REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 44 OF 2015

REPUBLIC……...…….....……..PROSECUTOR

VERSUS

JOSHUA KOIKAI SITAYA…….....…….ACCUSED

RULING

JOSHUA KOIKAI SITAYA hereinafter referred to as the accused was charged with the offence of murder contrary to section 203 and section 204 of the Penal Code.

Brief facts: it is alleged in the particulars of the charge that the accused on the night of 31st October 2015 at Birika village in Olooloitikosh Location within Kajiado North Sub-County within Kajiado County murdered ORAIS SAPUNYU MUNEI, hereinafter referred as the deceased. The background of the murder as deduced from the prosecution case being that at the material day the accused came back home at about 23.00 hrs and found the deceased in his house talking with his wife. The accused and deceased had a quarrel regarding his presence in the house (accused's) given the fact that deceased had been earlier warned not to enter the house. In that exchange of words, the accused armed himself with a metal bar and wooden stick which he used to attack the deceased on his head inflicting fatal injuries.

The accused denied the offence. The case was set down for hearing where he was represented by Mr. Mokaya advocate and the prosecution led by Mr. Alex Akula – Senior Prosecution Counsel.

The prosecution called a total of eleven (11) witnesses. At the close of the prosecution case the defence counsel elected to file a motion of no case to answer pursuant to section 306 (1) of the Criminal Procedure Code Cap 75 by filing written submissions. The Senior Prosecution Counsel Mr. Akula filed a response of his written submissions to the no case to answer motion by the defence.

SUBMISSIONS BY THE DEFENCE

Mr. Mokaya learned counsel for the accused submitted that on appraising the evidence of the eleven (11) witnesses, the charge of murder under section 203 of the Penal Code has not been proved by the prosecution. Mr. Mokaya further submitted that the prosecution is required to proof the death of a person as well as the cause of his death. Secondly, the prosecution has the burden to proof that the death of the deceased resulted from an unlawful act or omission on the part of the accused person. Thirdly, proof that such unlawful act or omission was committed with malice aforethought. It was further his submissions that the evidence when tested whether it has fulfilled the requirements of section 50, 58 and 66 of the Evidence Act Cap 80, the same fall short of these evidence provisions.

Mr. Mokaya highlighted the testimony of PW1 who was the star witness for the prosecution. The bone of contention by the defence was that PW1's testimony was full of inconsistencies and contractions reading

it insufficient to establish a prima facie case against the accused. Counsel further submitted that the inconsistencies revolved around what was the cause of death and murder weapon used to inflict injuries upon the deceased. Learned counsel further contended that the incident is alleged to have occurred at night but at the same time admits that there was no security light at the scene to assist in positively identifying the events on what transpired.

Additionally in counsel's submissions, credibility of PW1 is an issue regarding the explanation on the evening of 31/10/2015 concerning which English team was playing as the deceased is said to have come home after watching a match. Learned counsel further submitted that besides the contradictions and inconsistencies noted with PW1's testimony, the other witnesses PW2, PW3, PW5 and PW9 cast doubt as to how the deceased met his death. Learned counsel pointed out in PW2's testimony he alleged that the deceased was found in his house oozing blood from the nose but evidence from the scenes of crime officer made no findings on signs of blood.

According to learned counsel, the other witness PW10 Dr. Ndegwa the pathologist testified that deceased had blood stains on the left hand contrary to other prosecution's witnesses who were at the scene of the murder. Learned counsel further submitted as to the testimony of PW5 on the murder weapons while adducing evidence on oath which was inconsistent with the recorded statement made at the police station. Learned counsel further referred to the testimony of PW9 the investigating officer. He poked holes to the testimony on grounds that the neighbours within the scene were not asked to record statements. It was PW9's testimony that the deceased was hit using a wooden stick while the other prosecution witness aver that the accused used a metal bar to inflict injuries on the deceased. That according to the learned counsel is a contradiction which affects the reliability and credibility of the prosecution witnesses.

Learned counsel submitted that based on the evidence, the prosecution has failed to discharge the duty to prove all the ingredients of the offence of murder against the accused. Learned counsel placed reliance on the principles in the case of ***R.T. Bhatt v Republic [1957] EA 332 – 335*** and the persuasive authority in English Law in the case of ***May v O'Sullian [1955] 92 CLR 654***.

The legal proposition in those two authorities being that for a litigating party to be said to have established a prima facie case:

> **"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 learned counsel urged this court to apply these legal principles and to evaluate the evidence to draw a conclusion that no prima facie case has been made out by the prosecution which can warrant the accused to be called upon to answer. In the foregoing a verdict of not guilty should be entered and the accused be acquitted.

