REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 16 OF 2018

REPUBLIC..... PROSECUTOR

VERSUS

JULIANA WAMBUI THIONG'O..... ACCUSED

RULING

No case to answer. What does this mean?

Juliana Wambui hereinafter referred to as the accused was charged with the offence of manslaughter contrary to section 202 as read with section 205 of the penal code Act Cap 63 Laws of Kenya. The particulars of the offence were that on 19th May 2018, at Masaini Area in Mashuru township within Kajiado county, unlawfully killed Keith Carlos Wambui hereinafter referred to as the deceased.

The accused pleaded not guilty to the charge. She was represented at trial by Mr. Nairi and the prosecution was conducted by Mr. Meroka, Principal Prosecution Counsel. The prosecution called a total of 3 witnesses; we will examine the prosecution's case and accused counsel's submissions.

The Case for the Prosecution

PW1 Isaac Ndirangu is a qualified and registered nurse, on 19th May 2018, he was heading to Sultan Hamud on the way he was stopped by some members of the public. He talked to a lady and a man carrying a baby. He went with the lady and the baby to Sultan Hamud hospital. On arrival they headed to the emergency and on examination of the deceased he called for a colleague but there were no signs of breathing. The clinical officer later learned the child had passed away. On cross examination; PW1 narrated that the ambulance did not have any emergency kits. They did not require the kits. She rushed the victim to the hospital; clinical officer found the baby was not breathing. She did not see any trauma on the deceased. She referred the accused to the police station.

PW2 – Francis Charo is a casual labourer and a friend to the accused, on 19th May 2018, PW2 saw the accused carrying a baby claiming he is unwell. They were on a motorbike, he advised the accused to go to the hospital with the child. He found the accused and the deceased at Kilome hospital, the deceased was in the examination room, they were referred to Sultan Hamud Hospital. On arrival at Sultan Hamud the accused child was confirmed dead. The deceased was taken to the mortuary. On cross examination, PW2 stated that he did not know how the child had died earlier on. The accused was crying, it appeared she was shocked about the incident.

PW3 – PC (w) Mercy Wambere Police Detective based in Kajiado south. On 19th May 2018 she received information from OCS Emali that he had in his custody a suspect of murder. She had suffocated the child. The accused was picked from the police cells while the deceased was at Kilome Nursing Home mortuary. The clinical officer recorded his witness statement and arranged for the post-mortem. According to PW3 the post-mortem revealed that the deceased suffered respiratory collapse. The accused was taken to Mathari-mental hospital for assessment; PW3 preferred a charge of manslaughter. PW3 produced the post mortem as exhibit to be adduced as evidence.

On cross examination, PW3 narrated that she visited the crime scene; there were no eye witness to the offence. There was nothing at the scene.

Submissions on behalf of the Accused

In the accused submissions dated 12th November 2018 and filed on the same date, Mr. Nairi counsel for the accused challenged the prosecution witness testimonies, by stating the following; PW2 lived with the accused for only a week till the incident happened. He did not know her well nor had any meaningful contact. Purpose of the visitation was to discuss formalization of the relationship with the accused which was not discussed during that period. He could not establish a rapport with the child, he had a busy schedule he could not know if the child had health complications. Learned counsel impugned PW2 testimony that he was not capable of confirming whether the child was dead

or alive. He indicated that the child was sick as regards PW1 was negligent and did not make any effort to see whether he could conduct first aid or save the child, he only peeped the face and decided to keep quiet.

Learned counsel further submitted that PW3 who was the investigating officer visited the crime scene; he failed to produce before this Honourable court evidence like crime scene pictures. Did not gather sufficient evidence to put accused on her defence. Mr. Nairi relying on the evidence by the prosecution urged this court to find that the case against the accused falls short of the threshold of a prima facie case. Learned counsel pointed out reasons why this court should not allow the case to proceed further by calling the accused to answer under section 306(2) of the criminal procedure code, by restating the following facts: that: 1. **The death of the child was not caused by the action or omission of the accused person. Prosecution has not established an independent explanation on the connection between the accused and the offence. 2. The accused showed great concern; she first carried the child to pw2 workplace, rushed to the hospital and took herself to the police station upon advice from the hospital.**

Learned counsel referred to section 210 of Criminal Procedure Code but correct governing procedures for the high court trial is under section 306 (1) of the Criminal Procedure Code. Section 210 of the Criminal Procedure Code applies for a motion of no case to answer for trials in the magistrates' court

In conclusion the accused counsel submitted that the prosecution witnesses are of no probative value. He prayed that a prima facie case has not been established and that it is an embarrassment and waste of judicial time.

