



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CRIMINAL CASE NO.13 OF 2015
REPUBLIC.....PROSECUTOR
VERSUS
PRISCILLAH WANJIRU SALOME.....ACCUSED

RULING

The accused person, **Priscillah Wanjiru Salome** is hereby charged with the offence of murder contrary to section 203 of the Penal Code. The state alleged that on 21/6/2015 at Oloolua village, Ngong township in Kajiado North Sub-County, Kajiado County the accused murdered Johnstone Njeru Mbogo hereinafter referred as the deceased.

The accused who was represented by Mr. Nyaata advocate pleaded not guilty to the offence. At the trial the prosecution was conducted by Mr. Akula, the senior prosecution counsel. The state opened its case and summoned thirteen witnesses. The state also produced the following exhibits:

- (1) One blue kitchen knife.
- (2) Stripped black brown/cream T-shirt.
- (3) Green T-shirt.
- (4) One cream big (blood stained trouser).
- (5) Mobile forensic report.
- (6) Government analyst report.

The summary of the prosecution evidence emerged as follows:

That on 21/6/2015 the accused person and another not before court, were in company of the deceased in her house taking alcohol drinks. In the course of that day witnesses heard some form of screams from the accused. That is the time PW6 a security officer as the first responder noticed the accused running from the house. According to PW6 she intervened and apprehended the accused by returning her back to the house. She further stated that in the house there was another lady and the deceased body on the ground in a pool of blood. The matter was reported to the police station where PW1, PW2 and PW3 rushed to the scene and took control. The body of the deceased was collected by the police officers and taken to the City Mortuary. The postmortem report produced as exhibit showed the deceased to have suffered multiple injuries to the right chest cavity, injuries to the right lung, left chest cavity, the heart and bilateral haemathorax.

The other key witness for the prosecution was PW7 who testified on how he recovered the murder weapon upon information extracted from the accused person and the other lady identified as Ann not before court. The murder stained knife was subjected to DNA profile by the government analyst together with the blood sample of the deceased. According to the analyst report exhibit 8 the blood sample in the knife matched that of the deceased person.

At the close of the prosecution case Mr. Nyaata counsel for the accused submitted on a motion of no case to answer under section 306 (1) of the Criminal Procedure Code. In his argument the state case is purely based on circumstantial evidence. According to Mr. Nyaata it is impossible to establish who among the two ladies in the house stabbed the deceased. Learned counsel further submitted that despite the police exonerating one by the name Ann she was the perpetrator of the crime and not the accused person. Learned counsel further argued there was poor investigations which resulted in contradictions and inconsistencies in the witnesses' testimonies. In his view the shortcomings are such that no reasonable tribunal can draw a positive inference on how the deceased met his death. Learned counsel further submitted and urged this court to draw an inference that the state has not established a prima facie case against the accused to warrant her to be called upon to defend herself.

I have considered the charge, the evidence this far tendered by the state, and the submissions by the defence counsel. It is trite law that the burden of prove against accused guilty rests on the prosecution who undertakes this task on behalf of the state. There is no time does the accused get called upon to strengthen or fill gaps in the prosecution case. The prosecution must prove its case without the aid of the accused person's defence.

The legal position under section 306 (1) of the Criminal Procedure Code provides as follows inter alia that **“if at the close of the case for the prosecution at the trial of the accused the court is of the view that the evidence so far adduced does not disclose the accused committed the offence of which he may be convicted, it ought to return a verdict of not guilty and discharge the accused. (Emphasis - *this exercise of discretion at this stage commonly referred to as a motion of no case to answer must be exercised judiciously and entails principles codified in the case law.*”**

In the case of **R.T. Bhatt v Republic [1957] EA 332 - 335** the Eastern Court of Appeal articulated what constitutes a prima facie case in the following passage:

“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, at the close of the prosecution case, the case is merely one which on full 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. It may not be easy to define what is meant by a prima facie 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.”

From the provisions of section 306 (1) CPC and the pronouncement in the ***R.T. Bhatt case (Supra)*** it is clear that if at the close of the prosecution case there is no sufficient evidence to entitle the accused to answer the charge a verdict of not guilty should be entered and an order of acquittal in his or her favour.

In deciding whether a prima facie case has been established at the close of the prosecution case the trial court should bear in mind that the standard of proof is not that of beyond reasonable doubt.

My view therefore is that even at this stage of the trial the accused should not be placed on her defence merely to fill gaps in the prosecution case or possibly to set her up to give self-incriminating evidence. The constitution guarantees on right to a fair trial under Article 50 (2) (a) on the presumption of

innocence until the contrary is proven or the right to remain silent and not testify under (d) or the right to refuse to give self-incriminating evidence are to be protected and reinforced.

In the instant case I have weighed one factor after another on the evidence in relation to the charge against the accused person. What constitutes a prima facie as properly known in law and articulated in the case of R.T. Bhatt (Supra) has been established in this case in favour of the prosecution.

Having been so satisfied and for the above reasons I exercise discretion to call upon the accused to answer the charge as provided for under section 306 (2) as read together with section 307 of the Criminal Procedure Code.

Dated, signed and delivered in open court at Kajiado on 8/5/2017.

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R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Arunga for accused

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant