REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 7 OF 2015

REPUBLIC……...…….…….....PROSECUTOR

Versus

CLIFFORD OTIENO ODUNY…….……ACCUSED

RULING

CLIFFORD OTIENO ODUNY 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 Laws of Kenya. The brief particulars of the charge it is alleged that the accused on 2nd day of May 2014 at Orata area in Kitengela Township within Kajiado County murdered DUNCAN ONYANGO OWOCHA hereinafter referred as the deceased. The accused pleaded not guilty to the charge and particulars hereof. It was therefore the duty of the prosecution to tender evidence to establish the ingredients of the charge against the accused.

At the trial the accused was represented by Mr. Itaya advocate and the prosecution was led by Mr. Akula a Senior Prosecution Counsel.

The prosecution availed a total of six (6) witnesses in support of their case namely: PW3 Petro alias John Omondi Ongala and PW4 Peter Otieno Owocha testified that prior to this incident; they were working at the deceased's garage within Kitengela Township. It was further their testimony that on 2/5/2014 they reported on duty at the said workshop. They attended to customers and were paid Ksh.2,500 for repair of a certain motor vehicle. The deceased on the material day was not at the work station with PW3 and PW4. PW3 further stated that in the evening the deceased inquired from them whether they attended to any customer and amount paid for work done.

On receipt of information the deceased directed that the money be shared with him but the accused declined alleging that he was not part of the people who worked that day. This failure by the accused to share the money earned caused a dispute with the deceased culminating into a quarrel and physical confrontation.

PW3 confirmed that in the evening of the 2/5/2014 the accused returned from the house of the deceased agitated and angry. He went to the kitchen and armed himself with a knife. In a little while according to PW3 the deceased entered their house and demanded of the accused to share the money from the day's work. This demand did by the deceased PW3 states that it did not go well with the accused who used the knife to stab the deceased on the stomach and chest.

PW1 Serphina Omondi wife to the deceased also testified that on the material day in the presence of PW4 she witnessed the accused and deceased argue over Ksh.500 , which monies was supposed to be shared between them. This issue made the accused leave their house in a hurry to where he stayed with

PW3. This conduct by the accused (PW1) told this court irritated the deceased who decided to follow up the accused. As the house of the accused and that of the deceased were not far away. In a little moment, PW1 received sad news from PW3 that deceased has been stabbed by the accused using a kitchen knife. In the testimony of PW1, PW3 and PW4 they made arrangements to take the deceased to the hospital but unfortunately succumbed to the injuries.

PW5 Dr. Ndegwa conducted a postmortem on the 14th May 2014 and arrived at a conclusion that the deceased died as a result of penetrating stab wound to the abdomen, chest and pelvic area.

PW6 PC Leah Wanjiru conducted investigations of the murder and recommended for the accused to be indicted with the offence before court of killing the deceased.

At the close of the prosecution case both learned counsels filed written submissions on a no case to answer motion under section 306 (1) of Criminal Procedure Code.

Mr. Itaya Counsel for the defence submissions:

According to Mr. Itaya for the accused the prosecution evidence had not established that the accused was the one who committed the offence. Learned counsel based his arguments on the evidence of the witnesses who on consideration did not identify the accused as the one who committed the offence. Learned counsel also contended that the prosecution failed to prove malice aforethought or that accused actions to kill the deceased was intentional.

In absence of cogent evidence on the part of the prosecution, learned counsel submitted that there is no evidence to warrant putting the accused on his defence.

Mr. Akula counsel for the respondent submissions:

Mr. Akula Senior Prosecution Counsel submitted that the burden of proof case upon the guilt of the accused has been established through the testimony of six (6) witnesses. It was his contention relying on section 107 of the Evidence Act which provides that:

> **"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist."**

According to Mr. Akula it is always the burden and duty of the prosecution to prove its case against the accused except in instances where accused makes admissions to the charge. Mr. Akula submitted that what the prosecution set to prove against the accused are the following ingredients:

> **(1) That the deceased died.**
>
> **(2) That the death was a result of the unlawful commission or omission by the accused.**
>
> **(3) That in causing the death the accused had malice afterthought.**

While evaluation the evidence Mr. Akula contended that all the three ingredients are alive in this case and they point positively to the accused as the perpetrator of the crime. Mr. Akula placed reliance on the following authorities to support the proposition that a prima facie case has been made out against the accused person; ***Daniel Lentityo v Republic [2006] eKLR, Republic v Jared Osumba [2015] eKLR, Charles O. Maitanyi v Republic [1986] KLR 198***. Mr. Akula submitted and urged the court to be guided by the principles in these authorities and the evidence to call upon the accused to answer to the charge.