Analysis and Determination

The evidence as outlined as led by the prosecution in respect of the accused is based purely on circumstantial evidence. In the case of **Musili v Republic 2014 eKLR analyse several other cases like Republic v Kipkering Arap Koskei 16 EACA 135, Musike v Republic 1958 EA 715** dealing with circumstantial and once establishes the following principles to satisfy the legal threshold:

> ***"(1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established***
>
> ***(2) Those circumstances should be of a definite tendency, unerringly pushing towards guilt of the accused.***
>
> ***(3) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability by the accused and none else."***
>
> **To what extent have these principles been entrenched in the prosecution evidence against the accused person?**

No case to answer at the High court in criminal trials is provided under the criminal procedure code section 306(1) which states as follows:

> **"When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit recording a finding of not guilty. (2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence….."**

The term prima facie is defined by the ***Black's Law Dictionary 18th edition*** as:

> **" A case sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it makes later be proved to be untrue."**

The ***Oxford Companion of Law at page 907*** gives the definition as:

> **"A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive."**

In ***Mozley and Whiteley's Law Dictionary 11th Edition*** defines prima facie case as:

> **"A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case then is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side."**

The definition of what constitutes a prima facie case has occupied the mind of judges in the common-law jurisdictions including our very own. In the persuasive authority decided by ***Malaysian Court in PP v Datoseri Anwar bin Ibrahim No. 3 of 1999 2CLJ 215 at page 274 – 275*** **Augustine Paul J** made the following observations:

> **"A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence, must be such that, if**

rebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence."

In criminal trials that burden of proof is always on the prosecution. A trial court is therefore enjoined by law to determine whether at the conclusion of the prosecution case there exist a case discharging that burden of proof. In discussing the issue further **Lord Parder C.J** in the case of ***Sanjil Chattai v The State [1985] 39 WLR 925*** stated thus:

"A submission that there is no case to answer may properly be made and upheld:

(a) When there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence.

(b) When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it."

The Kenyan courts have heavily relied on the legal principles in the celebrated case of R.T. ***Bhatt v Republic [1957] EA 332 – 334 & 335*** to define what constitutes a prima facie case. The court of Appeal of Eastern Africa stated thus:

"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution case, the case is merely one which on fully consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court would 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 agree 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."

Besides the dicta in ***R.T. Bhatt Case (Supra)*** **Udoma JSC** of Nigeria Supreme Court in the case of ***Daboh & Another v State [1977] 5SC 122 at 129*** discussed the issue when a no case submission may be upheld in the following passage:

"Before, however embarking upon such exercise, it is perhaps expedient here to observe that it is a well-known rule of criminal practice, that on a criminal trial at the close of the case for the prosecution, a submission of no prima facie case to answer made on behalf of an accused person postulates one of the two things or both of them at once:

Firstly, such a submission postulates that there has been throughout the trial no legally admissible evidence at all against the accused person on behalf of whom submissions has been made linking him in any way with the commission of the offence with which he has been charged which could necessitate his being called upon for his defence.

Secondly, as has been so eloquently submitted by Chief Awolowo, that whatever evidence there was which might have linked the accused person with the offence has been so discredited that no reasonable court can be called upon to act on it as establishing criminal guilt in the accused person concerned; and in the case of a trial by jury that the case ought therefore to be withdrawn from the jury and ought not to go to them for a verdict.

On the other hand, it is well settled that in the case of a trial by a jury, no less than in a trial without a jury however slight the evidence linking an accused person with the commission of the offence charged might be, the case ought to be allowed to go to the jury for the findings as judges of fact and their verdict.

Therefore, when a submission of no prima facie case is made on behalf of an accused person, the trial court is not thereby called upon at that stage to express any opinion before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged.

If the submission is based on the discredited evidence, such discredit must be apparent on the fact of the record. If such is not the case, then the submission is bound to fail."

This discussion on a motion of no case to answer what is commonly referred as a prima facie case cannot be said to be complete without making reference to the constitutional right to silence and self-in culminating evidence. The constitution 2010 in Article 50 2(1) states that:

"the accused has a right to remain silent, and not to testify during the proceedings. under Article 50(h) the accused has a right to refuse to give self-incriminating evidence."

These rights expressly stated in both Article 49 and 50 of the constitution are among the protected rights that police must inform an arrested person immediately after any arrest read thereafter during trial. In regard to self-incrimination right is based on the maxim that ***NEMO tenetur seipsum accusare*** meaning: ***"no man shall be bound to accuse himself."***

In an adversarial system of justice there will always be an inevitable tension between the accuser and state. The reasons behind it essentially being the exercise of prerogative powers to pin down suspects alleged to have committed offences or breached criminal law. With all its

sufficient resources it is unlikely to maintain a fair balance on the rights of the accused to give each a constitutional blend aimed at a fair administration of justice. The drafters of our Republic Constitution so much to their credit placed the entire burden of proof in criminal cases upon the state. The constitutional standard in the criminal justice system is that the state or its actors are precluded from compelling an accused person to adduce evidence on any allegations in response to the charge(s). Whether an individual is accused of a serious offence(s) punishable with imprisonment or only with a fine.

The right to silence and self-incriminating under Article 50 are all part of the rights to a fair hearing. It follows with regard to these rights the accused is entitled to keep his or her mouth shut and stay put before and during the trial.

As a constitutional principle no person should be called upon to answer any allegation made against him by the state unless and until there is prima facie evidence that there is a case worthy the answer. The operation of the right in our jurisdiction means that the accused is protected literally from testifying evidence at all.

In establishing the framework for the rationale behind the rights **Field J in Brown v Baker US 1896** wrote:

> ***"The essence and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration, it is plan to every person who gives the subject a moment's thought. A sense of personal degradation in being compelled to incriminate oneself must create a feeling of abhorrence in the conveniently at its attempted enforcement."***

One of the most central aspects of determining the threshold of a prima facie case is for the court to draw its attention to the body of law which is concerned with rights to silence and self-incrimination. What this means is that the prosecution has the duty to prove the case against an accused person beyond reasonable doubt. The ramification under this constitutional regime narrates that unless and until an accused person voluntarily pleads to the charge or provides information to the police or trial court his silence should not be adversely used to supplement the state case. It is only plausible to draw such an inference when the state has manifestly discharged the burden of proof as required by law in establishing the elements of the offence against the accused person. That is why in the case of **Republic v P (M.B) 1994 ISCR 555, 579** respect must be paid to the findings made on a prima facie case at the conclusion of the evidence by the state. The court expressed itself as follows:

> ***"perhaps the single most importance organizing principle in criminal law is that right of an accused not to be forced into assisting in his or her own prosecution. This means, in effect that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case against him or her. In other words, until the court establishes that there is a case to meet, an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her. The broad protection afforded accused reasons is perhaps best discharged in terms of the over-arching principle against self-incrimination. It is up to the state, with its greater resources, to investigate and prove its own case and the individual should not be conscripted into helping the state fulfil this task. Once, however, the crown discharges its obligation to present a prima facie case, the accused can technically be expected to respond, whether by testifying himself or herself or calling other evidence."***

The aforementioned judgement raises the right principles to be upheld in deciding whether a prima facie case has been made out against an accused person at the close of the prosecution case.

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 (Supra)***. 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.

The prosecution called a total of three witnesses, who testified against the accused. The burden of proof was on the prosecution to establish that the deceased death on 8th May 2018 was as a result of the unlawful act of the accused. In the offence of manslaughter, the prosecution is supposed to prove the primary ingredients of the offence, namely:

I. Death of the deceased and the cause of death

II. That the accused committed the unlawful act which caused the death of the deceased.

Manslaughter is defined by the Penal Code in section 202(1) which provides that any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is not accompanied by an intention to cause death or bodily harm.

The prosecution proved the death of the deceased through evidence of Pw3 who identified the body of the deceased for post-mortem purposes; Pw3 produced the post mortem report confirming the death of the deceased herein.

The second ingredient is whether the accused committed the unlawful act or omission which caused the death of the deceased. PW2 testified that the accused told him that she is the one who killed the deceased; He reaffirmed the same in his cross examination. PW3 testified that the accused narrated that she was involved in the death of the deceased. The accused purported confession was not recorded in compliance with section 25A of the Evidence Act. In the post mortem report the pathologist formed the opinion that the cause of death was respiratory collapse which resulted to brain hypoxia.

A court of law must work with the evidence provided. The evidence provided to this court is incapable of assisting this court to make a finding that the case for the prosecution warrants the accused to be put on his defence. Defence cannot be expected to fill in the gaps for the prosecution's case. In my considered view the evidence tendered at the close of the prosecution case is very weak and no matter how I view it cannot be relied on to base a conviction if no evidence is offered by the defence. The prosecution has failed to establish a prima facie case requiring the accused to be called upon to defend herself.

Consequently, this court finds that the prosecution has presented no sufficient evidence to establish a prima facie case against the accused person for the charge of manslaughter contrary to section 202 of the penal code. A motion of no case to answer submitted by the defence succeeds to that extent. In light of the above the accused stands acquitted of the charge. She is at liberty unless otherwise lawfully held.

Dated, delivered and signed in open court this 10th December, 2018.

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HON. R. NYAKUNDI

JUDGE

Representation

Mr. Nain for the Accused - Present

Mr. Meroka for DPP – Present

Accused - Present