



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 16 OF 2015

REPUBLIC.....PROSECUTOR

Versus

GEORGE NDUNGU MWANGI.....ACCUSED

RULING

George Ndungu Mwangi hereinafter referred as the accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya.

The particulars of the charge as set out by the prosecution are that the accused on the night of 6th November 2014 at Nkoroni Location, Isiait Sub-Location in Kajiado within Kajiado County with another not before court jointly murdered **NKURUNA KASATWA** referred as the deceased. The accused denied the charge and particulars hereof.

The prosecution was led by Senior Prosecution Counsel Mr. Akula while the accused was represented by Counsel Mr. Sekento. At the hearing the prosecution called eight witnesses in support of their case.

Briefly the prosecution's case was to the effect that the accused and deceased stayed together where they jointly conducted charcoal burning business at Nkoroni Sub-Location. PW1 stated to have received information from the accused regarding deceased's condition. PW1 told this court that he took further action by informing PW3, wife to the deceased and PW4 who is a brother to the deceased. According to the testimony of PW1, PW2, PW3 and PW4 the gist of the report was that deceased has been burnt by the accused whereas as a result he suffered fatal injuries.

PW3 the wife of the deceased adduced evidence that prior to the death of her husband accused and deceased spent earlier hours at her home. The deceased and accused left together despite her objection that he should not leave the house together with the accused. She however was overruled by the deceased who walked away. It was her further testimony that deceased never returned back on that material day on 6.11.2014. It was her testimony that at about 2.00 am when PW2, PW3 and PW4 went to her house to break the bad news of the death of her husband. PW2 and PW4 told this court that they made arrangements to transport the deceased to Bissil Health Centre. On arrival at the Health Centre they were referred to Kajiado District Hospital for further examination and treatment.

The prosecution adduced evidence that a report was made to the police as confirmed by PW5 PC James Lugai. According to PW5 as at the time he booked the report the deceased was still alive and appeared that he will survive the injuries. This made him to prefer an initial charge of grievous harm against the accused who was under arrest at this particular time. PW5 further testified that he received information that deceased had succumbed to the burn injuries.

It was further PW6 testimony that on the night of 8th – 9th November 2014 while at the police station he received a report that the deceased had passed on due to the serious burn injuries occasioned against him.

The file was therefore compiled and forwarded to the Director of Public Prosecutions for action. The case was investigated by PW7 IP Joseph Kiilu whose evidence was to record statements from witnesses, preserved the exhibits and also made arrangement for the postmortem to be conducted to establish the cause of death. He presented before court a sketch plan of the scene, blanket used to cover the deceased, a jacket which the deceased was wearing in the early hours of the day, the Maasai lesa, two bottles one containing clear watery substance while the other had no contents. The two bottles were produced as exhibits in support of the prosecution case.

PW8 Dr. Edwin Walong who conducted the postmortem examination on the body of the deceased on 13.11.2014 concluded that the deceased possible cause of death was brain asyploxia due to circumferential chest bandages due to 3rd degree burns of 44%.

At the close of the prosecution's case this court was asked to make a finding of a no case to answer.

ANALYSIS:

This court at the close of the prosecution's case has considered the evidence on record weighed it alongside the charge of murder facing the accused. In a charge of murder the prosecution have a duty to prove each of the following elements beyond reasonable doubt:

- a. Death of a person.**
- b. That the death was unlawful or as a result of an omission or illegal act.**
- c. That the death was caused out of malice a forethought.**
- d. That it was the accused who was the perpetrator of the crime, hence evidence to place him at the scene.**

Proof of beyond reasonable doubt is proof of such a convincing character that a reasonable person would not hesitate to act upon it in the most important of his own affairs (**Twaning William and Stein Alex Edsi 1992 – Evidence and Proof (New York Generally Press)**).

This being a criminal trial the burden of proof is required of the prosecution to prove the guilty of the accused is beyond reasonable doubt. If at the close of the prosecution's case the presentation of evidence has not proved any of the necessary fact on the ingredients of the offence then the case may be dismissed without the accused having to put on any defence.

At this stage of the trial the standard of proof to be tested is that the amount of evidence presented by the eight witnesses has proved the case against the accused to be called upon to answer to the charge. It is not prove beyond reasonable doubt as the case is still one sided.

In evaluating the evidence this court has carefully to consider whether the prosecution evidence against the accused has established a prima facie case. In establishing a prima facie case this court has to evaluate the totality of the testimonies by the witnesses and the exhibits produced that there is prima facie evidence in favour of the prosecution. It is only then when the test of prima facie case has been met accused can be placed on his defence.

The term prima facie evidence is defined as evidence sufficient to establish a given fact and which, if not rebutted or contradicted, will remain sufficient (**See State Vs. McCoy, 395 [1980] Loisiaana Supreme Court**). It therefore follows that where a prima facie case has been made out from the evidence the burden shifts to the defendant/accused to offer evidence to offset an adversary's prima facie evidence.

In my considered opinion i bear in mind that the necessity of offering evidence by the accused in no way shifts the burden of proof, which continues to rest upon the prosecution at all times.

The test of a prima facie case has been litigated in our courts as far back in 1957 as illustrated in the case of **BHATT Vs. REPUBLIC [1957] EA 332** the court held interalia:

“The question whether there is a case to answer cannot depend only on whether there is some evidence irrespective of its credibility or weigh, sufficient to put the accused on his defence.

A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidenceat 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.”

The standard of proof in criminal trials in our jurisdiction is precise.

The tribunal/court of fact must be satisfied that the ingredients of the offence have been proved beyond reasonable doubt. If at the close of the prosecution a submission is made there is no case to answer, the decision of this court should depend not so much on whether the court (if compelled to do so) would at this stage convict or acquit, but on whether the evidence on record is such that this court might convict.

The question therefore to be decided is not whether on the evidence by the prosecution as it stands the accused ought to be convicted, but whether on the evidence as it stands he could be lawfully be convicted.

DECISION:

In applying the above principles to the whole of the evidence adduced by the prosecution at this juncture, i am satisfied that it is credible for the court to safely accept to warrant accused to adduce evidence in rebuttal.

In the result i do invoke the provisions of Section 306 (2) of the Criminal Procedure Code Cap 75 of the Laws of Kenya to call the accused to enter his defence on the charge of murder against him. The right and options available for the accused to present his case explained including the right to remain silent as under Article 50 (2) (i) of the Constitution.

It is so ordered.

Dated, delivered in open court at Kajiado on 6th day of June, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Sekento for accused person

Mr. Akula for the Director of Public Prosecutions

Accused present

Mr. Mutisya Court Assistant present