**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**CRIMINAL CASE NO. 33 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MESHACK KIMONDIU MUSYOKA.....ACCUSED**

**RULING**

1. The accused, **Meshack Kimondiu Musyoka,** is charged with murder contrary to section 203 as read with section 204 of the ***Penal Code*** (Cap 63) Laws of Kenya. The particulars being that on 24th May, 2016 at Mathingau Trading Centre, Mathingau Sub-location, Kinyaata Location, Yatta sub-county within Machakos County jointly with others murdered **Sammy Maundu**. The accused person pleaded not guilty and the case proceeded to full trial with the prosecution calling twelve (12) witnesses.

2. The only evidence in this matter that connects the accused to the murder of the deceased herein was that of PW1, **Lydia Munyiva Mysyoka**, the deceased's wife. According to her on the night of 23rd May, 2016 while they were asleep with the deceased they heard knocks on the door and heard the deceased being called. Upon opening the door, the accused grabbed the deceased's hand and upon being asked by the deceased what was happening the accused told the deceased that he would know later. The group then took the deceased away and locked her inside the house from the outside. Through the window, she was able to see the group pushing the deceased with the accused holding him. That was the last time she saw the deceased alive. The charred remains of the body of the deceased were later recovered at the market centre.

3. In the mater before me, the Court is being called upon to make a finding as to whether the accused has a case to answer or not.

4. Section 306(1) of the ***Criminal Procedure Code*** provides as hereunder:

> **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.**

5. In this case it was submitted on behalf of the accused that apart from the evidence of PW1, whose evidence was only to the effect that she saw the accused leading the deceased away, there was no evidence connecting the accused to the death of the deceased. No other witness saw the accused with the deceased and none of them saw the accused at the scene. Accordingly, there was no evidence that it was the accused who killed the deceased since the items recovered at the scene were never subjected to forensic examination.

6. In this ruling the court is being called upon to decide whether or not the prosecution has made out a *prima facie* case against the accused that would warrant this court to call upon the accused to give his defence. In other words, does the accused have a case to answer? In **Republic vs. Abdi Ibrahim Owl [2013] eKLR** a *prima facie* case was defined as follows: -

> **"Prima facie" is a Latin word defined by Black's Law Dictionary, 8th Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "Prima facie case" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption". To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, 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 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 the 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 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."**

7. The question that this court has to deal with and answer at this stage is therefore whether based on the evidence before this Court, the Court after properly directing its mind to the law and the evidence can convict if the accused chose to give no evidence. It was therefore held in **Ronald Nyaga Kiura vs. Republic [2018] eKLR** wherein paragraph 22 it is stated as follows:

**"It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of RAMANLAL BHAT -VS- REPUBLIC [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence."**

8. In my view, where clearly the prosecution's case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival. It was therefore held by the Court of Appeal decision in the case of **Anthony Njue Njeru vs. Republic Crim. App. No. 77 of 2006, [2006] eKLR** that:

**"Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt's case…, we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused."**

9. I therefore agree with the position adopted by the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 – **Public Prosecution vs. Zainal Abidin B. Maidin & Another** that:

**"It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See *Magendran a/l Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805*. Further, in**

**Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 Sharma J had occasion to observe:**

**'It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.'"**

10. The court in **Republic vs. Prazad [1979] 2A CRIM R 45, King CJ** held the very same standard on a prima facie case in the following terms:

**"I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it."**

11. While I appreciate that there is no direct evidence linking the accused to the killing of the deceased or the commission of the offence and all the prosecution is relying on is circumstantial evidence there is the evidence of PW1 that the accused was amongst the people who collected the deceased from their house and that it was the last time she saw the deceased alive.

12. I have considered the material on record as well as the submissions made on behalf of the accused in this ruling. The issue for determination at this stage is whether or not the prosecution has made out a *prima facie* case against the accused that would warrant this court to call upon him to give his defence. In other words, does the accused have a case to answer?

13. That there is a danger in making definitive findings at this stage, especially where the Court finds that there is a case to answer is not farfetched and the reasons for not doing so are obvious. As was appreciated by **Trevelyan and Chesoni, JJ** in **Festo Wandera Mukando vs. The Republic [1980] KLR 103**:

> **"…we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of "no case" is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned."**

14. I am alive to the fact that there is no direct evidence linking the accused to the death of the deceased or the commission of the offence and all the prosecution is relying on is circumstantial evidence without any evidence of a single eye witness.

15. It is therefore clear that the prosecution's evidence is based on the evidence that it was the accused who was last seen with the deceased. Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of **Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006**. That court, while considering the *'last seen alive with'* doctrine held:

> **"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."**

16. In yet another Nigerian case the court considering the same doctrine, in the case of **Stephen Haruna vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009** opined thus:

> "**The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."**

17. Whereas upon consideration of the totality of the evidence at the end of the trial, the court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a *prima facie* case has not been made out. As has been said time and again a *prima facie* case does not necessarily mean a case which must succeed. In other words, despite finding that a *prima facie* case has been made out, the Court is not necessarily bound to convict the accused if the accused decides to maintain his silence. At the conclusion the Court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a *prima facie* case for the purpose of a case to answer.

18. The English Court in **May vs. O'Sullivan [1955] 92 CLR 654** therefore held that:

> **"When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law."**

19. The test in such matters was therefore laid down in **Republic vs. Galbraith [1981] WLR 1039** in the following words:

> **"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.**
>
> **(2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of interment weakness or vagueness or because it is inconsistent with other evidence:**
>
> > **(a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.**
> >
> > **(b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."**

20. Accordingly, I will refrain from delving further in this matter. Having considered the material placed before me I find that the accused has a case to answer based on the doctrine of "last seen with". As to whether the said evidence meet the threshold for convicting an accused based on that state of evidence is a matter that will have to be considered at the end of the trial.

21. I accordingly place the accused on his defence.

22. It is so ordered.

**RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24TH DAY**

**OF JANUARY, 2022**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Langalanga for Mr Kamollo for the accused**

**Mr Ngetich for the State**

**CA Susan**