REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 45 OF 2015

REPUBLIC.....PROSECUTOR

Versus

DAVID GITONGA ITHARII.....ACCUSED

RULING

David Gitonga Itharii alias Hassan Ahmed referred as the accused was indicted 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. It is the case for the prosecution in the charge sheet that on the 14th day of November 2015 at Ongata – Rongai Township, within Kajiado County, accused murdered Fredrick Muriithi Muriuki.

The accused denied the offence.Mr. Itaya advocate represented the accused at the trial. The prosecution was led by Mr. Akula Senior Prosecution Counsel.

The trial commenced and the prosecution called a total of ten (10) witnesses in support of their case against the accused. In a charge under Section 203 as read together with section 204 the prosecution has the burden of proof to establish that the accused with malice aforethought on his part caused the death of the deceased, secondly the accused acts of commission or omission caused the death of the deceased and finally the victim of the murder must be confirmed as having passed on as a consequence of the accused actions or fault.

The prosecution at the trial relied primarily on the evidence of PW3 and PW4. The testimony of PW3 was to the effect that on the 14/11/2015 while in company of the accused and the deceased in their house preparing a day's meal a quarrel ensued between accused and deceased. In the course of events PW5 left shortly to go and seek assistance by calling PW6 to come and intervene between the accused and deceased. PW5 on returning back found the two still quarrelling and efforts to calm them down did not bear much fruits. In the ensuing events the accused got hold of a knife which was in the house pursuing the deceased and stabbed him on his chest. The impact of the injuries according to PW5 caused the deceased to fall down and started bleeding from the nose and chest. As at the time PW6 arrived at the scene he told this court that the deceased was already on the ground and bleeding from the injured chest and the nose. The report of the incident was made to Ongata – Rongai Police Station, who swung into action.

PW1, PW7 and **PW10** police officers testified that on receipt of the murder report they visited the scene confirming that the deceased was lying dead in a pool of blood with stab wounds on the chest. It was further their testimony that the body of the deceased was taken to City Mortuary where arrangements were made for a postmortem to be carried out. The postmortem in respect of the deceased was produced as exhibit 4 by consent of both counsels without calling the maker under Section 77 (1) of the Evidence Act Cap 80 of the Laws of Kenya.

According to the findings by the pathologist Dr. Njeru, the cause of death was chest injuries due to penetrating sharp trauma. The murder weapon being a knife had been recovered by PW1, PW7 and PW10 when they visited the scene on the 14/11/2015. The weapon was forwarded to the government chemist for analysis.

PW9 the government chemist who profiled the blood stained knife for DNA analysis testified and produced a report as exhibit 2 on the proceedings. She further stated that the analysis confirmed compatibility of the stains of blood in the knife with that of the deceased.

PW10 the investigating officer compiled the file by recording statements of witnesses, evaluation of the exhibit and evidence gathered at the scene. In his opinion and recommendations the accused was indicted with the offence of murder.

At the close of the prosecution case Mr. Itaya the defence counsel submitted herein under that the prosecution has not proved malice aforethought on the part of the accused. Secondly from the evidence counsel contended that it is the deceased who started the fight and there is no evidence of intention that accused intended to harm the deceased. Thirdly the prosecution has not shown that the accused came to be in possession of the knife alleged to have been used in the commission of the crime. The evidence of the government analyst was of poor quality in view that no DNA profile of the accused was conducted. Consequently he urged this court to enter a verdict of not guilty and acquit the accused.

Mr. Akula Senior Prosecution Counsel for the respondent submitted that the evidence before the court establishes the standard of proof that is sufficient enough against the accused to require him to make a defence to the charge. The learned prosecution counsel submitted that the evidence before court shows that the accused acted intentionally and unlawfully by stabbing the deceased on the chest occasioning fatal injuries. That by accused's actions an inference must be drawn that accused knew well in advance that his actions and conduct would either cause the death of and/or grieviously harm the deceased.

The learned prosecution counsel further contended that there is no doubt that from the testimony of PW5 and PW6 the accused was placed at the scene of the crime as a perpetrator. According to the learned prosecution counsel the injuries suffered by the deceased are consistent with the findings by the pathologist a Dr. Njeru who conducted the postmortem and his report admitted in evidence by consent. In his submissions, the learned prosecution counsel invited the court to find from the extract of the postmortem report Dr. Njeru opined that the cause of death was chest injuries due to penetrating sharp trauma. The learned prosecution counsel argued that the case for the prosecution has met the threshold of a prima facie case to call upon the accused to answer.

In support of the submissions for finding of a prima facie case against the accused, learned prosecution counsel relied on the following authorities; ***David Lentiyo v Republic [2006] eKLR*** for the proposition that in a case of self-defence if an accused finds he is in eminent danger from the opponent, he must retreat from the danger but, if he finds that he cannot retreat further, then he can use force to defend himself. Secondly the case of ***Republic v Jared Otieno Osumba [2015] eKLR*** for the proposition on the nature of injuries vis viz the degree of force and mensrea. In this case, the court held interalia:

> **"That where the injuries are inconsistent with self defence as portend excessive force morphing into malice aforethought……..."**

Learned counsel during drawing inference from the postmortem contended that the multiple injuries suffered by the deceased from the action of the accused connote malice aforethought.

The Law:

The import of no case to answer submission is provided for under section 306 (1) of the Criminal Procedure Code Cap 75 of the Laws of Kenya. It is clear from the provisions of the section that a judge is under a duty to discharge an accused person if he finds that a prima facie case from the evidence presented by the prosecution has not been established. The code however does not define this notorious

phrase of a prima facie case to be decided at the close of every criminal trial by the prosecutor.

The term in my research has been defined in various authorities. In the case of ***Shir Singh v Jiterndranathsen [1931] 1LR Calcutta 275*** the court stated as follows:

> **"What is meant by a prima facie case? It only means that there is ground for proceeding. But a prima facie case is not the same as proof which comes later when the court has to find whether the accused is guilty or not guilty and the evidence disclosed a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused.**
>
> **A decision to discharge an accused person on the ground that a prima facie case has not been made against him must be a decision which upon a calm view of the whole evidence offered by the prosecution a rational understanding will suggest; the conscientious hesitation of a mind that is not influenced by a party, preoccupied by prejudice or subdued by fear."**

In ***Mozley v Whiteley's Law Dictionary 5th Edition*** it states:

> **"A litigating party is said to have a prima facie case when the evidence in his facour 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 can be overthrown only by rebutting evidence adduced by the other side."**

In evaluating a submission of no prima facie case to answer made under section 306 (1) (2) of the CPC. The provision postulates two scenarios:

When the case for prosecution is concluded the court is called upon to consider whether from the evidence the prosecution has made out a prima facie case against the accused. If the court finds that the prosecution has not made out a prima facie case against the accused, the court is under a legal duty to make a finding of not guilty and order for an acquittal of the accused.

Secondly, if the court finds that at the close of the prosecution case there is evidence that the accused person, or persons committed the offence charged, the court shall inform him or them of the charge and his/or their rights to answer the charge or state their defence.

The determination as to whether the prosecution has established a prima facie case was considered in the celebrated case of ***R.T, Bhatt v Republic [1957] EA 332.*** The court stated as follows:

> **"Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out at the close of the prosecution, the case is merely one 'which on full consideration might possibly be thought sufficient to sustain a conviction'. This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. That the question whether there is a case to answer depends only on whether 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 discreated evidence."**

In exercising discretion and applying the principles in the case of ***R.T. Bhatt v Republic (Supra)***, the test to be applied revolves around the following questions; whether at the close of the prosecution case there is evidence on which a reasonable man might convict if not secondly whether there is reasonably possibility that if the defence avails no evidence, the standard of proof required in criminal case would have been established.

If the evaluation of the evidence by the court answers any of the questions in the affirmative then the court exercise of discretion should be towards placing the accused on his defence to consider the charge.

What therefore section 306 (1) of the CPC serves is to enable the court at the close of the prosecution case where it appears on scrutiny of the evidence that any of the ingredients has not been proved that the accused committed the offence then a plea of not guilty should be entered and an order of acquittal allowed.

At this stage of a prima facie case decision, it should be borne in mind that the objective is not to seek the defence evidence to supplement the gaps in the prosecution case. It is also not the time for this court to weigh the evidence and deal on the credibility of the prosecution witnesses. What then is the evidence available against the accused at the close of the prosecution's case. The accused person was charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. The accused person is alleged to have murdered the deceased. The prosecution therefore has to adduce evidence that the deceased died as a consequence of the unlawful omission or commission on the part of the accused, that in killing the deceased, the accused did so with malice aforethought.

I have weighed the submissions by Mr. Itaya for the defence and also Mr. Akula Senior Prosecution Counsel for the respondent. The evidence by the eleven (11) prosecution witnesses has been appraised visa viz the main facts of the case. This court do find that the evidence of PW5 and PW6 is consistent with the elements of the offence the prosecution set to proof against the accused. The two witnesses were at the scene of the crime where the deceased was fatally wounded. The deceased was taken to City Mortuary where a postmortem was conducted. The medical evidence establishes that the deceased died as a result of sharp penetrating injury to the chest.

In a motion of no case to answer under section 306 (1) of Criminal Procedure Code, the same may be upheld where there has been no evidence to prove an essential element in the alleged offence. This does not seem to be the case as advcanced by Mr. Itaya for the accused.

On consideration of the matter at this stage, I am persuaded that the prosecution has presented prima facie evidence to establish the essential ingredients of the offence of murder.

This consideration is whether the evidence is such that a reasonable tribunal might necessarily convict based on the evidence already on record if no defence is tendered in rebuttal.

DECISION

On my part, weighing one factor after another and on the legal principles stipulated in the case of ***R.T. Bhatt v Republic (Supra)*** I am satisfied that the prosecution has made out a case sufficiently to require the accused to answer to the charge.

Accordingly the accused is placed on his defence pursuant to section 306 (2) of the Criminal Procedure Code.

Dated, delivered in open court at Kajiado on 3rd day of November, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Akula for Director of Public Prosecutions

Mr. Itaya for accused

Accused present

Mr. Mateli Court Assistant