



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRC NO. 24 OF 2015

(CORAM: J.A. MAKAU – J.)

REPUBLIC.....PROSECUTION

VS

CALEB OTIENO WARINGA.....ACCUSED

RULING

1. The accused **CALEB OTIENO WARINGA** is charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal code**. The particulars of the charge are that on the 2nd day of January 2013 at Uhanya Beach in Bondo district within Siaya County murdered one **CAREN JUMA**.
2. At the close of the case of the Prosecution case Mr. S.M. Onyango, Learned Defence Counsel, put in written submissions on no case to answer. M/S Maurine Odumba, Learned State Counsel, relied on the evidence on record.
3. The Prosecution called six prosecution witnesses and from their testimony, the Prosecution case is as follows: - PW1 Nahashon Otieno Oloo on 2nd January 2013 at around 7.30 pm while on his way from the beach where he had gone to collect a child, aged 4 years, one Kennedy Oloo from Uhanya Beach, on arrival at his home he heard noises along the road, picked up a torch and shone it towards the direction from where the noise was coming from. He then heard a voice of a lady say "*Caleb why have you killed me*". He shone his torch again towards the road and saw someone running. It was the lady and she fell down 30 metres from PW1's compound. He proceeded to where the lady was and found her bleeding from the right side rib. He saw a child aged about 10 years on the right side of the road and asked him whether he saw anyone who said he did not but heard someone running. PW1 proceeded to Uhanya Police Station, he found no one but on his way back, he met a police vehicle, gave his report and accompanied them to the scene of crime. He told the police he heard the deceased mention the name "**Caleb**", telling the police he did not know who Caleb was. The police examined the lady and informed PW1 she was already dead.
4. During cross-examination, PW1 stated he did record in his statement the deceased was lying within his compound. He admitted in his statement he did not mention flashing his torch and seeing anyone running; and that he did not tell the police he moved close to the dead body and found it bleeding. He stated in his statement he recorded that he heard the lady say "*Caleb you killed me*", but he did hear the lady say "*Caleb why are you killing me?*" He stated he asked the *boda boda* riders who "**Caleb**" was and he was told that he was the husband of the deceased but the informer was not picked.
5. PW2, Maurice Ochieng Auko, Assistant Chief of Nyanza Misoru Beach testified that on 2nd January

2013 at 5.00pm, he saw Caleb walking alone, whom he had known for 2 months and that was unusual, on that day as he used to walk with his wife. That at around 8.30pm, PW2 received a call from unknown number informing him that one of the beach members was stabbed with a knife at Uhanya. PW2 proceeded to Uhanya to find out what had happened. That at the scene of the crime, he was told the person murdered was Nyalego alias Maurine. PW2 asked Nyalego who told him he heard the deceased saying **“Caleb why are you killing me?”** PW2 found OCS Usenge Police Station at the scene who asked him to assist in having Caleb arrested because he had killed Nyasembo. PW2 proceeded to the beach assembled youth and members of public to assist in arresting Caleb. That at around 4.40 am, a beach member Nyasembo Alias Dolosa saw Caleb, called youth leader Stephen Ochieng as Caleb started running away and PW2 and one Stephen followed him for a distance of 700 metres before he got into the bush. They searched for him and eventually found the accused standing holding a knife. That as PW2 wanted to arrest the accused; he raised his knife and cut PW2 on his right elbow. PW2 called Stephen who joined him with others; overpowered and arrested the accused and took the knife. PW2 called police who came and re-arrested the accused. PW2 gave the knife to OCS of Usenge Police Station. PW2 identified the knife as MFI-P1.

6. During cross-examination PW2 stated he knew the deceased to be the wife of Caleb, the accused, because everyone who came to the beach had to give his details in his office and that there was a book to register the visitors at the beach but PW2 stated he did not give the register to the police but showed them the book of the members of Nyenye Beach. PW2 stated when he used to see the deceased and the accused, they were always happy. PW2 denied telling the police as recorded in his statement the two had several quarrels. He stated that though stated he was cut by the accused he has nothing to show he was assaulted by the accused.

