REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 18 OF 2015

REPUBLIC…….…....PROSECUTOR

-VERSUS-

ALEX MWANZIA MUTANGILI……..…...ACCUSED

RULING

ALEX MWANZIA MUTANGILI hereinafter referred as the accused is charged before this court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the charge brought against the accused provide as follows: that the accused on the 22nd day of September 2013 at Kima village in Mashuru District within Kajiado County, murdered Jennifer Nthenya hereinafter referred to as the deceased.

The accused pleaded not guilty to the charge. He was represented at the trial by Mr. Ochieng advocate and the prosecution was conducted by Mr. Alex Akula, a Senior Prosecution Counsel. The prosecution called a total of nine (9) witnesses to prove the ingredients of the offence beyond reasonable doubt constituting the following:

(1) The death of the deceased.

(2) The death of the deceased was unlawful.

(3) That in causing death there was malice aforethought on the part of the accused.

(4) That the accused was positively identified as the one who caused or participated in the killing of the deceased.

At the close of the prosecution case the defence counsel Mr. Ochieng in compliance with section 306 (1) of the Criminal Procedure Code made a submission of a no case to answer in favour of the accused. The evidence adduced by the prosecution witnesses can be summarized as follows:

PW4, PW6 and PW7 who testified as relatives to the accused confirmed existence of a marriage between the deceased and accused person. The three witnesses further stated that on 22/9/2013 they were in the same homestead at Kima village where the offence was committed. It is also the evidence of PW4, PW6 and PW7 that prior to the material day a report had been conveyed regarding the illness of the accused. This prompted them to summon family members who gathered at Kima to come up with plan of taking the accused to the hospital.

It is apparent from their testimony that during the day they held prayer sessions and each one of them retired to bed as arranged within the same house. PW4, PW6 and PW7 also confirmed in their testimony

that the deceased as the wife of the accused was alive and did participate in the family meeting regarding the health of the accused. Similarly it was PW4, PW6 and PW7 testimony that when they woke up in the early hours of the morning the deceased was found dead in the same room she occupied with PW7.

PW3 the chief of the area testified as to how he received a report from one of his residents by the name Nzilani that a woman has been murdered at Kima village. PW3 further testified that he visited the home where he found other people had gathered in response to the sad news. PW3 further stated that the suspect whom he identified before court had been handcuffed while surrounded by some members of the public. This situation according to PW3 evidence prompted him to call assistance of the police from Mashuru station to take over investigations on the incident.

PW5 a police officer attached to Mashuru police station told this court that the scene was visited where he re-arrested the accused and also transported the body of the deceased to Kajiado District Hospital Mortuary. PW8 who was the investigating officer testified on the steps he took to record statements from the witnesses, made arrangements for the postmortem at the mortuary, recover mallet which was allegedly the murder weapon used to commit the murder.

PW1 a government analyst who had received a mallet and blood sample from PC Omondi produced her report as exhibit 2 (a). She had been asked to examine the items and determine the presence and origin of the blood stains. In her testimony PW1 confirmed that the mallet was not blood stained to enable extraction of the sample to be used in generating the DNA profile with the deceased blood. PW2 a clinical psychiatrist testified as to the mental fitness of the accused to stand trial and conduct his defence. PW9 testified on how he performed a postmortem on the body of the deceased. The report admitted in evidence revealed that the deceased had suffered multiple injuries to the left scalp, left ankle, hematoma to the head, depressed skull fracture and confusion to the brain.

It is against this background Mr. Ochieng learned counsel for the defence submitted on a no case to answer motion pursuant to section 306 (1) of the Criminal Procedure Code. Mr. Ochieng in his submissions invited the court to appraise the evidence of the nine (9) witnesses relied upon to prove the charge against the accused. The learned counsel contested the testimony of PW4 which made reference to the mallet and participation of the accused in committing the offence. That piece of evidence according to counsel submissions was not corroborated by any other independent witness.

Mr. Ochieng further submitted that PW6 and PW7 did not seem to know the existence of the mallet, the alleged murder weapon admitted in evidence as the one used to inflict fatal injuries on the deceased person. It was learned counsel contention that according to PW4, PW6 and PW7 the accused and deceased enjoyed good relationship as husband and wife. The prosecution therefore failed to establish motive on the part of the accused to warrant the commission of the offence. Mr. Ochieng further submitted that the prosecution failed to adduce evidence to identify the accused positively as the one who murdered the deceased. According to Counsel Mr. Ochieng, PW6 and PW7 slept in the same house with accused and the deceased but in their testimony neither of them implicated the accused.

