REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 15 OF 2015

REPUBLIC……..…….…….....PROSECUTOR

Versus

IBRAHIM OMULO OWENGA..…….……ACCUSED

RULING

The accused person one **IBRAHIM OMULO OWENGA** hereinafter referred as the accused was charged with the offence or murder contrary to Section 203 as read with Section 204 of the Penal Code.

The brief facts as per the prosecution were that the accused person was living with **GRACE WANJIKU MUKULIMA** herein referred as deceased as husband and wife at Loitokitok District: The accused on 13.6.2013 at unknown time at Olosoit Sub-Location, in Loitokitok District had a domestic quarrel with the deceased. As a result of the quarrel, the same escalated and accused armed himself with a panga which he used to inflict fatal injuries on the person of the deceased.

The accused who was represented at the trial by Counsel Mr. Nyaata denied the charge.

The trial commenced and the prosecution adduced evidence in support of the charge by calling a total of thirteen (13) witnesses. The prosecution was represented by Mr. Alex Akula Senior Prosecution Counsel.

Defence Counsel's Submission:

At the close of the prosecution case Mr. Nyaata submitted a no case to answer motion pursuant to Section 306(1) of Criminal Procedure Code that the prosecution evidence has not proved the ingredients of the offence to require accused to answer the charge. Mr. Nyaata counsel for the accused submitted that the prosecution has a duty to prove all the ingredients of the offence of murder as alleged in the information against the accused. The defence counsel outlined the key ingredients crucial for the offence of murder as:

(a) Proof of the fact of the death of the deceased;

(b) Proof of the fact that the deceased met his death as a result of an unlawful act or omission on the part of the accused.

(c) Proof that the said unlawful act or omission was committed with malice aforethought.

The defence counsel gave an overview of the prosecution evidence of which he conceded that the deceased died on the alleged date. However he further submitted that the prosecution evidence failed to

establish that the deceased met her death due to the unlawful act or omission on the part of the accused.

Counsel further submitted that from the testimony of the thirteen (13) witnesses there was no direct or other independent evidence to support the fact that accused inflicted fatal injuries on the deceased. Counsel further contended that the case for the prosecution was entirely on circumstantial evidence which did not meet the fit of threshold of circumstantial evidence.

Pertaining to the issue on circumstantial evidence counsel relied on the case of **ABANGA ALIAS ONYANGO V REPUBLIC [1990] (UR)**. Counsel invited the court to apply the three tests on circumstantial evidence to the evidence against the accused. According to his submissions the prosecution case will fall short of the three tests. The three tests to be satisfied as stated in **Abanga** case **(Supra)** are:

(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 guilt 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.

The defence counsel relying on the above principles was of the view that such evidence as adduced by the prosecution witnesses was deficient of circumstantial evidence test. He contested the evidence by the prosecution that any chain of events can be established to link the accused in harking the plan to kill the deceased. Counsel invited the court to find that no malice aforethought has been shown on the part of the accused. Counsel for the accused went on to submit that the case by the prosecution fails to disclose a prima facie case as envisaged in the holding of the court in the case of **R.T. BHATT VS. REPUBLIC [1957] EA 332 – 335**.

Mr. Nyaata counsel for the accused therefore concluded by relying on the case of **REPUBLIC VS. DERRICK WASWA KULOBA [2005] eKLR** that the evidence is insufficient to convict the accused with the offence. That according to counsel the burden of the prosecution to establish its case beyond reasonable doubt failed.

Submissions by the Prosecution:

On the part of the state Mr. Akula submitted that the court evaluates the evidence by the thirteen (13) witnesses by the prosecution.

According to Mr. Akula the death of the deceased was due to the fatal injuries inflicted by the accused. Counsel further submitted to the court to find that the incident started as a domestic quarrel. The accused last armed himself with a panga. The deceased sustained injuries while in her house at Loitokitok District. The police officer PW12 visited the scene of the crime and confirmed the death of the deceased. There is evidence that the deceased body was taken to Loitokitok District Mortuary.

It was Mr. Akula submission that PW5 Dr. Mutiso conducted a postmortem on the body of the deceased. He adduced evidence that the deceased died out of multiple injuries inflicted. He opinioned the cause of death as cervical spine fracture, secondary to multiple traumatic cut and blunt injuries. It was contended by Mr. Akula that the totality of PW1 – PW13 is that prosecution put forthwith prima facie evidence against the accused do discharge the burden of proof to call upon the accused to defend himself. Mr. Akula submitted that the court should scrutinize the totality of the evidence presented and there would be no doubt the case against the accused is watertight on both direct and circumstantial evidence. He

supported his arguments in referring to Section 107 of the Evidence Act which provisions according to counsel are in tendent with the facts and evidence of each one of them. He further cited the cases of **LIBAMBULA V REPUBLIC [2003] KLR 683** and **CHARLES O. MAITANYI V REPUBLIC [1986] KLR 198**. The two cases deal with motive and relevance to commit an act, while the second one lays the principle of how to treat evidence of a single indentifying witness.

