



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 10 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

LUCY NYOKABI MWAURA.....ACCUSED

RULING

Lucy Nyokabi Mwaura, hereinafter referred to as the accused was charged with the offence of murder of Caroline Wanjiku on 18th June, 2017 at Matasia trading center contrary to section 203 as read with Section 204 of the penal code. The accused who is being represented at this trial by Ms. Rashid Advocate denied the charge and any particulars regarding her involvement. In this country under Article 50 2(a) of the constitution always and everywhere great emphasis has been placed on the matrix on the presumption of innocence of an accused person while the contrary is proved by the state. It goes therefore that very little burden is placed on the accused to prove anything in a criminal case.

As regards the present case the prosecution summoned thirteen witnesses to discharge the burden of proof in placing evidence before court to disapprove innocence of the deceased. Mr. Alex Akula, the Senior Prosecution Counsel conducted the prosecution on behalf of the state. In addition to the testimonies of the thirteen witnesses the state relied on both documentary and physical exhibits to buttress their case against the accused person.

The background of the prosecution case as narrated by witnesses when Pw1 took the stand revealed that the deceased had visited Matasia center on 18th June, 2017. Her first stop seemed to have been the butchery of Pw1 where she left her bag containing personal effects. In Pw1 testimony in a little while he was to hear some noise of screams which on checking found that they involved an assault against the same lady who left her bag in the butchery.

Pw2 in her testimony alluded to the events of 18th June, 2017 in which the accused stopped at her salon to assist in making the hair of some customers. According to Pw2 in the course of duty, the accused left the salon for her house which is about 100 meters away. Further Pw2 stated that on her return accused mentioned about the contact they had with the accused at the stair case of her house. As they discussed the issue with accused Pw2 testified that they saw the child of the accused by the name J crying alleging that the said lady by the name Carole had made attempts to strangle her. It is against this information the accused left the salon to go back to the house to find out from Carole the reason she was making an altercation with J. What followed according to the evidence of Pw2 were screams, and in responding to the same she saw Carole who later was to be identified as the deceased lying down on the ground. Pw2 further stated that at that same time she noticed some blood and bleeding from the victim. According to Pw2 members of the public responded to the scene and assisted to take the victim to the hospital.

Pw3 further testified that on the fateful day she saw a girl whom she positively identified as J and daughter to the accused looking frightened and at the same time crying. In a short while what unfolded was a lady armed with a stone taking position to confront the accused. In her judgement Pw3 testified that she sensed imminent danger and decided to take her child from the scene to a safe place. She was later to learn that a lady whom she saw armed with a stone has been stabbed with a knife.

In respect to Pw4 evidence she stated that on 18th June, 2017 she went about her duties of selling groceries and vegetables at a premise located at upper Matasia. It was while at her grocery that the accused purchased airtime and also required to be assisted a mobile number of PC Mosei of Matasia Police Post. Pw4 testified that it did not take long before she could see many people gathered talking of a victim of an assault and that her knife was used to inflict the bodily harm. Pw4 further gave evidence that the alleged murder weapon was to be recovered at the rear part of the house thought she was at pains to explain how it was taken out of her house where she first used it to cut some vegetables.

Pw5 gave evidence regarding the role he played in taking the victim of assault to Upper Matasia Nursing Home and later to Zam Zam hospital for emergency treatment. Pw5 testified that the deceased succumbed to death in the course of the treatment.

Pw6 testified as a brother to the deceased and the basis upon which he was summoned by the police on 20th June, 2017 to visit the mortuary in order to identify the body of the deceased for purposes of postmortem examination.

Pw7 stated that on 18th June, 2017 while at upper Matasia trading center he heard a voice of a lady crying calling for help from her husband alleging that she has been stabbed with a knife. These distress screams attracted the attention of members of the public. Pw7 as part of the public further testified that he found other people in pursuit of the lady suspect who had been recognized as the assailant. It was Pw7 testimony that it did not take long before he arrested the suspect in connection with the offence. He was later to handover the suspect to the Ngong police officers for further action.