Mr. Ochieng 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 four 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:

> **(1) The prosecution has failed to demonstrate malice aforethought by the accused person to commit the offence.**
>
> **(2) The prosecution have equally failed to demonstrate that the accused caused the death of the deceased.**
>
> **(3) That the testimony of PW4, PW6 and PW7 on what transpired on the material day demonstrates inconsistencies and contradictions that fails to establish a prima facie case against the accused.**

(4) That the investigations conducted by PW5 and PW8 left gaps by not interrogating other key witnesses present at the scene of the crime during and after the incident.

Mr. Ochieng in summary submitted that the prosecution evidence as it stands cannot sustain a conviction to warrant accused to be put on his defence. He urged the court to make a finding of a no case to answer in favour of the accused and order for an acquittal. 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. By the time an order for a ruling was scheduled on the 16/1/2017, the respondent counsel Mr. Akula had not filed his written submissions.

The Law:

The starting point will be to look at the applicable law and cases on a prima facie case. I will then evaluate the prosecution evidence with the legal principles to make a finding on a prima facie case as submitted by Mr. Ochieng for the accused. The Criminal Procedure Code section 306 (1) provides 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 code does not mention the phrase prima facie nor is it defined anywhere under section 2 on interpretation of words and phrases used through the Criminal Procedure Code (Cap 75) of the Laws of Kenya. I therefore find no satisfactory definition either in this Code or the Evidence Act Cap 80 in Kenya. The answer however is found in the general principles, legal texts and case law commentaries.

The question on the prima facie case has been extensively considered by the courts and other legal texts by scholars. The ***Oxford Companion of Law at pg 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 pg 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."

The Federal Court of Malaysia also delved into the discussion on a prima facie case and interpretation of section 180 of the Criminal Procedure Code in the case of ***PP v Mohamed Radzi bin Abu Bakar [2005] 6MLJ 399***. The court set out guidelines for the trial court at the close of the prosecution case as follows:

"(i) The close of the prosecution case, subject the evidence led by the prosecution in its totality to a maximum evaluation, carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from the evidence if the evidence admits of two or more inferences, then draw the inferences that is most favourable to the accused.

(ii) Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent, I am/prepared to convict him on the evidence now before me? If the answer to that question is YES, a prima facie case has been made out and the defence should be called. If the answer is NO, a prima facie case has not been made out and the accused should be acquitted.

(iii) After the defence is called, the accused elects to remain silent, then convict.

(iv) After defence is called, the accused elects to give evidence, then go through the steps set out in May v Public Prosecutor [1963] (MLJ 263. *In this case in our Kenyan situation the trial court should proceed by calling the accused to defend himself by electing on any of the steps laid down under section 306(2) as read with section 307 of the Criminal Procedure Code* *emphasis mine*."

It is also worthy noting that section 180 of the Criminal Procedure Code interpreted by Malaysian court is materially similar before the amendment with our section 306 of the Criminal Procedure Code. The test of a prima facie case as interpreted by the superior courts though persuasive is good law applicable in our jurisdiction. This country also shares a common law heritage with Malaysia.

In making a finding on a prima facie case one should bear in mind the cardinal principle, on the burden of proof that it is the duty of the prosecution to establish the guilt of the accused for the offence charged beyond reasonable doubt. See ***Woolmington v DPP [1935] EA 462 at 481***.

Section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya provides that:

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."

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.**
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> **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.**
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> **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.**
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> **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.**
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> **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."**

The 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. I have considered the prosecution evidence and all these issue as canvassed by Mr. Ochieng learned counsel for the accused. The question I ask myself is whether the accused has a case to answer or can be put on his defence as provided for under section 306 (2) of the Criminal Procedure Code.

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. (See ***R.T. Bhatt v Republic (Supra), Daboh & Another v State (Supra), PP v Mohammed Abu Bakar (Supra).***

In the instant, the testimony of each of the nine (9) witnesses called by the prosecution has been evaluated against the charge of murder facing the accused. The standard of proof required at this stage is not that of beyond reasonable doubt as the court has not had the advantage of the defence.

From the evidence placed before me, I am satisfied that the test of a prima facie case has been met by the prosecution to warrant the accused person to be called upon to answer. The test to be applied here is as elucidated under section 306 of the Criminal Procedure Code and buttressed by the legal principles in the cited authorities.

The upshot of all these the accused person is hereby called upon to answer the charge as per the steps outlined under section 306(2) as read together with section 307 of the Criminal Procedure Code. The rights and options to elect from under section (2) are hereby explained to the accused in the presence of Mr. Mokaya learned counsel holding brief for Mr. Ochieng counsel for the accused.

It is so ordered.

Dated, delivered and signed in open court at Kajiado on 16/1/2017.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Mokaya for Mr. Ochieng for the defence counsel - present

Accused - present

Mr. Akula for Director of Public Prosecution - present

Mr. Mateli – Court Assistant present