REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL CASE NO. 28 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

CATHERINE KARIMI NYAGA.....ACCUSED

RULING

This is a motion taken out at the instance of Mr. Nyaata, counsel for the accused in terms of the provisions of Section 306 (1) (2) of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

Under subsection (1) it is provided:

> **"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 out of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire, record a finding of not guilty."**

Subsection (2):

> **"When or 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 the accused persons committed the offence, shall inform each such person of his right to address the court either personally, or his advocate or make unsworn statement and or call witnesses……."**

In the case before me accused was charged with the offence of murder contrary to sections 203 and 204 of the Penal Code Cap 63 of the Laws of Kenya.

The state alleged that on 28th day of January 2013 at Maile 46 market in Kajiado Central District within Kajiado County the accused who was married to one **PETER NYONYI MARONA** armed herself with a knife and stabbed him occasioning fatal injuries.

The state alleges from the evidence adduced by PW1 that he heard distress screams from the house of the deceased. On rushing to the scene he saw the deceased on the floor of the house and on his left side was a knife. He told the court that he raised further alarm and neighbours responded. The police were also informed about the incident.

PW2 further testified that on the material day of 28th January, 2013 at 7.00 pm he was attracted by the

screams from the house of the deceased where they shared a wall. On arrival it was his testimony that deceased was on the ground bleeding from the chest. He further told this court that next to the deceased was a blood stained knife. The police were telephoned regarding the murder. The police visited the scene.

PW4 police officer adduced evidence of having booked the murder report in the occurrence book. He further testified that the accused surrendered herself to the police alleging that they fought with the husband who in the course of the struggle suffered injuries.

The body of the deceased was taken to Kajiado District Hospital Mortuary and a postmortem conducted by PW8 Dr. Omari. On examination and findings he told this court that deceased suffered laceration on the fore head and penetrating wound on thoracic cavity approximately 0.5cm x 0.5cm. In his opinion the cause of death was massive haemothorax and restricted breathing due to penetrating lung injury.

PW5 and PW6 identified the body of the deceased at the Kajiado Mortuary where a postmortem was conducted. **PW7** the government chemist who analysed the blood stained knife, the jeans trouser, blood stained T-shirt, adduced evidence that the DNA profile generated confirmed that the knife had marching blood DNA profile with that of the deceased.

The evidence from the investigating officer PW10 was to the effect that the accused and deceased were involved in a fight which culminated in deceased being stabbed and sustaining fatal injuries.

Submissions by the defence counsel:

At the close of the prosecution case Mr. Nyaata for the accused submitted that prosecution evidence has not met the test of a prima facie case to warrant accused to be placed on her defence. In support of the case he referred the court to the following authorities:

Ramanlal Trambaklal Bhatt Vs. Republic [1957] EA

Republic Vs. Derrick Waswa Kuloba [2005] eKLR

Abanga alias Onyango Vs. Republic Cr. Appeal No. 32 of [1990] UR

The gist of Mr. Nyaata submissions in the case law cited was to the effect that the prosecution have not satisfied the test of a prima facie case. It was further his contention that the evidence taken in part or as a whole does not qualify to discharge the burden of proof by the prosecution in order for the accused to be called upon to state his defence. Counsel argued and urged this court to make a finding that from the totality of the evidence accused is entitled to an acquittal.

Submissions by the prosecution counsel:

In the preliminary submissions Mr. Akula the Senior Prosecution Counsel vehemently counter argued the line taken by the defence on the test of a prima facie case.

In support of the prosecution case the prosecution counsel set out a summary of the evidence by the ten prosecution witnesses. He further argued that the prosecution case was both based on direct and circumstantial evidence against the accused. That evidence according to Mr. Akula was credible and sufficient to satisfy the criteria of a prima facie evidence capable of discharging the standard of proof in the charge facing the accused. Mr. Akula in buttressing his arguments on a prima facie case relied on the following authorities:

a. **Libambula Vs. Republic [2003] KLR 683:** On the issue of evidence on motive on the part of the accused.

In this case the court held:

"We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime."

b. Further in his submissions the case of **Charles O. Maitanyi Vs. Republic [1986] KLR 198** on the principle of a testimony of a single witness and greatest care to be taken when the court makes a finding relying on the evidence of a single witness to prove a fact in issue.

c. A further case cited by the prosecution counsel was that of **Abanga Alias Onyango Vs. Republic Cr. No. 32 of 1990 (UR).** This case sets out the three tests to be met before a court relies on circumstantial evidence to draw an inference of guilt. The court held thus:

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 guilty 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."**

Mr. Akula further submitted to this court to consider the elements of the charge of murder and weigh the evidence tendered by the prosecution witnesses. He outlined the ingredients of the offence of murder set to be proven by the prosecution beyond reasonable doubt as:

1. **Death of the deceased (Peter Nyonyi Marona).**

2. **Malice aforethought of the accused.**

3. **Unlawful commission/omission by the accused.**

4. **The accused person as the perpetrator of the murder.**

He urged this court to evaluate the evidence of PW1 – PW10 on record and further consider the materials placed before it. The court according to the prosecution counsel would be satisfied that the facts as premised eventually met the test of a prima facie evidence in favour of the charge. It was his contention that both direct and circumstantial evidence sustains a prima facie case to warrant accused person to be called upon to defend himself. The case for the prosecution according to the prosecution counsel is that each of the elements of charge is supported by the evidence of the prosecution witnesses. That piece of evidence did place the accused at the scene of the crime hence the need to answer to the charge.

Analysis and determination:

I have evaluated the evidence, submissions by Mr. Nyaata advocate for the accused and Mr. Akula Senior Prosecution Counsel visa viz the charge of murder against the accused.

The test whether the court ought or must discharge the accused person at the close of the prosecution case has been set out in the case of **Ramanlal T. Bhatt Vs. Republic [1957] EA 332, 334 – 335**. The court held interalia on a situation where an acquittal must result where:

1. **There is no evidence to prove the essential element of the offence.**

2. **There is no evidence which a reasonable court acting judiciously might properly find accused guilty and make an order to convict.**

3. **The evidence adduced by the prosecution is so manifestly unreliable and contradictory that no reasonable tribunal or court could safely act on it.**

Section 203 as read with Section 204 of the Penal Code explains which, ingredients of the offence the prosecution is required to prove at the close of its case. It is after the close of the prosecution case under Section 306 of the Criminal Procedure Code the court ought to decide whether accused has a case to answer.

Although Section 306 has not defined the phrase prima facie case, it is construed from the provisions which can be deduced as follows:

1. **When the case for the prosecution is concluded the court shall consider whether the prosecution has made out a prima facie case against the accused.**

2. **If the court finds that the prosecution has not made out a prima facie case against the accused, the court shall record an order of not guilty.**

3. **If the court finds that a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence on electing use of the alternatives provided for under Section 306 (2) of the Criminal Procedure Code to answer to the charge.**

A determination as to whether a prima facie case has been made out in a criminal case was considered in the celebrated case of **Bhatt Vs. Republic (Supra)** cited herein.

Mr. Nyaata counsel for the accused relying on this case submitted that there is no case to answer or put rightly that the prosecution has failed to make out a prima facie case against the accused. The accused therefore according to counsel should not be called upon on to make her defence.

A determination on whether a prima facie case has been made out was also considered on the persuasive authority in the case of **Republic Vs. Jagwani M. Patel & Others 1TLR 85** on the duty of the court in considering the prima facie evidence to establish a prima facie case. The learned judge said:

"All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of the act or whether if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case would be justified in my opinion, in an order line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction."

In all these instances in the authorities cited if the prosecution fails to establish a standard of proof in a case against the accused, the test of a prima facie is considered to have failed.

In **Mosley's and Whiteley's Law Dictionary 5th Edition** the question of a prima facie case is defined more succinctly as:

"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 cannot be overthrown by rebutting evidence adduced by the other side."

It therefore follows that under Section 306(1) (2) of the Criminal Procedure Code Cap 75 of the Laws of Kenya it is my duty to subject the prosecution evidence to maximum evaluation and ask myself the following questions?

1. **If I decide to call upon the accused to state he/her defence and he/she elects to remain silence, am I prepared to convict him/her on the totality of the evidence contained in the prosecution case?**

2. **If the answer is in the negative then no prima facie case has been made out to warrant accused to be placed on his/her defence.**

From the above holding a prima facie evidence to establish a prima facie case is that force of the evidence adduced that if unrebutted it is sufficient to induce the court to believe the existence of facts stated on the charge, and that the facts exist and did happen.

DECISION:

I have considered the elements of the charge facing the accused. The evidence as presented by the witnesses at the close of the prosecution case. The submissions by Mr. Nyaata for the accused on a motion of no case to answer has also been factored; as it is the submissions by Mr. Akula for the prosecution. It is against that background i consider the legal position of whether the case against the accused has met the threshold of a prima facie case. Going by the analysis i am of the conceded view that the prosecution has presented a prima facie evidence against the accused person.

It is therefore the duty of the court to call upon the accused to answer the charge in compliance with section 306 (2) of the Criminal Procedure Code.

The rights of the accused as outlined in Article 50 (2) of the Constitution and Section 306 (2) explained to the accused regarding alternatives available to answer the charge.

Dated, delivered in open court at Kajiado on 7th day of June, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Mokaya for Nyaata for the accused

Mr. Akula for Director of Public Prosecutions

Accused present

Mr. Mutisya Court Assistant