



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 20 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ERICK MAINA KAMWIGU.....ACCUSED

RULING

A. Introduction

1. The accused herein is charged with murder, contrary to **Section 203** as read with **Section 204 of the Penal Code**.
2. The particulars of the offence are that on the 27/10/2013 at Kaithege Village, Kyeni North Location Runyenjes of Embu District, the accused murdered **John Kathauthi Nyaga**.
3. The accused pleaded not guilty to the charge. The prosecution called seven witnesses. Coming up for ruling is whether the accused has a case to answer.

B. Prosecution Case

4. PW1 testified that on the material day at around 8pm, she was returning from the market in the company of one Mathew Mugendi and the deceased, her father in law. She further stated that when they reached the accused compound, they spotted the accused and his wife in the kitchen and greeted them loudly and they responded. PW1 stated that they then proceeded with their journey however, the accused followed them flashing a torch.
5. PW1 testified that the accused ordered them to stop, which they did, after which the accused's wife screamed for help saying they were cow thieves. The accused stated "wacha nichukue panga" and entered his house. PW1 sensed danger and escaped cutting across the accused land to her home where she reported what had happened to her husband.
6. The following day PW1 received information that the deceased had been cut to death and was lying in the accused's shamba. PW1 testified that she had known the accused since 1993 when she married into the deceased's family and the accused was a young man and as such could identify his voice. Further, it was her testimony that she saw the accused at close range on the material day. In cross-examination, PW1 admitted that she did not witness the deceased's death as she had run away.
7. PW2 did not witness the incident. He received news on the 29/10/2013 that his father had been killed and his body found in the accused's tea plantation, where he went and saw the deceased's body with deep cuts on his head, hands and legs. PW2 further testified that the deceased's clothes were soaked with blood and further there was a lot of blood outside the accused's house covered with soil.

8. PW2 further testified that the police at the scene ordered demolition of the latrine at the accused's home and that a blood stained stick was recovered by a neighbour to the accused.

9. PW3 testified that the deceased, PW1 and another visited his bar on the material day at around 7.30pm. He did not witness the deceased's death but was told about it the next day.

10. PW4 performed the post-mortem on the deceased and testified that he found the cause of death to have been head injury a result of trauma. He produced his report in court. PW5 testified that he examined and found the accused mentally fit to stand trial.

11. PW6, a government analyst testified that he received some materials from the police in Runyenjes, being soil samples, two pieces of sticks as well blood samples of the deceased. It was his conclusion that the DNA profile generated from the stick matched the deceased's DNA blood sample.

12. PW7, the Investigating officer testified that the accused reported the incidence of the night of 27th & 28th October 2013 and that after carrying out investigations he later charged the accused with the death of the deceased. It was his testimony that he collected various materials from the scene of crime and forwarded them to the Government Analyst for tests.

C. Analysis of Law

13. I proceed to look at the applicable law and cases on a prima facie case. I will then evaluate the prosecution evidence with the legal principles to make a finding on a prima facie case as submitted by Counsel for the accused.

14. The Criminal Procedure Code section 306 (1) provides as follows:

“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 recording a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence.....”

15. The code does not mention the phrase prima facie nor is it defined anywhere under section 2 on interpretation of words and phrases used through the Criminal Procedure Code (Cap 75) of the Laws of Kenya. I therefore find no satisfactory definition either in this Code or the Evidence Act Cap 80 in Kenya. The answer however is found in the general principles, legal texts and case law commentaries.

16. The Kenyan courts have heavily relied on the legal principles in the celebrated case of R.T. *Bhatt v Republic [1957] EA 332 – 334 & 335* to define what constitutes a prima facie case. The court of Appeal of Eastern Africa stated thus:

“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 case, the case is merely one which on fully 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 the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence.”

17. The legal principles to guide a trial court in making a determination on a prima facie case have clearly been stipulated in both the persuasive authorities and in the Eastern African case of *R.T. Bhatt v Republic (Supra)*. The legal principles, which run through the cases, cited revolves around sufficiency of evidence capable of establishing the ingredients of the offence the accused are charged with. Secondly, a mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence. Thirdly, it is evidence adduced by the prosecution such that a reasonable tribunal properly directing its mind would convict the accused in absence of any explanation when called upon to answer or put on his defence. (See *R.T. Bhatt v Republic (Supra)*,

Daboh & Another v State (Supra), PP v Mohammed Abu Bakar (Supra).

18. At this stage, the court is not bound to give reasons for its decision where it is found that the accused has a case to answer. I wish to state that from the prosecution's evidence as a whole, I am satisfied that the test of a prima facie case has been met by the prosecution to warrant the accused person to be called upon to answer.

19. It is my finding that the accused has a case to answer. He is hereby called upon to make his defence.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Momany for accused

Ms. Nandwa for the State



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