7. PW3, Maurice Atieno Oloo, wife to PW1, told to the court that on 2nd January 2013 at around 7.30pm while at her home she heard noise coming from outside their house and that when she opened the kitchen, the noise ceased. That when she was back to the sitting room she heard the noise continuing. PW1, her husband took a torch and went outside. PW3 then heard someone saying, **“Caleb you killed me”**. PW3 stated that with the aid of light from the torch they saw a person about 50 metres away lying on the ground. That they proceeded to where the person and they found her breathing with difficulties and bleeding. PW1 went to report to the AP Uhanya then heard the people who came to the scene saying Caleb had stabbed the deceased and that Caleb was her husband. PW3 did not know the lady nor who Caleb was.

8. On cross-examination PW3 stated she heard someone screaming saying **“wooi woouoi”** and that she heard the person speak in Dholuo language saying, **“Caleb you have killed me”**. PW3 stated she did not tell the police the name of the person who died, and that she did not know Caleb had a lady before. That she stated there was a young man standing by talking on a phone. PW3 stated they saw two men, including the young one but did not ask him his name. That the young man was behind the person who was running, both of whom were after when the body of deceased was lying. PW3 stated she was not sure whether the voice she heard was coming from the lady, though she is sure it was a voice from a woman. PW3 stated that the young man returned to the scene of crime when police came, but she did not inform the police the young man witnessed the incident nor did he record any relevant information with police.

9. PW4, Noah Odhiambo Sudi, told court that on 7th January 2013 he took his friend Meshack Ochieng Herman to the hospital to see the body of member of their church. That the deceased body was removed and her brother identified the body.

10. PW5, Stephen Ochieng Olacho, testified that on 2nd January 2013 at around 10.00am, the Vice Chairman of Nyenye Mission Beach (PW2) told him, Caleb Otieno Waringa had killed his wife and they need to have him arrested. PW2 called youths to waylay him at his house, while others divided into groups of two and waited upto 4.00am. That at 4.30am, one Doni Omino switched on his torch and told them the accused had returned. The accused on being touched on, he took off as PW4 and his group followed him screaming for help. That they eventually managed to arrest him from a bushy area. The accused was at the time of arrested armed with a knife. Police officers were called, came and arrested the

accused. PW4 identified the knife MFI-P1 and stated when the accused was arrested and police took the knife it had blood stains. PW5 stated he knew the accused as they used to stay with him at Nyenye Mission Beach and that he had known him for 2 weeks. PW5 stated the accused was staying with a certain lady who he did not know very well.

11. During cross-examination, PW5 stated he knew the deceased to be the wife to the accused. He admitted it was normal for fishermen to have a knife with him such as the one before court. He stated it was surprising to find blood stains on a knife as after cutting a fish, the knife is usually washed. He stated the knife did not have fish blood but human blood.

12. PW6, No. 235737 Inspector John Olima, the Investigating Officer in this case told court that on 2nd January 2013 at 8.30 pm, OCS, Usenge Police Station instructed him to accompany D/OCS Inspector Solomon Kiritu to the scene of murder at Uhanya Beach. That at the scene they found the body of a young lady lying on a pool of blood on her back. On checking the body they found a deep cut on her right side of the chest and two stabs at the back. On enquiry they were told she had been stabbed by her husband, who later ran away. The body was picked and taken to Matangwe Mortuary within Bondo town, pending postmortem. On 3rd January 2015 at 5.00 am, PW6 was informed of arrest of a suspect who had allegedly killed his wife at Nyenye Beach and handed over to Uhanya Police Post with a knife which had been recovered from him. The suspect was then taken to Usenge Police Station together with the knife. The accused was placed in custody and subsequently charged with this offence. PW6 produced the knife as exhibit P1. PW6 stated when he recovered the knife it had no blood. PW6 attended postmortem at Matangwe Mortuary Home. He was issued with postmortem report which was identified as MFI-P2.

13. During cross examination, PW6 told the court the knife was brought to the police station by Cpl Wafula and APC Mirasi and it was not wrapped at all, and had no blood stains. That the two got the knife from the site. He stated the witnesses said the deceased was heard to have said "**Ameniua**" meaning "**he has killed me**". That the incident took place at around 8.30pm in a dark night. He added the knife had passed through many hands before it reached him.

14. The Prosecution did not in this case produce the postmortem report following several adjournments without availing a medical officer or the maker of the document. The MOH, Bondo District Hospital, to whom the postmortem report was initially addressed to, could not avail any doctor to produce the same for the reasons that; one the author of the postmortem report was unknown to them and secondly the postmortem report was carried out in a private hospital. This court had given the Prosecution the last and final adjournment twice and it could not give them any further adjournment in view of the age of the case and in absence of good reasons for seeking adjournment.

15. Upon the close of the Prosecution's case, the Defence Counsel relied on the written submissions on no case to answer. The Prosecution relied on the evidence availed before the court.

16. The issue that therefore arises for consideration at this stage is whether the evidence so far on record **establishes a prima facie case to require the accused to be put on defence.**

17. The accused faces a charge of murder contrary to **Section 203 and as read in Section 204 of the Penal Code. Section 203 of the Penal Code** defines murder as follows: -

"Any person who of a malice aforethought causes death of another person by unlawful act or omission is guilty of murder."

18. In **Republic V Andrew Mueche Omwenga, Criminal Case No. 11 of 2008 (2009)eKLR, Honourable Justice D.K. Maraga**, he then was, stated as follows: -

"...What is murder? Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by

criminal law before conviction can result. Whether a conviction results will depend further on the accused's state of mind at the time; usually intention or recklessness is required. The Latin maxim-actus non facit reum, nisi mens sit rea – “the act itself does not constitute guilt unless done with a guilty mind”, encapsulates this principle”.

19. Malice aforethought is very important ingredient for the offence of murder. The Prosecution has to prove facts which establish malice aforethought. **Section 206 of Penal Code** sets down the facts which constitute malice aforethought as follows: -

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

a) an intention to cause the death or to do grievous harm to any person, whether that person is the person actually killed or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be cause;

c) an intent to commit a felony;

d) an intention by the act or omission facilitate the flight or escape from custody of any person who had committed or attempted to commit a felony”.

20. In determining whether, the accused in this case has a case to answer, I think it is appropriate to define what a *prima facie case* is. In the case of **Bhatt V Republic (1957) EA 332**, the definition of *prima facie case* is well stated by the Court of Appeal as follows: -

“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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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. It is true as Wilson J said that the Court is not required at the stage to decide finally whether the evidence is worthy of credit or whether if believed it is weighty enough to prove the case conclusively. That 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.”

21. In **Republic V Hezron Maina Wanga and Another Criminal Case 15 of 2014**, Hon. Lady R.W. Sitati held: -

“.....mens rea, which is an ingredient under Section 206 of the Penal Code, namely the carrying out of the unlawful act or omission is satisfied when there is evidence proving any of the circumstances set out under the said Section. Regarding the establishment of malice aforethought where it is shown that the attack on the deceased was spontaneous with no evidence of there having seen a prior plan to attack the deceased it cannot be said that the killing was with malice.”

22. At this stage, it is sufficient for the Court to critically look at the evidence on record and determine whether such evidence as it is meets the threshold as set out in the **Bhatt Case** (Supra) in regard to what

constitutes a *prima facie* case. The strength of evidence establishing a *prima facie* case must be the kind of evidence upon whose strength the Court could convict if the defence does not give any explanation rebutting that evidence or opts to say nothing to rebut such evidence. It is also worth noting that at this stage the prosecution does not have to prove its case beyond reasonable doubt, for proof beyond reasonable doubt is required when the defence has also given its evidence or has closed its case either way.

23. In the instant case, the offence was allegedly committed at 8.30pm in a dark night as per evidence of PW1, PW2 and PW6. This therefore being the issue of identification/recognition, a critical issue for my consideration is whether the deceased recognized her assailant and whether there is evidence to prove positive recognition of the accused by the deceased or by PW1 and PW2. In **Wamunga V Republic (1989) KLR**, it was held that where the only evidence against a defendant is evidence of recognition, trial court is enjoined to examine such evidence carefully and to be satisfied the circumstance of the recognition were favourable and free from possibility of error before it can safely make it the basis of conviction.