The Law and Case Commentaries:

In a motion of no case to answer, I find the holding in the persuasive authority of ***Sanfix Chaittal v The State [1985] 39 WLR at 925*** elucidating the position:

"A submission that there is no case to answer may properly be made and upheld:

(1) When there has been no evidence adduced by the prosecution to prove an essential element in the alleged offence.

(2) When the evidence adduced by the prosecution has been so discredited that no reasonable tribunal could safely convict on it"

In applying these principles it is trite that the standard of proof in cases of this nature facing the accused is that of beyond reasonable doubt. Lord Denning had this to say in the case of ***Miller v Minister of Pensions [1947] 2ALL ER 372 – 373:***

"That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."

Section 306 (1) (2) of the Criminal Procedure Code explains the procedure the court has to follow at the close of the prosecution case.

"(1) When the case for the prosecution has been concluded, the court if it considers that there is no evidence that the accused or any of the accused committed the offence after hearing arguments by the advocate for the prosecution and defence may desire to submit, record a finding of no guilty.

(2) It when the evidence of the witnesses has been concluded the court if it considers that there is evidence that the accused person or persons committed the offence shall inform each such accused person of his right to address the court either personally or by his advocate, by giving sworn or unsworn evidence and or call witnesses."

In his defence although there is no mention of the phrase prima facie case under the provisions of section 306 (1) (2) of the Criminal Procedure Code, the same is implied by the procedure the trial court must adopt after the conclusion of the case for the prosecution. Under section 306 (1):

"If there court finds that the prosecution has not made out a prima facie case against the accused, the court shall record a finding of not guilty and order for an acquittal."

In the second category under section 306 (2):

"If the court finds that a prima facie case has been made out against the accused on the offence charged the court shall proceed to inform the accused of his rights to answer the charge and call upon him to enter his defence including calling witnesses if any in support of his case."

The question which this court must consider? What is then a prima facie case? This phrase was defined in ***Mozley and Whiteleys Law Dictionary 5th Edition*** as follows:

"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 can be overthrown only by rebutting evidence by the other side."

In a persuasive authority decision of the Court of Appeal in ***Looi Kow Chai v Public Prosecution [2003] 2 MLJ 65*** **Justice Gopai SRI Ram** considering the provisions of section 180 of Malaysian Criminal

Procedure with the same provisions with section 306 (1) (2) of our code had this to say on the meaning of the phrase prima facie case:

> **"It therefore follows that there is only one exercise that a judge sitting alone under section 180 of the CPC read section 306 of the Kenyan CPC with similar provisions with section 180 of the Malaysian CPC *emphasis mine* has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question if I decide to call upon the accused to enter his defence and elects to remain silence, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is on the negative then no prima facie case has been made out and the accused would be entitled to an acquittal."**

From the same jurisdiction the Federal Court in the case of ***Balachandaria v Public Prosecution [2005] 2 MLJ 301*** the court stated as follows on the phrase prima facie case under section 180 of the CPC:

> **"The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen on the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to made a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of section 180 (2) (3) which *has similar provisions with our section 306 (1) (2) of the CPC emphasis mine.* Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Such the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal. It follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silence he must be convicted."**

In our own jurisdiction, the East African Court of Appeal way back in 1957 pronounced itself in the celebrated case of ***R.T. Bhatt v Republic [1957] EA 322, 334 & 335*** on prima facie case:

> **"But at 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."**

In the present case having heard and considered the evidence by the prosecution and the submissions by both counsels under the provisions of Section 306 of CPC, I take the following conceded view:

The evidence of PW5 and PW6 testified as to the events on 2/5/2014 when the deceased met his death, the piece of evidence by PW1 confirmed as to motive of the dispute between the accused and the deceased. The postmortem report was produced by Dr. Ndegwa who opined the cause of death was sharp injuries to the abdomen and chest. The evidence of PW1, PW2, PW3, PW4, PW5 and PW6 taken together establish the facts that support the ingredients of the charge under section 203 as read with section 204 of the Penal Code.

I have evaluated the evidence by the prosecution and the indictment of murder facing the accused under section 203 of the Penal Code. Learned prosecution counsel for the respondent made detailed submissions to show that the prosecution evidence was tested under cross-examination by the defence and the same was not impeached as to its reliability.

DECISION

In line with the submissions by both counsels, the principles in the persuasive authority in the Malaysia Case of ***Looi Kow Chai v Public Prosecutor (Supra***) and closer home the proposition by the Eastern Africa Court of Appeal in the case of ***R. T. Bhatt v Republic (Supra)*** and section 306 (1) (2) of the Criminal Procedure Code and their application to the facts and evidence of this case, do amply paint a picture of a prima facie case in respect of the charge against the accused person.

In this regard, I am satisfied that the prosecution evidence meets the criteria set for a prima case to warrant the accused to be called upon to state his defence under 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

Mr. Mateli Court Assistant

Accused - present