REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 35 OF 2015

REPUBLIC……...……..PROSECUTOR

VERSUS

PARSATI PARTERI.…….…….....ACCUSED

RULING

PARSATI PARTERI hereinafter referred as the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that briefly that the accused on the 12th day of January 2014 at Sultan Hamud River in Mashuru District within Kajiado County murdered HACKSON KIBAKI PARTERI hereinafter referred as the deceased.

The accused pleaded not guilty to the charge. At the hearing the state was represented by Mr. Alex Akula, a Senior Prosecution Counsel. The accused was initially represented by Mr. Mutua advocate who due to the transfer of the case from Machakos High Court to Kajiado High Court declined to be retained under the probono scheme to continue representing the accused. The Deputy Registrar retained the services of Ms Mageto advocate to represent the accused in the remainder period of the trial.

The prosecution availed eight (8) witnesses in support of the charge against the accused person in the following order: PW1 Douglas Supuker testified that on 13/1/2014 he learnt from one Daniel Kenga that the deceased had been killed. According to his testimony he went to convey information to the chief of the location regarding the killing of the deceased. The two had a short conversation where the chief decided to look for the accused whom they located at a guest house taking tea. Thereafter the accused accompanied them to go and verify the cause of death as reported.

PW2 AGNES PARTERI mother to the deceased and accused person gave evidence that on 4/11/2013 she received a call from the deceased that his life and her life were in danger. It was further PW2 testimony that apart from making a formal complaint to the chief on the threats of danger over their lives she went about her chores as usual. PW2 further stated that the deceased was reported murdered where she participated in identifying the body during the postmortem at the mortuary.

PW3 JACKSON NJARI chief of the location testified on how he received the death report of the deceased on 12/1/2014. In his evidence he took up the matter and laised with the police and other people to travel to the scene. PW3 further alluded to the earlier complaint made by PW2 regarding the death threats over the life of the deceased in the month of November 2013. According to PW3 as they were going about making funeral arrangements and attending the postmortem the accused seemed to stay a loof as being part of the team. PW3 further stated that the accused conduct prior to and after the death of the deceased led to strong suspicion that there is something he knows on how the deceased died. The accused was therefore arrested and investigations commenced to establish whether he is the one who participated in killing the deceased.

PW4 EUNICE PARMOISEU told this court that on 12/1/2014 while travelling along Sultan Hamud in company of one Kibet they noticed a motorcycle on the road with a crate of bread without a rider. PW4 further testified that acting on suspicion they reversed to confirm the circumstances only to find a dead body of the deceased person with cut wounds on the head. PW4 added that this triggered an immediate report via telephone to the assistant chief PW3 who took over the matter.

PW5 DR KHALID testified on having examined and conducted a postmortem on the body of the deceased at Makindu Hospital Mortuary. According to his testimony PW5 observed that the deceased had suffered deep cut wounds to the forehead and upper lip, right side. PW5 attributed the cause of death as being a cardiopulmonary arrest secondly to severe head injury.

PW6 RICHARD SHOUNGEA testified that on 12/1/2014 at about 10.00 pm he was at Kilimanjaro bar when the accused and another booked two rooms where they spent the night till the following day. PW6 further stated that in the morning he met the accused whom confirmed that the person allegedly murdered was his brother.

PW7 PC ERIC MUNYAO testified that on 12/1/2014 while at Mashuru Patrol Base he was instructed to visit a murder scene at Sultan Hamud. PW7 further stated that on arrival at the scene he found a motorcycle reg. No. KMCR 363B and a body of the deceased lying on the ground. It was his testimony that the body and motorcycle were collected from scene. He further testified that he participated in witnessing the postmortem which was conducted by PW5 at Makindu District Mortuary.

PW8 CPL CHARLES KIOKO conducted investigations of the crime by recording statements from various witnesses. PW8 gave a detailed narrative on the information gathered from the relatives, the mother of the deceased, the threats which were received and reported to PW3. PW8 further told the court that the investigations revealed that accused did not participate in the funeral arrangements with the rest of the family members. According to PW8 testimony the accused briefly attended the burial but on inquiring whether the coffin of the deceased has been lowered to the grave he made attempts to leave the home. That was the time the members of the public blocked him to effect arrest.

PW8 further stated that from the investigations he established an existence of a family feud based on land distribution between the accused and the deceased. This dispute PW8 concluded it to be the motive that the mother PW2 and deceased received death threats in November 2013. During the investigations he told this court that the register at the chief's office which contained the complaint was retrieved and admitted in evidence to support the threats received and action taken by reporting it to the chief PW3.

Having called the eight witnesses the prosecution closed its case. The defence counsel Ms Mageto asked for more time to submit on a motion of no case to answer. That submission was never to be presented for reasons best known to counsel despite several mentions before the Deputy Registrar. The defence counsel is guilty of laches to the detriment of rights of the accused.

This court is enjoined by law under the provisions of section 306 (1) of Criminal Procedure Code at the close of the prosecution case to consider the evidence tendered and make a determination whether a prima facie case exist to compel the accused be called upon to answer or state his defence in rebuttal. In cases of this nature the prosecution bears the burden to prove the following elements of the offence:

(a) Death of the deceased.

(b) Causation (unlawful acts of commission/omission of the death of the deceased.

(c) Malice aforethought.

(d) The accused was the perpetrator of the crime.

The standard of proof the law has placed on the prosecution is to prove all these ingredients beyond reasonable doubt for a verdict of guilty to be entered against the accused person. This legal principle was

clearly elucidated in the case of ***Miller v Minister of Pensions [1947] 2 ALL ER 372*** where Lord Denning stated interalia as follows:

> **"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful, possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."**

Section 107 (1) of the Evidence Act Cap 80 provides as follows:

> **"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."**

It is against these background I will endeavour to establish whether upon closure of the prosecution case a prima facie has been made out to warrant accused person to be called upon to answer as outlined under section 306 (2) of the Criminal Procedure Code. In the event the evidence presented fails short of the threshold on the standard of proof on each element of the offence a motion of no case to answer under section 306 (1) of Criminal Procedure Code will succeed and a determination of not guilty recorded in favour of the accused.

The preliminary question to be answered at this stage of the trial is whether there is evidence on which this court will find in favour of the prosecution on whom the onus of proof lies as stipulated under section 107 (1) of the Evidence Act. Section 306 (1) of the Criminal Procedure Code does not use the phrase prima facie case. It 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."**

Section 306 (2):

> **"When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is sufficient evidence that the accused person or any one or more of the several accused persons committed the offence, shall inform each such accused person of his right to address the court personally, call witnesses in his defence" *or in answer to the charge in rebuttal emphasis mine*."**

The Criminal Procedure Code of Kenya does not therefore define the commonly phrase used in criminal trials 'a prima facie case.' That has been left to scholarly texts and case-law. The Oxford Companion of Law at pg 907 gives the definition as:

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

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

> **"A litigating party is and 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 has also found its way in many cases decided by the superior courts in the commonwealth jurisdictions. In ***PP v Dato Seri Anwar bin Ibrahim No. 3 of 1999 (2 (CLJ 215 at pg 274 – 275) A***, **Paul**

J made the following observation:

> **"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 induct 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 exist 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 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 in the case of ***PP v Mohd Radzi bin Abu Bakar [2005] 6MLJ 399*** the court delved into the issue of a prima facie case and set out the following steps to be taken by a trial court at the close of the prosecution case:

> ***"(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 witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused.***
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> ***(ii) Ask yourself the question: If I how 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, then a prima facie case has been made out and the defence should be called. If the answer is 'NO' then, a prima facie case has not been made out and the accused should be acquitted.***
>
> ***(iii) If 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 MATV Public Prosecutor [1963] MLJ 263."***

The principles in this persuasive authority falls within the provisions of section 306 (2) of the Criminal Procedure Code of Kenya on the procedure to be complied with in making a finding for a no case to answer and the second limb for determination the case to proceed by calling the accused to enter his defence.