24. In the instant case, there is no evidence that the deceased and the accused had a quarrel before the fatal night as PW1 and PW2 nor any other witnesses witnessed such a quarrel or a fight between the two. There is sufficient evidence from PW1 and PW2 that at the material time and at the site of the incident it was dark and that one could not see nor identify anyone without the aid of light. The deceased did not state how she was able to recognize her attacker before she passed on. She instantly gave one name of “**Caleb**” as her attacker. It was not stated at Nyenye Mission Beach, there are no other persons known as “**Caleb**” other than the accused. In this case, it cannot be wished out that the deceased could have mistaken her attacker to the accused in view of the fact that the conditions were not favourable for positive identification. No single prosecution witness placed the accused at the scene of murder at the time it was committed. PW1 and PW2 did not know who ‘**Caleb**’ mentioned by the deceased was. In view of the above, I have warned myself and I am not satisfied that the circumstance of recognition were favourable and free from possibility of an error as to the identity of the assailant and such recognition by the deceased would be safe to be a basis of putting the accused on his defence.

25. On the deceased dying declaration in the case of **Shadrack Mbaabu Kinyua V in Criminal Appeal No. 163 of 2011(Nyeri)**, the Court of Appeal stated thus: -

“.....The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval.....it is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-V-Eligu s/o Odel and Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is a satisfactory corroboration. ”

26. I find that it would be unsafe to base on an aver of case to answer on the deceased alleged dying declaration, in view of the circumstances of the case, and as the offence was committed at night in the absence of any eyewitnesses, mistaken identification and/or recognition of the accused cannot be ruled out. Further there is no other evidence pointing towards the guilt of the accused such as forensic test on the blood found on the knife (if any) coupled by contradictions as to what the deceased was heard saying by PW1 and PW2 and what PW6 was told the deceased stated.

27. In **Donald Agwata Achira V Republic, Criminal Appeal No. 47 of 2003(2003)eKLR at Kisumu**, it was held as follows: -

“.....In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels’ speeches. A trial judge should approach the evidence of a

dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross-examination, unless there is satisfactory corroboration.

In the instant case, there is no other evidence connecting the accused with the death of the deceased save for the dying declaration. No one witnessed the accused with the deceased at the material time or fighting with the deceased. It was the alleged dying declaration that made the youths and villagers, after police instructed them to arrest the accused, go after him. The accused had no prior knowledge that he was a suspect and was due to be arrested. That on returning home at 4.00am in the morning he was met by a crowd who were chasing him and as such he ran to whatever safe place he thought of. I find that it would be unsafe to base a case to answer solely on the dying declaration of the deceased.

28. On circumstantial evidence in **Solomon Kirimi V Republic, HCRA No. 46 of 2011(Meru)**, Lady Justice J. Lesiit stated thus:-

“.....It is settled 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 that within all human probability the crime was committed by the accused and none else.”

29. The prosecution case is based on facts that the accused and the deceased were staying together as man and wife and the accused is called “**Caleb**” and that the deceased mentioned in her dying declaration the name of “**Caleb**”, I find that the Prosecution case is weak and has a lot of loop holes. PW1 and PW2 stated they saw someone running towards the lake. That they did not give the description of the person they saw running away. There is no evidence that they saw his face nor did they state the sex of the person they saw running away. It was a dark night and one could not see clearly without the aid of light. That they did not say the area was only occupied by the accused. The knife found with the accused was produced as P.exhibit P2, however it is alleged when the accused was being arrested, the knife had blood stains yet no evidence was proved that the blood on the knife was that of the deceased and not of PW2. PW6 contradicted PW2’s evidence in that the knife he recovered had no blood stains.

30. In the instant case, though no postmortem report was produced, the Prosecution proved death of the deceased through the evidence of PW1, PW2, PW3, PW4, PW5 and PW6, however, the failure to produce the postmortem report denied the court the opportunity of finding out what was the cause of death of the deceased.

31. In view of the above, I find the evidence placed before me insufficient, contradictory and unsustainable to warrant the accused being put on his defence. The accused has no case to answer. Accordingly, I make a finding that the accused is not guilty of murder of **CAREN JUMA** and is accordingly acquitted under the **provisions of Section 306(1) of the Criminal Procedure Code**. I direct that the accused be set at liberty unless otherwise lawfully held.

DATED AT SIAYA THIS 2ND DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 2ND DAY FEBRUARY, 2017.

In the presence of:

Mr. S.M. Onyango: for the Accused

M/S Maurine Odumba: for State

Accused - Present

Court Assistants:

1. Patience Beryl Ochieng

2. Leonidah Atika

3. Sarah Ooro

J.A. MAKAU

JUDGE