REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 39 OF 2015

REPUBLIC…..……..……PROSECUTION

VERSUS

HONSTER KISANYA EDAGWA……..ACCUSED

RULING

HONSTER KISANYA EDAGWA, hereinafter referred as the accused is facing a charge of murder contrary to section 203 punishable under section 204 of the Penal Code. The briefs facts as framed in the charge sheet are that the accused on 22nd March 2015 at about 12.00hrs at Gichagi village in Ngong within Kajiado County murdered **Paul Mungera Edagwa** hereinafter referred as the deceased.

The charge was read and explained to the accused who denied that he committed the offence of killing the deceased. He was represented by Mr. Wakla advocate while the prosecution was conducted by Mr. Alex Akula, the senior prosecution counsel.

The prosecution called eight (8) witnesses in support of the charge in order to prove the guilt of the accused person.

The facts which emerge from the evidence as narrated by **PW1 George Kimemia,** the Assistant Chief was that on the 22nd March 2015 the allegedly fought with the deceased. On receipt of the report PW1 visited the scene where he saw the body of a young man with multiple injuries. According to PW1 a knife was also next to the body of the deceased. That is when PW1 sought the involvement of Ngong police station to take over the investigations of the incident.

The evidence of **PW2 Lisah Olesia Edagwa** a sister to the accused and the deceased was to the effect that through her son Derrick she learnt that the deceased had suffered some physical injuries. In the ensuring events PW2 visited the house where the deceased was said to be lying and did confirm the occurrence of the incident on arrival. What PW2 observed was the deceased bleeding and his right hand holding a knife. The witness testified that she involved other relatives and the police. It was further the testimony by PW2 that the accused had also surrendered himself to the police. During cross examination PW2 testified that the accused and the deceased had for sometime had a frost relationship. In her evidence PW2 rescited an incident involving a DVD belonging to the deceased which accused carried away without the consent of the deceased. The evidence by PW2 indicated that this happened earlier than the fateful day of 22nd March 2015. In order to emphasize the dissatisfaction of the accused conduct the deceased had the issue with the family including PW2. The family involvement according to PW2 was to find a way out of pressuring the accused to return the DVD to the deceased. PW2 further told this court that the accused did not comply with the demands given by the deceased and other family members to give back the DVD to the deceased.

The witness **PW3 Wilson** was a brother to the deceased and also the accused. PW3 testified that on 1/4/2015 he was called upon by the police to participate in identifying the deceased body to the pathologist who performed the postmortem at the mortuary.

PW4 John Edagwa a brother to both the deceased and the accused stated that he because aware of the death of the deceased from his sister PW2 Lisah Olesia. According to PW4 he responded to the message by travelling to the scene where the incident is alleged to have taken place. On his arrival with other relatives like PW2 and the police he saw the deceased body with stab wounds at the neck and rib cage area. In a short while PW4 stated that the police made arrangements and carried away the body to City Mortuary.

PC Emmanuel Ekai PW5 a scenes of crime officer testified on the role he played of documenting the scene by taking photographs of the house and the deceased body. What PW5 was able to observe was a body of the deceased lying on the floor with a stab wound on the left chest. The photographs taken capturing various views of the body and the scene were admitted in evidence as exhibit 1 and the report as exhibit 1(b).

PW6 Sgt John Mbewa who at the time of the incident was attached to Ngong police station booked the murder report made by the accused. At the time of reporting PW6 told this court that the accused was in a distress condition wearing clothes with fresh blood stains. The witness concern was that despite the blood stained clothes accused did not seem to have any injuries. As the information from the accused was still scanty he held him in custody to await further action.

In the evidence of PW6 he also attended to the scene in company of other police officers, PW5 and PC Benjamin Kapei removed the body from the house where the alleged killing is said to have occurred to the City Mortuary.

The investigating agency took over the mater under the guidance of PW8 – PC Kapei. In the evidence of PW8 based on the witness statements, the postmortem report, the murder weapon being the knife recovered from the scene the accused was charged with the offence under section 203 of the Penal Code. PW8 further produced the knife and the blood stained T-shirt and bed sheet as exhibits in support of the prosecution case.