What can be deduced from these holding on a prima facie case is the golden rule is that it's the duty of the prosecution to prove the accused's guilt. (See ***Woolmington v DPP [1935] AC 462 at 481***). What therefore section 306 (1) (2) of the Criminal Procedure Code calls us to do is to weigh the effect of the evidence by the prosecution with a view to draw an inference that is needed in satisfying the judicial mind on the existence of state of facts proven on the ingredients of the offence. In our own jurisdiction, Court of Appeal of Eastern Africa in the case of ***R.T. Bhatt v Republic [1957] EA 332*** at 334 pronounced itself interalia as follows:

> **"It may not be easy to define what is meant by a prima facie case; but at least it must mean out 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."**

As reiterated elsewhere in this ruling on a charge of murder what the prosecution set to prove is crystal clear. However at this stage the standard of proof is not that of beyond reasonable doubt. (See ***Republic v Minister of Pensions (Supra***). It is evidence which on evaluation a reasonable court or tribunal may convict the accused for the offence charged or any other ***offence which the evidence can establish in order to enter a verdict of guilty and convict. (See section 306 (1) (2) of the Criminal Procedure Code***).

In applying the above principle to the present case, the following inferences emerge on each ingredients of the offence:

> **(a) Death of the deceased** – the testimony of PW1, PW2, PW3 and PW4 who are relatives to the deceased positively identified the body of the deceased at the scene and Makindu Hospital Mortuary. The postmortem was conducted by Dr. Khalid PW5 who in his autopsy report admitted in evidence under section 77 of the Evidence Act confirmed the death of the deceased due to cardiopulmonary arrest secondary to severe head injury.

The prosecution in their evidence proved the death of a human being in the name of Hackson Kibaki Parteri on 12/1/2014 at Sultan Hamud River.

> (b) The second ingredient **on the death being unlawful** - the testimony of PW1, PW3, PW3 and PW4 confirms that prior to 12/1/2014 the deceased was in good health going about his duties without any impediment. The prosecution evidence established that the deceased was riding his motorcycle in the night of 12/1/2014 when he suddenly met his death. The body of the deceased was found next to his motorcycle. The testimony of PW1, PW2, PW3, PW4, PW6 and PW7 made observations to the body of the deceased and confirmed existence of bodily injury to the head.

According to the medical evidence by Dr. Khalid PW5 the deceased sustained cut wound measuring 8 cm in length, cut wound on the lower lip right side and deep cut on the skull. PW5 opined that the injuries occasioned the death of the deceased.

What can be deduced form the evidence the death of the deceased was not due to a traffic road accident. There is credible circumstances evidence tendered by the prosecution that a third person inflicted deep cut wounds on the body of the deceased. The medical evidence by PW5 does not include the possibility of the death of the deceased from natural causes in any event. The deceased was stabbed on the head causing cardiopulmonary arrest. The evidence by the prosecution is therefore consistent with the legal principle in the case of ***Republic v Gusambizi S/O Wesonga [1948] EACA 65*** that all homicides are presumed unlawful unless excused by law. The ingredient of unlawful death of the deceased has therefore been satisfactory proved.

> **(c) The third ingredient – malice aforethought** - it is the mental element as conceived by the assailant. The elements of malice aforethought as defined under section 206 of the Penal Code. Under these provisions the prosecution is said to have proved malice aforethought where any of the following circumstances exist:
>
> > ***(a) An intention to cause the death of another.***
> >
> > ***9b) An intention to cause grievious harm to another.***
> >
> > ***(c) Knowledge that the act or omission causing death will probably cause death or grievious harm to some person, whether that person is the person killed or not, accompanied by indifference whether death or grievious injury occurs or not or by wish that it may not be caused.***
> >
> > ***(d) An intention to commit a felony.***
> >
> > ***(e) An intention to facilitate the escape from custody of or the flight of any person who has committed a felony or attempted it.***

It is also trite that malice aforethought can be inferred from the circumstances surrounding the death of the deceased. The Court of Appeal East Africa pronounced itself on the matter in the case of ***Tubere S/O Ochen [1945] 12 EACA 63*** as follows:

> **"(1) The nature of the weapon.**

(2) The part of the body targeted.

(3) The manner in which the weapon is used.

(4) The conduct of the accused before, during and after the death of the deceased *or attack (emphasis mine)*."

In this case the murder weapon was not recovered. The nature of injuries inflicted depict use of a lethal weapon. The prosecution relied on the testimony of PW2 the mother of the accused and deceased following a threat report made in November 2013 to PW3. The prosecution further adduced evidence of PW3, PW6 and PW8 on the conduct of the accused prior to and after the death of the deceased to implicate him with the murder. This was in respect that the accused did not participate in the funeral arrangements of his late brother (deceased). Secondly on the following day the accused seemed to be aware of the death of the deceased and thirdly, on the day of the burial he attended the function where he asked one of the mourners whether the coffin of the deceased has been lowered to the ground. The prosecution further led evidence by PW5 on the postmortem report which revealed deep cut wounds to the head. It is not in dispute that the attacker targeted the vulnerable part of the body of the deceased with the intention to cause death or grievious harm.

The circumstantial question which calls for an answer is whether the conduct of the accused before, during the funeral preparations and after the fateful day amounts to sufficient evidence on malice aforethought. The second issue is whether the prosecution led evidence which can positively identify the accused by placing him at the scene of the crime. On appraisal of the evidence there is no doubt that the prosecution case was anchored on circumstantial evidence. It is trite law that a case founded on circumstantial evidence to hold the chain of causation must be complete, indeed so complete that there is no escape from the conclusion that the crime was committed by the accused person. See text on ***Criminal Law at pg 310, Mnyete v Republic [2010] 2 EA 315***. In the case of ***Abanga alias Onyango v Republic Cr. Appeal 32 of 1990*** the principle of circumstantial evidence was stated as follows:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion within all human probability the crime was committed by the accused and none else."

What can be inferred from the evidence is the fact that whoever killed the deceased had malice aforethought. The pieces of evidence on the threats of 2013 against the life of the deceased, the land dispute between the accused and deceased as put forward by PW8, the conduct of the accused prior to and after the death to me remain scantly to identify the accused as the assailant. Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for a reasonable inference of the occurrence of the fact in issue.

In my evaluation of the evidence the explanation offered by the prosecution witnesses as to the accused being involved in the murder is not cogent. This is because the standard of proof required on the part of the prosecution is one of prima facie evidence to help or dispel differences between onus of proof and strong suspicion against an accused person. There can be no denying that the accused conduct prior and after the death was questionable. This court may be persuaded of the existence of that conduct by accused absolutely and make a finding in favour of the prosecution, but until the phrase reasonable doubt is well grounded in the case, it's nothing more than a balance of probabilities. Applying this test I am of the

holding that the circumstances of this case makes it at least more improbable that the accused was at the scene of the murder or participated in killing the deceased on 12/1/2014.

Guided by the authorities herein cited above I am of the opinion that the test of a prima facie case has not been established by the prosecution in reference to the charge of murder or any other offences under the Penal Code. There is no evidence to prove an essential elements of the offence including to positively identify the accused placing him at the scene of the murder.

In the result i find the application on a motion of no case to answer succeeds as provided for under section 306 (1) of the Criminal Procedure Code. The accused herein is found not guilty and subsequently is hereby acquitted forthwith unless otherwise lawful held.

Dated, delivered and signed in open court at Kajiado on 10th day of January, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Accused - present

Ms Mageto advocate for accused - present

Mr. Akula for Director of Public Prosecution - present

Mr. Mateli Court Assistant - present