Pw8 a gazetted Scenes of Crime Officer testified as to the visit he made to the scene where he documented the scene by taking various photographs. Besides the scene Pw8 also took photographs of the deceased involving the nature of injuries sustained. The set of photographs and a certificate to that effect were admitted in evidence as exhibit 2(a) and (b) respectively.

Pw9 testified in connection with the re-arresting of the accused from the members of the public and the recovery of the knife alleged to have been used to stab the deceased at the scene of crime. The witness evidence was that the knife before court produced as exhibit 1 was positively identified by pw4.

Pw10 testified as the driver of motor vehicle KUB 408J which took the victim of the assault to the hospital immediately after the attack. Pw10 further confirmed that on arrival at Zam Zam hospital the victim succumbed to death while undergoing treatment.

Pw11 gave evidence as a government analyst attached to National government chemist where analysis of samples and DNA procedures are carried out. With regard to this specific case Pw11 confirmed to have received a blood stained knife, skirt, blouse, swab from the scene for purposes of DNA profile. In his summary tabulated in the report produced as exhibit 7(a). Pw11 stated that he generated a DNA profile from the blood stains on the swab, which matched with that of the deceased. Apparently, pw11 confirmed that the blood stained knife failed to generate any DNA profile.

Pw12 gave evidence as an analyst with Safaricom Mobile provider in respect with telephone numbers 0727 -068781, 0728 806896 and 0718 535515. According to Pw12 having so far dealt with the analysis it confirmed that mobile numbers 0727068781 registered in the name of the accused showed that she was around Matasia area on 18th June, 2017. Pw12 produced the subscriber details of the accused and the deceased as exhibit 8(b) and (c) respectively.

Turning to Pw13 who spent considerable time as the investigating officer on the matter testified on how she collected and correlated all such information and articles relevant to the case. Pw13 stated that upon establishing the cause of death from the postmortem report admitted in evidence as exhibit-9 the accused was charged with the offence of killing the deceased. Pw13 further indicated in her testimony that the brown bag containing personal effects of the deceased, one pair of black and brown shoes, one blue and white blouse identified to be that of the deceased were also collected as part of the evidence in support of the charge. Accordingly PW 13 produced them as exhibits 4, 5, 6(a) and (b) as supportive material that the deceased was at the scene of the crime.

At the close of the prosecution case Ms. Rashid for the accused very strongly submitted that the case against accused has not been proved to warrant her to be placed on her defence. She also drew the attention of the court to the circumstances under which the killing had taken place which appeared to render suspicion to the prosecution case. Learned counsel went into the aspects of the evidence of the witnesses and submitted that no account was given to show that the accused stabbed the deceased. In considering this case for a mention of no case to learned counsel to a large exhibit relied on the principles as explained by the court in the case of **R.T. Bhatt Republic 1957 EA 332 – 335**.

As the prosecution cases rests on circumstantial evidence learned counsel cited and relied on the principles in the cases of **G. M. v. Republic 2013 eKLR, Republic v Kipkemei Arap Koskei & another EACA 135, Republic v Musoke 1958 EA 715** on the part of counsel. The quality of the circumstantial evidence remained scanty and weak throughout the trial which leaves this court with no option but to acquit the accused. Learned counsel submitted that the consequence of the lack of prima facie evidence is no doubt a chance for this court to free the accused of any charges. I did not have the advantage of a rejoinder from the prosecution counsel on this issues.

Analysis and decision

I have given careful consideration to the whole matter, the evidence as adduced by the prosecution and submissions made by the defence counsel. There is no dispute that the accused was arraigned before this court charged under Section 203 of the Penal Code which reads: “**Any person who of malice aforethought causes death of another by an unlawful act or omission is guilty of murder**” if the accused is to be found guilty and convicted of murder the prosecution must prove that she had the necessary malice aforethought and acts carried which caused the death were unlawful. Secondly the manner in which the murder was committed carried no defence known in law to justify her actions.

The court in this matter under Section 306(1) of the Criminal Procedure Code is not required to give a final verdict on the charge. The legal duty is to assess whether there is sufficient prosecution evidence to establish what is commonly referred to as a prima facie case against the accused. The word prima facie does not exist in Section 306(1) of the Criminal Procedure Code which is the section that a submission of no case to answer has been made by the defence counsel. The English case of **Republic v Galbraith 1981 1 WLR 1039** illustrates the application of the procedure under our Section 306(1) of the Criminal Procedure Code. The court held as follows:

(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 a tenuous character for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on 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, or other generally speaking within the province of the jury and where on one possible view of the facts, there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

The case of ***R.T Bhatt v Republic 1957 EA 332 – 335*** is considered as the leading authority in this area in our jurisdiction as it outlines the elements of what constitutes a prima facie case at the close of the prosecution evidence in any trial.

The gist of this authority with regard to a motion of no case to answer was held to be made **when there has been no evidence adduced by the prosecution to prove an essential element of the offence. Secondly, where the evidence adduced by the prosecution has been so discredited then no reasonable tribunal directing its mind to the evidence could safely convict on it** (see also ***Sanjit Chai Hal v the State 1985 39 WLR 925***)

In our own criminal justice system any person charged under the penal code or other statute creating an offence triable by the High Court may proceed at the close of the case for the prosecution to submit under Section 306(1) of the Criminal Procedure code that there is no case to answer.

By virtue of Section 306(1) of the Criminal Procedure Code the accused has the onus to demonstrate to the trial court that there is either no evidence or the reliability to be placed on the available evidence as being sufficient to prove elements of the charge. That is why Section 306(1) lays emphasis to the phrases that if at the close of the prosecution case it appears that there is no evidence to support the offence accused person has been charged with a verdict of not guilty should be entered and an order to discharge or acquittal be granted in favour of the accused person.

It is clearly the position in law that Section 306(1) of the Criminal Procedure does not require the court to enter into the realm of inconsistencies, contradictions, credibility or accuracy of the evidence by the prosecution witnesses. The reasoning behind this direction is to avoid any definitive findings on the charge which may likely prejudice the accused person defence. These are matters in our criminal adjudication that have to await the conclusion of the evidence as whole.

The substantial consideration taking the queue from the test in ***R. Bhatt v Republic*** and ***Republic v Galbraith*** case is whether the evidence at the close of the prosecution case is such that a reasonable court or tribunal properly constituted may convict the accused if there is no rebuttal in answer to the charge. The thrust of Ms. Rashid submissions is that at the close of the prosecution case there is no witness who has implicated the accused with the assault and subsequent death of the deceased.

In answer to the question raised by the defence counsel I have reviewed the summary of the thirteen witnesses who were called by the prosecution. According to the evidence the prosecution presented exhibits which comprised photographs, the postmortem report, the alleged murder weapon, the call data of the accused and the deceased in support of the alleged offence committed on 18th June, 2017. Further I should also mention the testimonies by Pw1, Pw2, Pw3, Pw4, Pw7 and Pw9 which deem to support the matrix under the domain of circumstantial evidence.

In the context of this case I am of the view that there is sufficient evidence in favour of the prosecution to warrant the accused to be placed on her defence. The test applicable here is whether on the evidence as it stands it is sufficient to establish a prima facie case to lawfully call for an answer in rebuttal. In my view the answer is in the affirmative.

I am therefore satisfied that the degree of quality and quantum of evidence taken at its highest as required of the court in the principles espoused in the cases of ***R.T Bhatt v Republic*** and ***Republic v Galbraith*** cases has been discharged by the prosecution. That being the finding of this court the accused is hereby placed on her defence under Section 306(2) as read with Section 307 of the Criminal Procedure Code. It is so ordered.

Dated and delivered in open court at Kajiado this 17th day of **September, 2018.**

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Anam for Rashid for the accused

Meroka for the DPP