



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO 16 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

IBRAHIM ADAN IBRAHIM.....ACCUSED

RULING

After the conclusion of the case for the prosecution in a criminal trial, the court examines all the evidence presented before it and makes a finding as to whether there is a requirement for an accused person to give evidence in his defence. To make this finding courts comply with the provisions of section 306. Subsection (1) of that section states that:

When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

Subsection (2) of the same section relates to situations where the court makes a finding that there is evidence requiring the accused to give evidence in his defence.

For the court to arrive at either conclusion contemplated by the two subsections of Section 306, the court must examine the evidence on record. This is the stage at which this court is.

Ibrahim Adan Ibrahim, the accused, faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. He is alleged to have murdered Shaban Issack Mohamed, the deceased, on 14th September 2011 at Bulla Afya Village in Mandera Central District of the Mandera County. He is represented by Mr. Kullow while the State is represented by Mr. Mulama.

Five (5) witnesses have testified for the prosecution. I now wish to turn to their evidence. Dr. Frederick Kinama, PW1, conducted the post mortem on the body of the deceased on 15th September 2011, a day after he was shot dead. This was at Mandera District Hospital, which this court was told is situated at Elwak. His findings were that the deceased died of gunshot wounds to the head on the left side at the level of the ear causing excessive bleeding.

Administration Police Corporal Abdiaziz, PW2, received the accused from an Assistant Chief whose name is not given. This was on 24th September 2011 at about 6.00am. PW2 was informed by the said Assistant Chief that the accused had been involved in murder.

Police Constable Robert Nyamweno, PW3, and Chief Inspector of Police Absolom Wamalwa, PW4, both

of Elwak Police Station visited the scene of murder on 14th September 2011 after received the report. At the scene they found the body of the deceased lying in a pool of blood. Both witnesses testified that they observed military boot marks from the scene towards the Somalia border. Court was told that the border was about 6-7 kilometres from the scene. They also collected 8 spent cartridges of 7.62 calibre ammunition. The body was removed to the Mandera District Hospital where PW1 performed the postmortem. The 8 cartridges were forwarded to the Government analyst for examination.

SP Lawrence Nthiwa, PW5, examined the cartridges and confirmed that they were of 7.62 by 39mm calibre. He subjected them to comparative microscopic examination and confirmed that all had been fired from the same gun which could have been either an AK 47 Rifle or a Smonov.

The question which begs for an answer is whether this evidence establishes a case requiring the accused person to be put on his defence. In R. v. Jagjiwan M. Patel and Others (1) T.L.R. (R) 85 the court stated that:

‘. . .all the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make his defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a border line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence, is yet of the opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction.’

Prima facie case is defined in the case of Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, where the court stated, *inter alia*, that:

‘It is may not be easy to define what is meant by a ‘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.’

The evidence presented before this court does not place the accused at the scene of the crime. In fact no witness has testified to his being involved, either directly or circumstantially. This court is aware, as submitted by defence counsel, that other than police officers, the firearm examiner and the doctor, there is no evidence from civilian witnesses. The court is alive to the challenges faced by the prosecutor in tracing witnesses. PW2 talks of an Assistant Chief who handed the accused over to him but his person did not testify. This was on 24th September 2011 nine (9) days after the shooting. This was at Shambir, about 55 kilometres from Elwak.

The available evidence shows that the deceased died from gunshot wound; that the spent cartridges were collected from the scene of murder and a suspect was handed to the police nine days after the fatal shooting at 55 kilometres from the scene. All this evidence is disjointed. The spent cartridges were confirmed to have been firearms as per the Firearms Act and their being found at the scene where the deceased was found and the cause of death having been confirmed to be gunshot wounds, this court can draw an inference that they were used to shoot the deceased or at least one of them caused the fatal wounds. There is no evidence that there were more than one gunshot wound. Evidence shows that there were boot marks towards the Somalia border. The deceased was dressed in jungle green trouser which in the view of this court is associated with military/security personnel attire. There is no evidence from any relative of the deceased and this court is not even aware of the citizenship of the deceased.

Taking into account of all the surrounding circumstances, especially the proximity of the scene to the border with Somalia, the jungle green trouser of the deceased, the military boot marks going towards Somalia, this court cannot help but speculate whether the accused was from the military or security personnel and whether he was Kenyan or Somalia; whether those who killed him were from Kenya or Somalia and whether they too were from the military or security agency. Further, how the accused is connected to all this. These will remain speculations. There is no evidence to establish any of this. This

court takes judicial notice of the fact that the death of the deceased occurred at the time of heightened military activity between Kenya and Somalia following the crossing of the Kenya Defence Forces to that country. PW3 told the court in cross examination that he was aware that once in a while the Somalia TFG soldiers wandered into Kenyan territory. This is not strange since PW3 told the court that the scene of murder was 6-7 kilometres from the Kenya/Somalia border. In other words, the deceased could have been killed by anyone. Without evidence to connect the accused with his murder, this court is left with one option; that of finding that there is no case made out against the accused as to require this court to call upon him to give a defence. This court finds that he has no case to answer and in the words of Section 306 (1) this court records a finding that the 'accused is not guilty'. It follows therefore that this court enters an order for acquittal. The accused, Ibrahim Adan Ibrahim, shall be released from custody forthwith and with immediate effect unless he is held for any other lawful cause. I make orders accordingly.

S.N. MUTUKU

JUDGE

Dated, signed and delivered this 1st of October 2013.

Counsels

Mr. Allan Mulama instructed by DPP

Mr. Kullow instructed by Kullow & Co. Advocates