



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**HIGH COURT CRIMINAL CASE NO. 18 OF 2017**

**REPUBLIC.....RESPONDENT**

**-VERSUS-**

**JOHN MUINDI KAMAU (*alias Rasta*).....1<sup>ST</sup> ACCUSED**

**TITUS KAMAU MUINDI.....2<sup>ND</sup> ACCUSED**

**R U L I N G**

1. **John Muindi Kamau** (*Alias Rasta*) and **Titus Kamau Muindi** the 1<sup>st</sup> and 2<sup>nd</sup> accused persons respectively are jointly charged with the offence of murder contrary to **Section of 203 as read with Section 204 of the Penal Code**. The particulars as per the information provided are that on the **14<sup>th</sup> October 2017** at Tungutu village within Kitui County the two accused persons murdered **Joseph Kilomba Wambua**.

2. The two denied committing the offence and the prosecution has called 6 witnesses to prove their case. The prosecution's case against the accused persons was purely circumstantial and pointed at the 1<sup>st</sup> and 2<sup>nd</sup> accused persons as the persons who caught the deceased stealing khat in the farm of 1<sup>st</sup> accused. The body of the deceased was later found dumped at Kalundu Dam and partly burnt with hands tied together with a wire. The doctor's (PW5) evidence indicates that the deceased body was tied at the back with a rope which had been burnt. The doctor found the body with burns which he assessed at 80% or 3<sup>rd</sup> degree burns and concluded that the cause of death was due to lack of oxygen to the brain because of inhaling hot air.

3. The evidence of Inspector Musyoka Kailu (PW6) shows that report of the missing of deceased person was made almost at same time and that the report of the 1<sup>st</sup> accused that his khat had been stolen was also reported. The police officer testified that the 1<sup>st</sup> accused reported that he found someone stealing his khat at his farm. The investigating officer in his statement (P Ex 2) connected the death of the deceased with the accused persons because having found the deceased stealing khat belonging to 1<sup>st</sup> accused they took the law into their hands instead of reporting it to the police.

4. This court is now being called upon to determine whether based on the evidence tendered there is sufficient basis to place the accused persons to their defence.

5. The prosecution submits that they have established a **prima facie** case to place the accused on their defence but the defence submits that the prosecution has failed to do so.

6. The accused submit that the prosecution has failed to establish a prima facie case against them. They rely on **Republic v Benson Ochieng Oyungi (2016) eKLR** in that respect.

7. They have also placed reliance on the case of **Republic vs Silas Magongo Onzere alias Fredrick Namema (2017) eKLR** submitting that the prosecution's case has not met the threshold of a case to answer.

They submit that the witnesses called by the prosecution have not provided evidence that directly points to the accused persons as the perpetrators. They submit that the prosecution's case is merely based on suspicion.

They relied on the case of **Rodgers Kalama Pola v Republic (2019) eKLR** where the High Court ordered for a re-trial after it found that the prosecution faltered in its case after it failed to call back a witness for cross-examination.

8. The accused submit that the prosecution has failed to establish a **prima facie** case against them. They have cited the case of **Republic vs Benson Ochieng Oyungi (2016) eKLR** where the court made observations on amounts to a prima facie case. In the case, the court referred to the case of **Bhatt vs Republic** where the

court was asked to examine whether the evidence presented by the prosecution was enough to warrant a conviction if no other explanation was provided.

9. They submit that the witnesses called by the prosecution have not provided evidence that directly points to the accused persons as the perpetrators. They submit that the prosecution's case is merely based on suspicion.

10. The accused also take issue with the evidence of PW6 stating that the same should be disregarded. They have relied on the case of ***Chaol Rotil Angela vs R (2001) eKLR*** the court allowed production of a post mortem report in this matter by an investigating officer instead of the doctor who prepared it but cautioned that documents prepared by experts ought to be produced by their makers unless it is difficult to get the maker to come to court.

11. This court has considered the evidence adduced by the prosecution and the submissions made by the defence. At the close of prosecution's case, under **Section 307 of Criminal Procedure Code**, the prosecution must satisfy the trial court by way of evidence that a prima facie case has been made out to warrant the accused being called to answer to it.

12. The meaning of what constitutes a prima facie case is well settled in the landmark case of ***R.T. Bhatt v Republic [1957] EA 332 – 335*** where the Eastern Court of Appeal 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 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 may not be easy to define what is meant by a prima facie, 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.”*

13. 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.”*

14. Applying the above standard, this court is satisfied that the prosecution's case based on the evidence, without unnecessarily going into details, has established a prima facie against both accused herein. The evidence tendered suggest that they were the last people suspected to have been in contact with the deceased after finding him stealing khat. The evidence by the prosecution is circumstantial but nevertheless the same has established a prima facie case against the accused persons under **Section 306 of Criminal Procedure Code**.

They both have a case to answer. The accused persons are hereby informed of their rights in defending themselves i.e.

- a) Right to address this court directly or through advocate.
- b) Right to give sworn or unsworn statement of defence.
- c) Right to call witness if any.

DATED, SIGNED AND DELIVERED AT KITUI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE