



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 21 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

JUMA KAZUNGU KADENGE.....1ST ACCUSED

SAFARI KOMBE KOI.....2ND ACCUSED

KAHINDI SAFARI KOMBE.....3RD ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Gekanana for the accused

Accused present

RULING

The above name accused persons face a charge of murder contrary to section 203 of the Penal Code as punishable under section 204; of the code. The particulars of the charge relied upon by the prosecution were that on 8th December, 2016 at Matsangoni Village in Karimani sub-location in Ganze, within Kilifi County jointly with others not before court murdered **Karisa Kani**.

During the arraignment and plea each of the accused persons denied the offence. The trial commenced in earnest and the prosecution summoned seven (7) witnesses to prove the offence beyond reasonable doubt.

At the close of the prosecution case under **Section 306(1)** of the Criminal Procedure Code the court is obligated to make a finding on a motion of no case to answer or in the alternative existence of a prima facie case against the accused person.

The specific rule in **Section 306(1)** of the code is a formulation for the court to review the evidence in respect of the elements of the offence sufficiently established whether there is a case proved as stipulated in Section 107 (1) of the Evidence Act.

The primary function in terms of this section is that at the close of prosecution case it appears to the court there is no evidence to support the charge, then a motion of no case to answer succeeds. While on the other hand on evaluation and scrutiny of the evidence in totality the court is of the view that a prima facie case exists against the accused persons it will be their turn to offer their defence.

“The test as to which constitutes a prima facie case was laid down by the Court of Appeal of Eastern Africa in R. T. Bhatt v R 1957 EA where the court held inter alia that a prima facie case is one which a reasonable tribunal directing its mind to the law and the evidence would convict if no explanation is given by the defence.”

When considering a motion of no case to answer the duty is as of necessity stated in the principles set out in the case of **R v Galbraith 1981 I KLR 1042**.

“How then should the judge approach a submission of no case?”

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

(a) Where the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convince upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness reliability on other matters which are generously speaking within the jurisdiction of the jury and where one possible view of the facts there is evidence upon which a jury properly came to the conclusion that the defendant is guilty, then the Judge should allow the matter to be proceeded to the jury.

There will of course, as always in this branch of the law, the burdening cases, they can safely be left to the discretion of the Judge.”

In the present charge the allegation is that the accused persons jointly murdered **Karis Karoi Kani** on 8th December, 2016 at Matsangoni village. The prosecution relied on both direct and circumstantial evidence to establish the elements of the offence that:

(a) The deceased Karisa Katoi Kani is dead

(b) That his death was out of the unlawful act

(c) That in causing death of the deceased accused persons had malice aforethought.

According to the evidence on record by (PW1) the incident which led to the death of the deceased was in a sequence of events at the home of the third accused. PW1 testified that on 8th December, 2016 he responded to screams from the home of the 2nd accused. Thereafter he met many people including the deceased within the homestead. What followed was a dispute between the second accused and the deceased. As they made attempts to run away his evidence was to the effect that the accused four assaulted the deceased. He then said that the incident took a full blown scale over a conflict involving the accused persons and the deceased.

PW3 Dama a neighbor and an eye witness who was also the wife of the deceased testified that she was also assaulted by the 3rd accused at their homestead.

PW2 Katana told the court that it appears that the whole dispute which culminated in the attack and inflicting fatal harm was based on suspicion of witchcraft. The claim was that the deceased had bewitched the 3rd accused's wife.

PW4- Stephen Juma stated that following the death of the wife of the 3rd accused it was decided that the

deceased to undergo an oath ceremony to dispel any allegations that he is the one who used witchcraft to kill the wife.

No sooner that oath was taken, PW4 saw the deceased being assaulted by the accused persons from various angles while armed with crude weapons. This was also confirmed by the testimony of **PW5 Kahindi Karisa** and **PW6 and Ronald Safari**.

PW7 CPL Stanley Maritim who was the investigating officer told the court he carried out several assignments relevant to this case including recording of witness statements, arranging for the postmortem examination, recovery of the murder weapons and recommending a charge of murder against the accused persons.

On evaluation of the evidence, at the close of the prosecution case, there is both direct and circumstantial evidence such that a reasonable tribunal properly directing its mind on the Law and evidence may fully be justified to accept the evidence and convict the accused persons.

Having regard to the facts and the evidence to satisfy the principle in **R. T. Bhatt (supra)** on a prima facie case to warrant this court to place the accused on their defence.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 11TH DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE