



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MIGORI**  
**CRIMINAL CASE NO. 2 OF 2020**  
**GRACE AUMA DIMA.....ACCUSED**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**RULING**

**GRACE AUMA DIMA**, the accused in this case, faces a charge of Murder contrary to section 203 as read with section 204 of the Penal code.

The particulars of the charge are that on 22/4/2020 at Wuoth Ogik area in Migori County, murdered **Odhiambo Ouma Jasper**.

She denied the offence and the case proceeded to full trial with the prosecution calling a total of six (6) witnesses and closed its case. The issue at hand is whether the prosecution has established a prima facie against the accused to warrant her being called upon to defend herself.

The prosecution evidence was as follows :-

**PW1 Felix Okinyi Wambogo** is the person who identified the body of the deceased to the Doctor, PW2 Dr. Awinda Victor on 24/11/2020 before PW2 performed the post mortem. PW1 knew the child, being a cousin to accused's husband.

PW2 upon carrying out the post mortem on the deceased who was aged about one (1) year and 2 months, formed the opinion that he died of Asphyxiation ie lack of air in the lungs and the cause of death was Cardiorespiratory Arrest caused by wet drowning. He produced the post mortem report (PEXhibit 1).

**Givance Leris Omolo (PW3)** recalled that on 22/11/2020 about 5:00pm, while at his home in Dip, he got information that the body of a child had been seen floating in the river. With the help of his son, he managed to retrieve the body of the dead child. Police were called and he handed over the body to them. He later found the accused seated in the police vehicle and it was alleged that she was the mother of the dead male child. He did not know how the child came to be in the river.

**PW4 Bruce Omondi and PW5 David Onyango Obad** recalled the 22/11/2020 about 3:30pm when they heard screams from sand harvesters stating that somebody was drowning on their side of the river.

They rushed to the river, jumped in and rescued the woman. After applying first Aid and she came to, the accused told them that she had a child called Jasper and that she had slipped and fallen into the river.

Later, they learned that a dead child had been found in the river. They proceeded where the child had been found and the accused identified the body as that of her child.

**PW6 Sergeant Geoffrey Nabulindo** was the investigating officer. He received information on 22/11/2020 that a lady had tried to commit suicide in Migori river and that she was with her child. He went to the scene, found the accused had been rescued. PW3 also informed them that he had recovered the body of a child, took the police where the body of the deceased was recovered.

After recording statements, PW6 decided to prefer this charge against the accused. The investigations also revealed that accused had quarreled with her husband before this incident.

After the close of the prosecution case, Mr. Awino, the accused's counsel filed written submissions dated 10/11/2021 in which he urged this

court to acquit the accused because there is totally no evidence to support the charge. He relied on the decision of **Republic vs= Abdi Ibrahim Owl (2013) e KLR** which in turn relied on the decision of **Ramanlal Trambaklal Bhatt vs= Republic (1957) E.A 332**, where the court discussed what prima facie case means.

**Mr. Kimanthi**, the prosecution counsel on his part urged the court to place the accused on her defence arguing that the deceased was of tender age and must have been taken to the river by the accused and that the accused also tried to take her own life in the same river.

The accused faces a charge of murder under Section 203 of the Penal Code. To prove a charge of murder, the prosecution has to prove beyond any doubt that :-

1. **The death occurred;**
2. **That the death was caused by an unlawful act or omission of the accused person;**
3. **That the accused person who caused the death had malice aforethought.**

The issue is whether a prima facie case has been established against the accused so that if accused is placed on her defence and she says nothing, the court may be able to convict based on the evidence before the court.

**Black's Law Dictionary** defines '*prima facie*' a Latin word as follows'

**“the establishment of a legally required rebuttable presumption “**

In the **Bhatt case (supra)** the court stated at page 234-355 as follows;-

**“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie 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 could 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 argue 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 may not be easy to define what is meant by 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.**” (Emphasis added)

In **Ronald Nyaga Kiura vs= Republic (2018) eKLR** paragraph 22 the court stated ;-

**“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 Bhatt 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.”**

I have to analyse the evidence adduced before this court to determine whether it meets the threshold set out in the above cases.

There is no doubt that the deceased and the accused were retrieved from Migori river which was then swollen because of the rains. PW1 confirmed that the deceased died of wet drowning. Nobody witnessed how the deceased got to be in the river.

PW4 and PW5 rescued the accused from drowning in Migori river and later she explained to them that she had a baby, Jasper whose body was later retrieved from the same river. Nobody witnessed the accused trying to drown the deceased or that she intentionally threw herself in the river. According to PW 4 and 5 who rescued the accused from the river, she told them that she slipped and fell into the swollen river. It was confirmed that this was during rainy season and the river was swollen. Apart from PW6 telling the court what the accused's husband told him, that is what had happened between them, there is totally no evidence on how the accused got to be in the river and how the child drowned. If she is placed on her defence, and she opts to remain silent, this court would have no option but acquit her.

For the above reasons, I find that the prosecution has not established a prima facie case against the accused for her to be called upon to defend herself.

She is hereby acquitted of the charge of murder, under Section 306 (1) of the Criminal Procedure Code.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2022**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

Mr. Kimathi for the Respondent.

Mr. Awino for Accused

Appellant present.

**Nyauke** Court Assistant