



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 10 OF 2015

REPUBLIC.....PROSECUTOR

- VERSUS -

STEPHEN SILA WAMBUA.....ACCUSED

RULING

Stephen Sila Wambua Matheka, hereinafter referred as the accused was charged with two counts namely:

- (1) Murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya.
- (2) Attempted murder contrary to section 220 (a) of the Penal Code.

According to the information filed against the accused, on the 11th day of June 2012 at Mashuru Township in Kajiado County he murdered one Mutuku Muhia, hereinafter referred as the deceased and on the same place and time unlawfully attempted to cause the death of Christine Ndinda Ndisii by cutting her on the left hand elbow and the left side of the ribs using a panga. The accused denied each of the count and particulars hereof. He was represented at the trial by Mr. Onchiri Advocate while the prosecution was conducted by Mr. Alex Akula, a Senior Prosecution Counsel.

The case against the accused:

The prosecution case as projected by the eleven witnesses and unmasked at the trial is briefly set out below:

PW1 Christine Ndinda testified that on the 11/6/2012 she was at her place of work, a food kiosk owned by PW5 Juliana Wacucu located at Mashuru. The accused and the deceased also worked at the same hotel as a cook and waiter respectively. According to PW1 the accused was off-duty but visited the hotel where he had a cup of tea and demanded some payment from PW5 for work done the previous day. During this period the accused told PW1 that she had referred to him as a devil worshipper. This reference according to PW5 came as a surprise and on further inquiry what that meant the accused drew a panga and aimed at cutting her on the head. Faced with the situation PW1 stated that he raised his hand to defend herself from being hit on the head but ended up sustaining cut wounds on the right hand.

It was further her testimony that while on the ground a second cut was inflicted on the left side of the body. While in that condition PW1 saw the deceased with multiple injuries. Following the injuries PW1

told the court that she was seen and treated at Kajiado District Hospital as supported by the p3 dated 13/6/2012. PW5 Juliana further confirmed that he accused came to her hotel demanding to know the fate of his job. According to PW5 she explained the accused that due to his lack of seriousness it will be no longer possible to continue working at the hotel.

As a result PW5 paid accused all the outstanding dues for work done the previous day while PW5 stood within her hotel premises. She heard screams from PW1 and running to check accused was holding her firmly but already had suffered cut wounds. As PW5 canvassed with other workers on the incident involving accused and PW1 the deceased asked accused whether he ever referred to him as a devil worshiper. In the testimony of PW5 the accused in a span of seconds raised the panga and cut the deceased several times. PW5 stated that they reported the matter to the police.

PW4 PC Otieno and PW6 APC Benson Musomba confirmed visiting the scene where they found accused holding a panga surrounded by members of the public. According to PW4 and PW6 they made arrangements to transport PW1 who had sustained bodily harm from the accused and also the body of the deceased at Kajiado Hospital. PW4 and PW6 further told this court that they re-arrested the accused person whom they placed in police custody to undergo interrogation and investigations.

PW6 in his testimony produced the panga recovered as exhibit. The testimony of PW4, PW6 was also corroborated by that of PW7 - APC Juma Mandati. PW10 Chief Inspector Mwangi Gitau stated that he visited the scene of murder at Mashuru where he took photographs capturing the incident. He placed before the court a bundle of photos and certificate as exhibit 5 (a) and (b) which confirmed the death of the deceased.

PW11 Cpl Jackson Kariuki testified that on visiting the scene he found PW4, PW6 and a body on the ground. In company of PW4 and PW6 he took action of re-arresting the accused and taking possession of the weapon used to inflict injuries upon the deceased and PW1.

PW9 Caroline Njoki from the government analyst conducted analysis of the blood samples of the deceased and that of PW1 Christine together with the blood stained panga. According to PW9 she was to determine a match between the blood samples on the panga with that of the deceased. In her findings the DNA profile generated matched that of the deceased. According to Dr. Adrian Muriithi who performed the postmortem the deceased body had large laceration skull fracture, laceration cut wounds on the right cervical region, right hand laceration on the right hand and laceration on the left hand with deep cuts.

At the close of the prosecution case learned Counsel Mr. Onchiri elected to make submissions under section 306 of the Criminal Procedure Code for a motion of a no case to answer in favour of the accused.

In this respect learned counsel made reference to the testimonies of the eleven witnesses whose evidence was in support of the prosecution case. It was the submissions by the learned counsel that the evidence by the government analyst PW9 negatives a positive finding as to support attempted murder charge against the accused.

As regard court learned counsel placed reliance on the testimony of PW1 and PW5 to impugn the credibility of the evidence as to the identification of the accused as the perpetrator of the offence. Learned counsel also pointed out that the prosecution failed to record statements from crucial witnesses who chased the accused before being rescued by the police. When summarizing up the submissions learned counsel contended that the evidence by the prosecution fails the threshold of a prima facie case to warrant accused to be put on his defence.

By the time the date this ruling was scheduled the prosecution written submissions had not been filed in court. Based on the above evidence by the prosecution the court is mandated by law to make a determination whether the accused has a case to answer to enable the trial proceed further as provided for under section 306 (2) of the Criminal Procedure Code. The prosecution at this stage ought to demonstrate that there is sufficient evidence to prove the following elements of the offence:

On the first count of murder:

- (1) That the deceased died.
- (2) That the death of the deceased was unlawful.
- (3) That in the causing death the accused had malice aforethought.
- (4) That it was the accused who participated or caused the death of the deceased.

On a charge of attempted murder the following ingredients must be proved:

- (1) An attempt to cause the death of another person.
- (2) The intention unlawfully to cause death of another person.
- (3) Cause grievous harm likely to endanger human life.

What the prosecution must prove at this stage of a motion on no case to answer is existence of sufficient evidence to establish the essential elements of the offence. The standard of proof is not that of beyond reasonable doubt in view that the court has not heard the defence side.

It is against this background the learned counsel Mr. Onchiri for the accused made submissions of a no case to answer in terms of section 306(1) of Criminal Procedure Code which 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 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.”

Section 306 of the Criminal Procedure Code does not include the word phrase prima facie case nor does it exist in any of the provisions of the code. The determination as to what consist a prima facie case under section 306 has been extensively discussed in case law and other legal texts.

I will endeavour to consider widely what the courts have laid out as the legal principles on a prima facie case. In the case of *Queen v Melaine Coye & Others Cr. Appeal No. 16 of 2010* the court observed:

“More appropriate to a case such as this where the crown’s case is built upon circumstantial evidence are the following passages from the judgement a King C.J in question of Law reserved on *Acquittal No. 2 of 1993 [1993] 61 SASRI* which were accepted by the *Privy Council in DPP v Varlack [2008] UK PC 56* as an accurate statement of the law.”

‘I would re-state the principles, in summary form as follows: If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus capable of causing a reasonable mind to exclude any competing hypothesis as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that the plies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution and are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or put it another way could not exclude all hypothesis consistence with innocence, as not reasonably open on the evidence.’

In the case of *May v O’sullivan [1955] 92 CLR 654* the court held that a no prima facie case is

established:

“When at the close of the case for the prosecution, a submission is made that there is no case to answer. The question to be decided is not whether on the evidence as it stands the defendant ought to be convicted ‘but whether as it stands he could lawfully be convicted. This is really a question of law.”

In a line of authorities by Zimbabwe Courts a test on a prima facie case to guide the court at the close of the prosecution case to record a finding of not guilty and discharge the accused has been held in the following circumstances:

“(1) Where there is no evidence to prove an essential element of the offence.

A.G. v Bruma & Another [1987] 2 ZLR 96 at 102

(2) Where there is no evidence on which a reasonable court acting carefully might properly convict.

A.G v Mzizi [1991] 2 ZLR 321 at 323

(3) Where the evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it.

A.G v Tarwireyi [1997] 1ZLR 575 at 576.”

I take note that Zimbabwe is a common law jurisdiction with the same legal foundations like Kenya. I agree with principles stipulated herein in the cases cited within the common law jurisdiction with a history of English Law as the foundation of our criminal justice system. The position in Kenya courts has been substantially guided by the decision of the Court of Appeal of Eastern Africa in the case of **R.T. Bhatt v Republic [1957] EA 332** cited with approval by the Court of Appeal in the case of **Antony Njue Njeru v Republic Cr. Appeal No. 77 of 2006 eKLR** the court held inter alia on a prima facie case thus:

“A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It is true as Wilson J said that the court is not required at that stage to decide finally whether the evidence is worthy or credit or whether if believed it is weighty enough to prove the case conclusively that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a 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.”

The persuasive authorities and our own case law provide the test to be applied in applications on a prima facie case under section 306 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

In the instant case the evidence of the eleven witnesses for the prosecution has been scrutinized and evaluated viz the charges of murder and attempted murder against the accused. The evidence reveals the following:

That the deceased and PW1 were at Mashuru Town on 11/6/2012. The deceased was attacked and sustained fatal injuries while PW1 suffered bodily harm. The testimony of PW1 and PW5 points to the accused as the one who armed himself with a panga which he used to hit both PW1 and the deceased. PW2 confirmed as having participated in identification of the body of the deceased at Kajiado Hospital Mortuary. The postmortem was conducted by PW8 who prepared a report and opined the cause of death as cardio respiratory failure secondary to massive hemorrhage from the multiple cuts. PW6, PW7 and PW10 received a telephone call and on visiting the scene arrested the accused, recovered the murder weapon and also transported the body to the mortuary at Kajiado. The government analyst PW9

conducted DNA profile from the blood samples of the deceased and the stains extracted from the panga recovered at the scene. The DNA analysis tabulated in the report confirmed a match on the stains on the panga with the blood sample of the deceased.

On the second count the prosecution evidence has been appraised and the same reveals the following:

PW1 was at the scene of the crime on the material day. The accused and PW1 worked at the same venue where the incident took place. The attack against PW1 happened during broad day light. She was able to positively recognize the accused. It is on record from the testimony of PW1 that she was assaulted by the accused. Her testimony has been corroborated by PW5 Juliana Wacucu. From the evidence of PW1 she was seen at Mashuru Health Centre by PW11 who examined her and filled the P3 admitted in evidence as exhibit 9.

The circumstances which flow from the prosecution case are that the accused action against PW5 was aimed at causing death or grievous harm as this can be inferred by the nature of the weapon and the force used to inflict physical harm.

In view of the evidence so far tendered on behalf of the prosecution, I am satisfied that a prima facie case against the accused has been established to warrant him to be called upon to answer or tender his defence under the steps outlined in section 306 (2) as read together with section 307 of the Criminal Procedure Code.

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

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R. NYAKUNDI

JUDGE

Representation:

Mr. Onchiri for the accused - present

Accused - present

Mr. Akula for Director of Public Prosecution - present

Mr. Mateli Court Assistant – present