



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO. 105 OF 2015

REPUBLICPROSECUTOR

VERSUS

EUGENE BARGETUNY.....ACCUSED

RULING

1. The accused **EUGENE BARGETUNY** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on the 25th day of October 2015 at Tassia Estate in Embakasi Division within Nairobi County murdered **STEPHEN OKOTH**.

2. On 24/11/2015 he took his plea before Lesiti J. when a plea of not guilty was entered for him. On 9/5/2016 the matter was adjourned since the prosecution's nine (9) bonded witnesses were absent in court. On 11/5/2016 whereas the prosecution had one witness in court, the matter was adjourned as the prosecution had not supplied the defence with committal bundles.

3. On 14/9/2016 the matter commenced for hearing before me with one witness testifying and after hearing three prosecution witnesses on 11/12/2017 and despite warrants of arrest being issued against the prosecution witnesses who did not attend court, the prosecution was granted final adjournment which order was reviewed on 15/2/2018 and on 18/4/2018 the prosecution informed the court that they were unable to execute warrants against the civilian witnesses who had refused to attend court to testify and sought to close their case at that stage and opted not to make any submissions on whether they had established prima facie case.

4. On behalf of the accused it was submitted that the accused having denied the commission of the offence, it was upon the prosecution to prove beyond reasonable doubt that he committed the offence. It was submitted that vital witnesses were not called by the prosecution neither did the police visit the scene nor produce the murder weapon and that other four witnesses who testified before court presented no evidence whatsoever that the accused committed the offence charged. In support of the submissions the case of **REPUBLIC v ABDI IBRAHIM OWL [2013] eKLR** was submitted to support the fact that it is worthless to proceed to a full trial where at the close of the prosecution case there is no sufficient evidence to sustain a conviction.

5. The prosecution case was presented by **PW1 CORP. CHRISTINE INYELE** who stated that on 6/10/2015 while going through the OB saw that a case of murder had been assigned to her to investigate. She called the reportees and recorded their statements from which she found that the deceased and his friends were on the material day having a drink at a Pub when the accused came and took up the chair the deceased was sitting on when the same had left to answer a phone call. When the deceased came back and took the seat, this annoyed the accused and a fight ensued in which the accused stabbed the deceased. It was her evidence that the accused was subsequently arrested by **INSPECTOR JANE NGUMBI** who was not called as a witness.

6. **PW2 DR. KISI SHAKO** examined the accused who had a healing scratch marks and abrasions on the neck, bleeding on the left eye and stitched wounds caused by a sharp object on the 3rd, 5th and 6th finger on the right hand. She formed an opinion that the same was fit to stand trial and produced medical report to support the same. **PW3 DR. BENARD OWINO MIDIA** conducted postmortem examination on the body of the deceased and formed an opinion that the cause of death was head injury due to penetrating injury on the frontal aspect of the head.

7. **PW4 PC PAUL MUTHIANI** received the report of the incidence from one **MAURICE OTIENO OLOO** and **ALVIS OLOO** both brothers of the deceased to the effect that the same had been assaulted and admitted to Kenyatta National Hospital from where he died while undergoing treatment. On 6/11/2015 he attended the postmortem examination. It was his evidence that the incidence took place on 25/10/2015 while he went to the scene on 5/11/2015. He stated that at the time of his arrest the accused had injuries which he said had been inflicted by the deceased. It was this evidence that the accused took the knife from somebody who was selling smokies with which he stabbed the deceased.

8. For the prosecution to sustain a conviction on a charge of murder it must be proved beyond any reasonable doubt the fact and cause of death of the deceased. It must further be proved that the said death was caused by unlawful act on the part of the accused with malice aforethought. At this stage of the proceedings the court can only put the accused on his defence if and only if prima facie case is proved. Prima facie has been defined in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332 at pg 335** as follows:-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is “some evidence irrespective of its credibility or weight sufficient to put the accused on his defence.”

A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence. (Emphasis added)

9. From the evidence tendered before the court, there is no eye witness called to testify on how the deceased met his death. Both **PW1** and **PW4** evidence is hearsay evidence. The prosecution failed to produce before the court those who were with the deceased. The police officer who arrested the accused was also not called to testify on the circumstances under which the same was arrested. Further the prosecution failed to present before the court the initial treatment documents in respect of the deceased so as to confirm the nature of the injuries sustained if any on 25/10/2015 and whether the deceased died as a result of the said injuries as the evidence of **PW3** indicated that there were medical intervention.

10. Whereas the charge sheet indicated that the death of the deceased was caused on 25/11/2015, the postmortem report produced in exhibit before the court indicated that the death occurred on 4/11/2015 and no attempt was made by the prosecution to link the two dates as stated herein above.

11. From the evidence tendered before the court there is strong suspicion of the involvement of the accused on the death of the deceased but mere suspicion however strong cannot be a basis to sustain a conviction. The prosecution must prove its case against the accused beyond any reasonable doubt and in this case having found that the prosecution failed to call vital witnesses who would have placed the accused at the scene of the murder to put the accused on his defence at this stage would amount to requiring the same to fill the gaps in the prosecution case and should the accused opt not to offer any evidence, the court will be put between a rock and a hard place in deciding what to do thereafter.

12. It is therefore clear and I find that the prosecution has failed to establish a prima facie case and whereas it is sad that the deceased lost his life which shall not be replaced, the only option available to the court is to find the accused not guilty and accordingly acquit the same under the provisions of **Section 306 (1)** of the **Criminal Procedure Code**. The accused to be set free forthwith unless otherwise lawful held.

13. I must state here that this is a case where the prosecution failed the criminal justice system and the victims family in not exercising all the options available to them having been confronted by un co-operating witnesses but note that **Article 50 (2)** provides for the right to every accused person to a fair trial which includes the right:-

- a. to be presumed innocent until the contrary is proved,**
- b. to have the trial begin and concluded without unreasonable delay,**
- c. to remain silent and not to testify during the proceedings,**
- d. to refuse to give self-incriminating evidence,**

and where the prosecution does not honour any of these constitutional provisions, this court will not shy away from enforcing the same, the fact that there is loss of life notwithstanding.

DATED, SIGNED and DELIVERED at Nairobi this 7th day of June, 2018.

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J. WAKIAGA

JUDGE

In the presence of:-

Miss Wegulu for the State

Mr. Wokabi for Mr. Mathenge for the Accused

Accused present

Court Assistant - Karwitha