PW7 Dr. Ndegwa evidence focused on the postmortem report. In the report exhibit 4 PW7 confirms severed mesenteric blood vessels, perforated bowels and haemoperitoneum. The cause of death was attributed to ex-sangulanation due to penetrating stab wound to the abdomen.

At the close of the prosecution case I am mandated pursuant to the provisions of section 306 of CPC to make a finding on a prima facie case. Section 306 (1) provides 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 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.**

(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 any one 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 sate whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact."

The substance of section 306 of the Code is twofold, one is to consider the evidence at the close of the prosecution case has satisfied the standard of proof of a prima facie case to call upon the accused to answer. Secondly is where at the end of the prosecution case the evidence led in support of the charge is so insufficient to warrant the court to return a verdict of not guilty and acquit the accused.

The question of what constitutes legal sufficiency or insufficiency evidence has been considered in various case law commentaries. It is worthwhile to examine how other jurisdictions have faired on a no case to answer motion.

In English Criminal Law which was the foundation of our criminal law the matter has been widely considered. In the case of ***Republic v Galbraith [1981] 1 WLR 1039*** the court held on an approach of no case to answer as follows:

> **"If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.**
>
> **(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.**
>
> **(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed convict upon it, it is his duty upon a submission being made, to stop the case.**
>
> **(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters, which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the mater to be tried by the jury."**

In the case of ***Republic v PMB [1994] 1 SCR 555*** the Supreme Court in a statement by **Lamer CJ** stated as follows on a prima facie case:

> **"Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced to into assisting in his or her own prosecution. This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case against him or her. In other words, until the crown (establishes that there is a case to meet", an accused is not compatible in general sense (as opposed to the narrow, technical sense) and need not answer the allegations against him or her."**

In our own jurisdiction the Court of Appeal in Eastern Africa in the case of ***Bhatt v Republic [1957] 1 EA 332*** held as follows on a prima facie case:

> **"Whether there is a case to answer cannot depend only 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 but whether a reasonable tribunal properly directing its mind to the law and the evidence, can convict if no other evidence is adduced."**

At this preliminary hearing, the prosecution needs not to prove the accused's guilt beyond reasonable doubt. However it is important that it puts forth sufficiency evidence to show that a prima facie case exists in their favour.

In my understanding under section 306 of the CPC there are two inquiries that this court has to make:

One: That an offence was committed in which the accused is the suspect.

Two: that it is probable from the evidence that the accused may have committed the offence.

In applying the above principles the issue for consideration is whether at the close of the prosecution case

a no case to answer satisfies the provisions of section 306(1) and (2) of the CPC.

I am alive to the fact that the phrase prima facie case though litigated from time immemorial there is no definition in our statute or the criminal procedure code. This has been left to the interpretation accorded the term in our jurisprudential development within case law decisions.

In consideration of the issue on a prima facie my view is that the court has to subject the prosecution case in its entirely to scrutiny and evaluation. I bear in mind the constitutional right under Article 50 (2) (1) of our Constitution for an accused person to remain silent, and not testify during the proceedings. This right therefore obligates the trial court to take into account the nature of the evidence to satisfy itself whether the elements of the offence have been proved. This assessment is critical for the sole purpose that if an accused person elects to remain silent the judge has to convict him on the evidence adduced.

On my part, I hold therefore that a prima facie case is made out where the prosecution evidence tends to prove the ingredients of the offence against an accused person. In the event the accused person is placed on his or her defence and fails to answer or provide defence to the facts proved the court would have no option but to convict. There can be no denying that the burden of proof lies with the prosecution as outlined under section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya.

Applying this test to the present case I am satisfied that the prosecution has placed before court prima facie evidence to warrant the accused person to be called upon to answer as provided for under section 306 (2) of the Code.

As a result the provisions of section 306 (2) of the Code explained to the accused person to state his defence.

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

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R. NYAKUNDI

JUDGE

In the presence of:

Accused

Mr. Wakla for accused

Mr. Akula for Director of public prosecutions

Mr. Mateli Court Assistant