



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CRIMINAL CASE NO. 15 OF 2016

JOSEPHAT MUKUNDI KANONO.....APPLICANT

-VERSUS-

REPUBLIC.....PROSECUTION

RULING

The accused Josephat Mukundi Kanono is charged for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The brief facts of the alleged offence are that the accused lived together with his fiancé one Purity Gakii Karianki hereinafter referred as the deceased at Kwale slums in Ongata Rongai within Kajiado County. That on 31st day of July, 2016 in their homestead the accused killed the deceased.

On his arraignment on 15/11/2016 he pleaded not guilty to the charge and particulars as constituted in the information by the prosecution. The trial commenced before this court on 7/3/2017 where the prosecution called twelve witnesses to prove the charge against the accused.

The summary of the prosecution case constituted the following:

PW1 Elizabeth Waithera testified as a government analyst in respect of analysis undertaken on blood stained a black trouser of the accused, a blood stained kitchen knife, the blood samples of the deceased, buccal swabs indicated of the accused. In the report of PW1 the examination carried out revealed a DNA profile matching that of the accused in respect of the black trouser and the buccal swabs. Secondly the DNA profile on the kitchen knife matched that of the blood samples of the deceased.

PW2 Ann Leyian a clinical officer who attended the deceased on 31/2/2016 testified that on observation she found the deceased had already passed away. This therefore became a police case who came and initiated investigations including taking away the deceased body to the mortuary.

The police swung into action where PW3 Sgt Odhiambo of scenes of crime visited Nairobi Women's Hospital to document the body of the deceased. It was also his testimony that under the same instructions he moved to the compound at Kwale slums where the alleged murder took place to reconstruct the scene by way of photographic prints. The photographs processed and developed under his supervisions were admitted in evidence as exhibit 5A (1-9). In support of the work he did a certificate which was also produced as exhibit 5(b).

PW4 Jackline Mwendwa a cousin to the deceased told this court how she was enlisted to identify the deceased body at the mortuary to the pathologist.

PW5 Ali Mohamed testified in respect of the events of 3/7/2016 at Kwale slums. According to the

testimony of PW5 while within his vicinity his attention was drawn to people rushing to a particular scene. According to his testimony he joined in with the rest of the public. On arrival PW5 told this court he saw a man and a woman insulting each other in Kimeru. In the course of the insult PW5 stated that the man got hold of a broom which he started using to assault the woman. According to PW5 the beatings continued with the woman falling down, putting up some form of resistance but the accused could not hear of it. In a little while PW5 further told this court he observed the beatings escalated by the man using kicks, dragging the woman on the ground as if he wanted her to go back to the house. PW5 further witnessed the man leave in a hurry through the staircase and came out with an object which he used to hit the woman severally. What was to follow thereafter the women became overpowered. She fell on the staircase having sustained stab wounds and bleeding profusely. The man whom he identified as the accused started making attempts to run away from the scene. That is when PW5 took steps to go after him by apprehending and escorting him to the police station.

PW5 reportee booked a report and the reasons for arresting the accused. According to PW6 it was alleged that the suspect had been found fighting his wife who suffered fatal injuries.

PW7 Dr. Peter Ndegwa the pathologist carried an examination on the deceased body on 10/8/2016. On examination of the external body PW7 noticed four stab wounds at the back averaging 4cm long spread from the right shoulder to the left lower posterior chest wall. The autopsy report was admitted in evidence as exhibit 6.

PW8 Geoffrey Kanono on his testimony told this court that he was engaged as a caretaker of the plot where the accused and the deceased lived. He was not at the scene when the alleged offence took place. He attested to the fact that accused had rented house No. 5 which he learnt later that an incident of murder had occurred on 31/7/2016.

PW9 James Muriungi an uncle to the accused testified to the fact that having been invited to participate as a relative during the confession statement recording by the accused on 5/8/2016. The confession statement was recorded by PW11 Musyoki Kimeu of Ongata Rongai police division. PW11 stated in his evidence that before commencement of the accused confessing to the incident he explained to him his rights under the constitution. It was further the testimony by PW11 that he had also to inquire whether the accused was doing it under coercions, duress or influence from any other person. The recording officer having ascertained that there was no impediments on the law and from the accused side he commenced to take the confession in Swahili language.

It is the said confession which PW9 participated on request by the accused: on completion of the activity of taking down the details according to PW11 the same was read over to the accused who confirmed the truth of its contents. PW11 thereafter caused the relative PW9 and the accused person to append their signatures to the statement for compliance with the rules. PW11 also countersigned the statement which was admitted in evidence as exhibit 8 (1) (b).

PW10 Philip Maina testified as being present at the scene on 31/7/2016. His role as stated before court was that he did witness a man running away after assaulting his wife. According to PW10 in company of other members of the public he apprehended the accused person. PW10 further told the court that at the same time he pursued the accused who was making attempts to run away from the scene. He however managed to arrest the accused and did escort him to Ongata Rongai police station. In addition PW10 testified that they also made arrangements for the victim to be taken to the hospital for treatment.

PW12 PC Chege the investigating officer put together the case file on this murder incident. In his testimony he visited the scene, recorded statements from witnesses who gave vital leads on alleged crime. PW12 further testified that he did involve the scenes of crime officer PW7 who documented the scene. During the postmortem PW12 caused samples of blood, the murder weapon and the exhibits to be taken to the government analyst for examination. This is supported by the testimony of PW1. According to PW12 he received the postmortem report which showed the cause of death. While armed with what he alleged was relevant information and evidence he recommended a charge of murder be prepared against the accused. In conclusion he produced the alleged murder weapon identified as a kitchen knife and also

the black trouser indicative as that of the accused.

At the close of the prosecution case I am obligated to make a determination under section 306 (1) of the CPC on a motion of no case to answer. The provisions of the code are such that ***“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 the 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 record a finding of not guilty.*”**

On the other hand

(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 anyone or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any) to give evidence on his own behalf, to make an unsworn statement, and to call witnesses in his defence, and in all costs require him or his advocate if any to state whether it is intended to call any witnesses as to the fact other than the accused person himself; and upon being informed thereof the judge shall record the fact under subsection 3 the accused may elect to remain silent or address the court by making unsworn statement or adduce evidence on oath. In the event he opts not to tender any evidence the defence prosecution counsel shall then sum up the case for the courts determination.”

The purpose of this inquiry under section 306 of our Criminal Code is to enable the trial court to determine at a very early stage whether there is sufficient evidence to warrant the accused to be called upon to answer. That is why the court is called upon under subsection (1) (2) to consider whether at the close of the prosecution case there is admissible and relevance to constitute a prima facie case which to me constitutes the following elements:

If the evidence against the accused or any one of them is of such quality that is not ought to prove any of the elements of the offence a verdict of not guilty ought to be entered. Conversely if on analysis and appraisal of the evidence by the prosecution satisfies the criteria that would provide a reasonable prospect of a conviction of the offence against the accused or any one of them, he or she will be called upon to answer.

In the instant case the complaint against the accused is that of the offence of murder contrary to section 203 of the Penal Code. The elements sought to be proven by the prosecution comprises of the following:

- 1) The death of the deceased.**
- 2) That the death was unlawful.**
- 3) That in committing the murder the assailant had malice aforethought.**
- 4) That the accused person(s) before court are the ones who committed the offence.**

It is essential therefore at this juncture to have a look as what the courts have said on this phrase – prima facie case. The purpose being to break this down in ordinary terms in view of the fact that our code is silent on the definition.

I bear in mind that the burden of proof in criminal cases is always cast upon the prosecution. This is clearly provided for under section 107 (1) (2) of the Evidence Act (Cap 80) of the Laws of Kenya ***“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 that those facts exist.”***

Section 108 ***“the burden of proof in a suit or proceeding lies on the person who would fail if no evidence if no either side. These provisions therefore confirm that the accused assumes no***

responsibility in so far his guilt or innocence is concerned.”

What then can we say constitutes a prima facie case? This legal phrase found itself in **Mozley and Whiteley’s Law Dictionary 5th Edition** which states thus:

“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 to answer it. A prima facie case, then, is one which established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.”

By this definition there are two catchy words of significance. First, is the concept of evidence. My basic understanding of evidence in any trial is that which connotes relevance, materiality and admissibility. The Director of Public Prosecutions under Article 157(6) has the mandate to institute, undertake, takeover, continue or discontinue any criminal proceedings save for those under (court martial’s tribunals) against any person within this Republic.

In exercising these powers under this constitution no prosecution shall be initiated, undertaken or continued without the strength of the evidence. A key objective for this condition is to exercise his role within the confines of subsection (11) to safeguard the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. The state function on prosecution of criminal offences is delegated to the Office of DPP. It is that evidence by the prosecution against the accused which will be of concern to me in making a verdict on the outcome of the case at this stage.

What will concern me while exercising discretion is whether the evidence fits within the following stated parameters?

- 1) The probative value of individual items of evidence.**
- 2) The sufficiency of the whole body of evidence adduced by the twelve (12) witnesses in meeting the standard of proof.**
- 3) The relative completeness of this body of evidence in proving the charge(s) against the accused person(s).**

The other question to be answered is whether the evidence placed before me at the close of the prosecution meets the criteria of sufficiency:

The answer to this can be found in the provision of the Evidence Act Cap 80 of the Laws of Kenya. The test revolves around the concept of admissibility and exclusion of evidence. Under the Evidence Act it should be noted that evidence which is excluded on objection or struck out will not be counted in measuring the sufficiency of evidence to establish existence of a prima facie case.