It was therefore submissions and arguments by Counsel Mr. Akula that the prosecution evidence proves the ingredients of murder. He further submitted that there is ample evidence accused was the perpetrator of the crime.

Analysis and Resolution:

It is with the above submissions and arguments that i need to determine the one issue at this stage of the trial;

> **Whether the prosecution has provided sufficient evidence to pass the test of a prima facie case against the accused to require him to answer the charge?**

It is now settled that at this stage of the trial, the court is not concerned within the charge against the accused has been proved beyond reasonable doubt. **GLANVILLE L. WILLIAMS** in his book on **CRIMINAL LAW [1953]** at pg **695** outlined as follows:

> **"That at this stage the duty of the judge is to decide whether there is any reasonable evidence for the jury on which it can reasonably find the fact is proved but not beyond reasonable doubt."**

In the celebrated case of **BHATT V REPUBLIC [1957] EA 332 – 335** it was held interalia:

> **"That the question whether there is a case to answer can't depend only on whether there is done evidence irrespective of it's credibility on weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough nor can any amount of worthless evidence."**

At page 335:

> **"At a prima facie case must mean, one when a reasonable tribunal properly directing it's mind on the law and the evidence could convict if no explanation is offered by the defence."**

It is the law in our jurisdiction that an accused person is not convicted on the weakness of his defence but on the strength of the case as proved by the prosecution. See **(SARIEL EPUKA S/O ACHIETU v REPUBLIC [1973] EACA 162**.

> **(1) The court shall after hearing arguments from the defence, if necessary record a finding of not guilty;**
>
> **(2)If the court finds when the evidence of the witnesses for the prosecution has been concluded, the court if it considers that the accused committed the offence shall inform of his right to address the court, either personally or his advocate……."**

Section 306 of the Criminal Procedure Code governs a determination as to whether a prima facie case has been made out against the accused or not. It is this procedure at the High Court which defence counsel do adopt at the close of the case for the prosecution to submit that accused has no case to answer. What in

essence the defence submits on is that the prosecution has failed to make out a prima facie case on the evidence against the accused.

It is trite law that when an accused person pleads not guilty the prosecution is enjoined by way of evidence to prove each ingredient of the offence beyond reasonable doubt. An accused person does not bear any burden to prove his innocence. The rights of an accused are insulated under Article 50 (a) 2 (a) which provides that an accused is to be presumed innocent until the contrary is proved.

The stage for establishing a prima facie case and the weight of evidence can be deduced from the provisions of Section 306 (1) (2) of the Criminal Procedure Code. Under Section 306(1) the Code explains what the prosecution is required to prove at the close of its case as follows:

> **(1) When the evidence of the witnesses for the prosecution has been concluded the court shall consider that there is no evidence that the accused or any one of several accused committed the offence. That is when the duty of the court takes effect to consider the evidence already adduced to decide whether or not there is sufficient evidence for the accused to put in his defence.**
>
> **(2) When the court considers the evidence by the prosecution it is to answer the question of a prima facie case.**

In **Mosley** and **Whiteley's Law Dictionary 5th Edition** it phrase prima facie case as:

> **"A litigant 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, is out which established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other party."**

It therefore follows under Section 306(1) (2) of the Criminal Procedure Code when i undertake the scrutiny of the evidence at the close of the prosecution case what answer do i get from the following questions:

> **(1) If i decide to call upon the accused to address the court to enter his defence and he elects to remain silence, am i prepared on the evidence to convict?**
>
> **(2) If the answer is in the negative then a prima facie case has not been made out under Section 306(1) and the accused would be entitled to a discharge or acquittal?**

Secondly if the force of the evidence adduced by the prosecution at the close of their case is such that if unrebutted it is sufficient to persuade this court to believe on the existence of facts proved, then a prima facie case has been made out under Section 306 (2) of the Criminal Procedure Code.

DECISION

I have considered the charge, evidence presented by the prosecution at the close of their case, submissions by the defence counsel on a no case to answer and the prosecution counter-submissions on the matter. The applicable principles of the law governing determination of a prima facie case in the case of **R.T. BHATT V REPUBLIC [1957] EA 332 – 335** have been applied to the facts of this case.

On evaluation of the evidence adduced by the thirteen (13) witnesses at the close of the prosecution case for purposes of the provisions of Section 306 (2), i am of the considered view that there is sufficient evidence against the accused to call for an answer to the charge. As a result the accused is placed on his

defence as provided for under Section 306 (2) of the Criminal Procedure Code.

Dated, delivered in open court at Kajiado on 4th day of July, 2016.

……..

R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for State (Director of Public Prosecutions)

Mr. Myaata for accused - present

Mutisya Court Assistant

Accused present