operator testified that he was also at the same club but left soon thereafter leaving behind, other customers including one Jackson whom he was more conversant with of the group. He was to be telephoned by Jackson that he provides boda boda services, which he did by dropping him at the hospital with one he identified as George. PW2 also confirmed noticing the dead

person at the club.

PW3 – Jackson Said Ali testified as the watchman on duty on the fateful day of the 10th October, 2018 when (PW1) served the accused and the deceased with alcoholic drinks. PW3 stated that in the course of that night he saw the deceased move into location of the accused and by use of force grabbed away his drink. The incident triggered a conflict and a fight ensued between the accused and the deceased. Neither his plea for them to stop fighting could be heeded because on intervention he was also threatened with assault. Immediately thereafter he saw the accused persist with acts of assault against the deceased. As a consequence PW2 was asked to take the accused to the hospital and the deceased remained at the scene to await further police action.

PW4 – Henry Changau testified that following the death of the deceased he was asked to participate in the identification of the body to the pathologist at Kilifi hospital mortuary.

PW5 – P.C. Dominic Kilifi DCIO office testified on steps taken to investigate this incident involving identify of the deceased. He referred to the court the nature of the evidence which ultimately culminated in the indictment. According to PW5, the forerunner to the death of the deceased was a fight which occurred between him and the accused person. He drew the court's attention to a piece of wood allegedly used to inflict harm against the deceased during the fight. More importantly, the witness produced a postmortem report by **Dr. Lorraine** as exhibit 2 with the conclusion that the cause of death was severe head injury.

With that evidence, I was called upon to make a finding under Section 306(1) of the Criminal Procedure Code on a motion of no case to answer.

The Law

The most authoritative statement of the law on the burden of proof of any fact in issue or relevant facts is to be found under Section 107(1), 108 of the Evidence Act, which places the burden of proof of a fact on the party who asserts the existence of any fact in issue or relevant fact respectively.

The position in law is that in criminal cases the prosecution bears both the legal and evidential burden to prove the charge against an accused person beyond reasonable doubt.

The principle and policy statement on the standard of proof on criminal cases was acknowledged by Lord Denning in **Miller v Minister of Pensions 1947 2 ALL ER 372 at 374** as he then was as follows:

“If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusions one way or the other, then the man must be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case.

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say “we think it more probably than not the, burden is discharged, but if the probabilities are equal, it is not.”

That approach restated by Lord denning was usefully considered by learned author Sarkar on evidence Volume 2 17th edition Ed 2011 reference at page 1868, where he observed that the evidential burden at all once asserted as stated in the classic exposition of the law in Miller case is never static but must shift as soon as the party with the burden produces evidence which prima facie gives rise to a presumption in his favour. It may again shift back on him if the rebutting evidence produced by his opponent preponderates.”

All this has been explained time and again but perhaps as a reminder it is significant to emphasize that in the dichotomy on the burden of proof of a prima facie case, the illuminating provisions under Section 119 of the Evidence Act on presumption is equally applicable. She section states as follows:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case within this parameter in particular, if the prosecution shows that the accused person acted with a particular intention and that the evidence shows form its character and circumstances that such an intention can be suggested, then the burden shifts to the accused to prove to the contrary that the circumstances within his knowledge did not constitute an intention to do the act complained against him.”

It transpires that having considered such matters of facts as asserted by the prosecution witnesses, and the contexts of cross-examination and keeping in mind the recollection of the events of the material day that evidence together establishes a prima facie case to warrant accused person to be placed on his defence.

As such the accused is placed on his defence in terms of Section 306(2) as read with Section 307 of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF DECEMBER, 2019.

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R NYAKUNDI

JUDGE

IN THE PRESENCE OF: -

Accused person