When evaluating the sufficiency of the evidence under section 306 to the facts of this case I will not be focusing primarily with credibility nor with the compelling permissible references between the prosecution and the accused. It is the function of the court at this stage of the proceedings to determine whether the evidence in its entirety would convincingly and persuasively support a verdict of not guilty in favour of the accused. If on the hand the scale tilts in favour of the prosecution the accused would then be placed on his defence. That is the sense I make of a prima facie case where which demands that the accused gives an answer to the charge or defends himself as provided for under section 306 (2) of the CPC.

What will constitute a prima facie case has been articulated as exemplified by a few of cases cited herein in this analysis:

In the persuasive authority from the neighbouring jurisdiction of Uganda in the case of ***State v Rajhnath Ramadhan, Amoy Chin & Another HCA 104 of 1994*** adopting the decision in ***Sanjat Chaital v the***

State [1985] 39 NLR 925 the court held 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.”**

In the classic locus case of R.T. Bhatt v Republic [1957] EA 332 the East African Court of Appeal predecessor of our own Court of Appeal held as follows interalia:

“That a prima facie case is where a reasonable tribunal properly directing its mind to the law and evidence would convict the accused if no explanation is offered by the defence. A mere scintilla of evidence can never be enough not any amount of worthless discredited evidence.”

It is therefore trite that our jurisprudence on the interpretation of section 306 of the Criminal Procedure Code is anchored on the principles of these cases. At the close of the evidence by the prosecution the accused would be acquitted or discharged if there is no evidence to prove the essential elements of the offence. Secondly, if there is no evidence on which a reasonable court or tribunal directing its mind reasonably to the law and facts might properly convict. Thirdly the nature of the evidence at the close of the prosecution case is so manifestly unreasonable and inconsistent that no reasonable court or tribunal could safely act on it to convict the accused person.

These principles underpin the courts role and solemn duty to bear in mind throughout the trial that the onus of proving the charge is always with the state. There should be no room for the court to place an accused person on his defence to answer or rebut the offence if the state has not discharged the standard of proof.

While determining whether a prima facie case has been established the provisions of Article 50 of the Constitution should always reign supreme. One such right to a fair trial is of presumption of innocence until the contrary is proved. (Article **50 (1) (a) of the Constitution**).

As the law stands in determining the existence of a prima facie, one key safeguard is to avoid calling upon the accused to defend himself hoping to fill up any gaps or defects in the case being pursued by the prosecution. It is desirable that in evaluating the prosecution case the court admits only evidence which is admissible in law to support the substantive offence. I am of the conceded view that no accused person should be placed on his evidence unless and until the state has put for the a prima facie case.

I can therefore quite agree with the position taken by the Federal Court of Malaysia on dealing with the issue of discretion under section 306. It seems to me that the principles summarized in the case of Public Prosecutor v Chin Yoke [1940] 9 MLJ 47 at pg 48 summarizes it all as a guide as follows:

“One is familiar with the course often adopted by counsel for the defence at the close of the case for the prosecution; when he submits that he has no case to answer, or in other words, that the prosecution has failed to make out a prima facie case, against the accused and it is submitted that accused should not be called on for his defence it is then that it is the duty of the magistrate or judge to consider the evidence already had and decide whether or not to call on the accused for his defence.

There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, it unrebutted, it would warrant the accused’s conviction in such case, the accused is then called upon to answer the prima facie case which has thus been made against him. If however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe

to convict upon such evidence standing alone, then no prima facie case has been made out and the accused should not be called on for his defence.”

The provisions of section 306 of our code bears resemblance with section 180 of the Malaysian Code *which has similar provisions with our section 306 of the Criminal Procedure Code* but it does not follow, in my opinion, that the magistrate or judge must necessarily accept the whole of the evidence for the prosecution at its face value.

When applying this dictum to the facts of the present case it would constitute unfairness to call upon the accused to answer the charge on the basis to supplement the state case. All that is necessary is that in circumstances of the case, there is sufficiency in the evidence to draw an inference that the allegation has been proved, if left unexplained the court is to some greater degree likely to convict the accused. A mere preponderance of evidence on the part of the state will not be sufficient to warrant an answer or defence from the accused.

Reviewing the evidence by the state as a whole from the dispositions taken from the twelve witnesses a prima facie case is disclosed to render the accused to be called upon to answer. I entertain no doubt in my mind while guided by the legal principles in the cited cases that the only inference is such that the evidence is deemed to be prima facie evidence on the charge of murder against the accused.

Accordingly, I allow the state case to proceed to stage two as provided for under section 306 (2) as read together with section 307 of the Criminal Procedure Code for the accused person to enter his defence.

Dated, delivered and signed in open court at Kajiado this 5th day of May, 2017.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Wakla for the accused

Mr. Akula for the DPP

Accused present

Mr. Mateli Court Assistant