



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO.40 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

BONIFACE ISAWA MAKODI.....ACCUSED

RULING

The accused **Boniface Isawa Makodi** was charged before this court for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The brief particulars of the offence as set out in the information by the prosecution are that on 3rd day of July 2012 at Ole-rarei Area of Namanga in Kajiado Central District, accused **Boniface Isawa Makodi** murdered **Raphael Cheserek Chelang'a**, hereinafter referred as the deceased.

The accused who was represented at the trial by counsel Mr. Makundi pleaded not guilty to the charge and particulars. At the trial the prosecution called five (5) witnesses and tendered 3 exhibits of which were the Tecno mobile phone, the sketch plan and postmortem report.

At the close of the prosecution case learned counsel Mr. Makundi for the accused moved the court by way of written submissions for a no case to answer motion. It was the submissions of learned counsel for the accused that an evaluation of the evidence by the prosecution failed to establish a prima facie case hence the accused is entitled to be acquitted.

Learned counsel for the accused reiterated the summary of evidence tendered by the prosecution witnesses on the charge of murder against the accused. He further contended that the testimony of PW1 touched on the fact of having met a drunken person on 3.7.2012. The person allegedly made a complaint that someone by the name **Boni** has threatened him with a death if he does not pay up the debt. That PW1 further stated the person who complained about one **Boni** was found dead the following day. This piece of information by PW1 and PW4 who was found with deceased Tecno mobile phone formed the basis of indictment of the accused.

Mr. Makundi learned counsel for the accused contested the evidence of PW4 as it lacked the credibility upon which the prosecution relied against without any corroboration. The learned counsel also poked holes to the testimony of PW3 and PW5 that it was not clear how the deceased met his death. According to the defence counsel all what they told the court was discovery of a dead person on the roadside. The body under the instructions of the OCS was collected from the scene and taken to Kajiado District Hospital. The postmortem was conducted by Dr. Gituma whose report was admitted in evidence by consent. Learned counsel submitted that it is true the deceased had sustained physical bodily harm, but we are not told who inflicted the injuries.

The details on examination as per the postmortem report form shows that deceased sustained multiple

injuries. The injuries as deduced in the form were multiple injuries to the right parietal occipital region, bruises on the right mandible, bruises on the right clavicular region and fracture of the cranium on left frontal bone. In his prognosis Dr. Gituma opined the cause of death as cardio respiratory failure secondary to intracranial haemorrhage tertiary to trauma.

Counsel referred to parts of the evidence of PW1, PW2, PW3, PW4 and PW5 and submitted that there was no evidence to discharge the burden of proof for the offence of murder against the accused. He further submitted that there was no evidence of participation against the accused. Learned counsel further contended that the mere recovery of the phone with PW4 was not sufficient to establish a prima facie case against him.

In his submissions the learned counsel senior prosecution counsel submitted that there is a prima facie case of murder against the accused. He referred to the evidence of PW1, PW2, PW3, PW4 and PW5. The learned senior prosecution counsel anchored his submissions on the testimony of PW1 regarding complaint lodged by the deceased that his life was in danger from one **Boni**.

Secondly, the testimony of PW4 who was found with the deceased mobile phone but shifted the burden of possession to the accused. It was his contention that the court puts together the testimony of PW1 and PW4 to make a finding of accused involvement with the offence. He urged the court to find that the evidence by the prosecution warrants the conclusion of there being a prima facie case. Learned counsel for the prosecution to support his submissions relied on the following authorities:

(1) Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Cr. Appeal No. 272 of 2005 (UR).

(2) David Mugo Kimunge v Republic [2015] eKLR

(3) Libambula v Republic [2003] KLR 683.

I have considered the charge, the prosecution evidence, and both counsels' submissions. It is a requirement of the law that at the close of the prosecution a decision ought to be made whether a prima facie case under section 306 of the CPC has been established.

The principles of law on a prima facie case have been laid down to guide the courts in several cases. One such classic case is **R.T. Bhatt v Republic [1957] EA 332**. In this case the court *inter alia* held as follows:

“A submission of no case to answer may properly be upheld:

- (1) Where there has been no evidence to prove an essential element of the alleged offence.**
- (2) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination; or is manifestly unreliable.**
- (3) That no reasonable tribunal could safely convict on it.”**

The decision to uphold or reject the submissions does not depend upon whether the adjudicating tribunal would at that stage convict or acquit, but upon whether the evidence is such that a reasonable tribunal can convict.

The question is whether the submissions made by counsel for the accused shows that the prosecution case was rendered manifestly unreliable under cross-examination. In answering this question the court has to be bound by the evidence tendered in court in support of the charge.

In applying the principles **Bhatt v Republic** the prosecution have a duty to prove the ingredients of the offence of murder against the accused. The standard required is such that this court properly directing its mind to the law and evidence would convict if no other evidence is adduced.

In the instant case the prosecution has to prove the following elements of the offence of murder:

- (a) Death of a person;**
- (b) The death was caused by unlawful act;**
- (c) Prove of malice aforethought; and**
- (d) The accused was the perpetrator of the offence.**

I have considered the charge, submissions by both learned counsel for the accused and learned prosecution counsel and the arguments raised therein on a motion of no case to answer. The totality of the prosecution evidence has been weighed alongside the discrepancies in the witness testimonies complained of by the learned counsel for the accused. The evidence contemplated under section 306 of the Criminal Procedure Code means no less than that tendered in court and liable to be tested in cross-examination by the accused.

I am persuaded by the arguments by the learned prosecution counsel that the court confines itself to the evidence, so called and tendered by PW1 – PW5. In the circumstance i am of considered opinion that there is sufficient evidence to justify a finding of existence of a prima facie case. I will not endeavour to give detailed reasoning on the evidence at this stage to avoid prejudice and right to a fair trial of the accused when called upon to answer the charge.

Pursuant to section 306 (2) of the Criminal Procedure Code a prima facie has been made out against the accused to warrant putting him on his own defence. The provisions of section 306 (2) duly explained to the accused who on understanding elect which option preferred to conduct his defence at a date to be assigned the case.

Dated, signed and delivered in open court at Kajiado on 20/7/2016.

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R. NYAKUNDI

JUDGE

Representation:

Accused present

Mr. Kiveu for Mr. Makundi for accused present

Mr. Akula for Director of Public Prosecutions

Mr. Mateli Court Assistant