THE RESPONDENT'S COUNSEL SUBMISSIONS

Mr. Akula the Senior Prosecution Counsel submitted and reiterated the evidence of the eleven (11) witnesses presented to court to prove the facts of the case as provided for under section 107 of the Evidence Act. Learned prosecution counsel make reference to the elements of the offence under Section 204 of the Penal Code submitted that the prosecution discharged the burden of proof to warrant accused person to be placed on his defence.

Learned counsel for the respondent submitted that under section 203 of the Penal Code the prosecution has the burden of proof to prove; death of the deceased, unlawful commission or omission by the accused and that there was malice aforethought on the part of the accused. Learned prosecution counsel referred to the evidence of PW1 which pointed to the identity of the accused as the person who inflicted the fatal injuries upon the deceased. That evidence according to the learned counsel submissions places the accused person at the scene and perpetrator of the offence.

Learned counsel for the respondent further submitted that besides PW1's testimony the other

prosecution's witnesses adduced circumstantial evidence which corroborates PW1's testimony on commission of the alleged offence.

In reference to the principles in the authorities of ***Libambula v Republic [2003] KLR 683 and Charles O. Maitanyi v Republic [1986] KLR 198***. Learned counsel urged this court to find that a prima facie case has been established against the accused to be placed on his defence.

The issue which can be deduced from the rival submissions by the defence counsel together with the reply from the prosecution counsel; is whether the prosecution at the close of their case under section 306 (1) of the Criminal Procedure Code has provided sufficient evidence against the accused to warrant him to be called upon to answer the charge as provided for under section 306 (2) of CPC.

What the law envisages under section 306 (1) of the Criminal Procedure Code is not proof of the case by the prosecution beyond reasonable doubt. The legal position under section 306 (1) of the Criminal Procedure Code provides as follows:

> **"If at the close of the case for the prosecution at the trial the court is of the opinion that there is no evidence that the accused committed any of the offences in the charge which he may be convicted it may record and return a finding of not guilty."**

This section of the law sets the stage where the trial court has to exercise discretion on sound legal principles coupled with the evidence and facts to make a finding on a prima facie case. The finding therefore is evidence based.

In both civil and criminal justice proceedings the phrase prima facie case has been litigated a lot but no such definition can be found either in the Civil Procedure Act or Criminal Procedure Code. What has provided invaluable assistance to the meaning of prima facie case is plethora of case law and legal texts. In the celebrated case of ***R.T. Bhatt v Republic [1957] EA 332, 334, 335*** the East African Court of Appeal had this to say on what constitutes prima facie case:

> **"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 if, 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. Nor can we agree that the question whether there is a case to answer depends only on whether, there is some evidence, irrespective of its credibility or weight, sufficient to put accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It is may not be easy to define what is meant by a prima facie case "but atleast 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."**

From the principles in the Bhatt Case **prima facie case should not be confused with the standard of proof of beyond reasonable doubt for the simple reason that the trial court has yet to hear the defence. The concern of the court at the close of the prosecution case is to establish whether there is reasonable sufficient prima facie evidence for which the court directing his mind to the law can make a finding on the charge and prove facts.**

Under section 306 (1) (2) of the Criminal Procedure Code the law envisages in both cases the court to draw conclusions at the close of the prosecution case whether there exist a prima facie evidence to meet the threshold of a prima facie case against an accused person. The return of a finding of guilty or not guilty is therefore to be based on prima facie evidence.

In our Criminal Procedure Code I could not find the meaning of the phrase prima facie evidence save in a South African Case; in the case ***of Exparte the Minister of Justice, Republic v Jacobson [1931] AD 466-***

468 and Levy. See also ***Sir Boesak [2000] (3) SA 361 Statford JA*** defined prima facie evidence as follows:

> **"Prima facie evidence in its usual sense, is used to mean prima facie proof of an issue; the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus. It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue. It depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue. If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence calls for an answer, then in such case, he has produced prima facie proof, and in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof; if a doubtful or unsatisfactory answer is given it is equivalent to no answer and the prima facie proof being undestroyed again amounts to full proof."**

It follows therefore that at the conclusion of the prosecution case if the court finds sufficient evidence to support the charge against the accused a prima facie case is said to have been established. The procedure to receive and admit evidence at the trial is provided for under the Evidence Act Cap 80 of the Laws of Kenya. It has safeguards and rules of admissibility and the burden of proof to be discharged by a party as outlined under Section 107, 108 and 109 of the Act.

The courts are in search of the truth to resolve the dispute between two warring parties or in criminal cases the state and an accused person. This means that in a criminal case the guilty must be convicted and the innocent set free.

Burden of the courts in administering justice through these legal instruments was well stated by ***Hallo and Khan (The South African Legal System and Background)*** who stated thus:

> **"Truth is an elusive goddess, and judges, like other mortals are not omniscient. An accused person or a party to a civil law suit may fail to avail himself of the opportunity of stating his case or may state it badly. There may have been no witnesses to an occurrence or it may not be possible to find them, or if witnesses do give evidence, they may be lying or mistaken."**

It is generally under this terrain the prosecution has to navigate and present evidence to prove a fact or not to prove the existence or inexistence of a disputed fact by way of evidence. The determination whether a prima facie case has been made out by the prosecution is dependent upon existence of a prima facie evidence adduced at the trial. This is how the application of section 306 of the Criminal Procedure Code comes into effect to determine whether a prima facie case has been made to return a verdict of not guilty or call upon the accused to answer the charge(s).

I find the criteria to determine whether a prima facie case has been made as provided for under Section 306 (1) (2) of the Criminal Procedure Code clearly elucidated in the Malaysia case by ***Girdon Smith Ag JA in the case of Public Prosecutor v Chin Yoke [1940] 9th J 47*** when applying the provisions of section 180 of the Malaysia Criminal Procedure Code which has similar provisions with our section 306 (1) (2) of the Criminal Procedure Code.

In that case the court stated as follows:

"One is quite familiar with the course often adopted by counsel for the defence at the close of the case for the prosecution (in a trial with a jury), when he submits that he has no case to answer, or in other words, that the prosecution has failed to make out a 'prima facie case' against the accused, and it is submitted that accused should not be called on for his defence. It is then that it is the duty of the magistrate or judge to consider the evidence already and decide whether or not to call on the accused for his defence, and the question arises what is a prima facie case."

The court went on to adopt the definition ***Mozley and Whiteley's Law Dictionary 5th Edition*** which

states:

> **"A litigating party is said to have a prima facie case when the evidence in his favour is sufficient 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."**

The court in reference to section 180 further observed thus:

> **"This follows very closely the actual wording of the sections referred to but it does not follow, in any opinion, that the magistrate or judge must necessary accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it, and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In such case the accused is then called upon to answer the prima facie case which has thus been made out against him. If however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no prima facie case has been made out and the accused should not be called on for his defence."**

In the present case before I have considered the entire evidence by the prosecution witnesses and the further materials including documentary evidence together with exhibits in support of the indictment against the accused. The submissions by Mr. Mokaya counsel for the accused person regarding the issue of inconsistencies and contradictions which he urged this court to scrutinize and find that they did weaken a prima facie case against the accused person.

There is no dispute that the prosecution bears the burden of proof against the accused. The principles on a prima facie case have been extensively discussed in the ***East African Case of R. T. Bhatt (Supra***) led the way in 1957. The legal position is crystal clear that prima facie evidence is that which will prove a fact or delegation if not no other evidence is produced to the contrary to rebut it.

The learned prosecution counsel has contended that the evidence from the eleven (11) witnesses is sufficient to render a reasonable conclusion in favour of establishing the elements of the offence of murder. That having met the threshold as far as their duty to adduce such evidence on the indictment he was of the view that the accused should be called upon to answer the charge.

It is trite as deduced from the dicta in the case of ***R.T. Bhatt v Republic (Supra)*** that a prima facie case could not be established by a mere santilla of evidence or by an amount of worthless discredited prosecution evidence. It is also trite that at this stage of the proceedings on a motion of no case to answer under section 306 of the Criminal Procedure Code the standard of proof of evidence to establish a prima facie case does not mean a case proved beyond reasonable doubt; for at this stage the accused is yet to state his defence or call witnesses in reply to the charge.

DECISION

On careful evaluation of the evidence and applying the legal principles from the authorities cited, I am satisfied that there exist sufficient evidence adduced against the accused to establish a prima facie case pursuant to the provisions of section 306 (2) of the Criminal Procedure Code.

I therefore call upon the accused to answer the charge by exercising his rights provided for under the said section 306 (2) of the Criminal Procedure Code including that of calling witnesses in support of his defence and or the right not to tender any evidence at all.

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

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R. NYAKUNDI

JUDGE

Representation:

Mr. Mokaya advocate for the accused – present

Mr. Akula for the DPP – present

Mr. Mateli Court Assistant