REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL CASE NO. 23 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MUTHUKUMI KILONZO.....ACCUSED

R U L I N G

1. Muthukumi Kilonzo, the accused herein, is charged with the Offence of Murder **Contrary to Section 203** as read with **Section 204 of the Penal Code.** The particulars as per the information presented to this court are that on **3rd October, 2016** at Katooni Village, Maai Location, Mwingi East within Kitui County the accused murdered **Joseph Mutati Kilonzo.**

2. The accused person denied committing the offence and the prosecution has presented a total of seven (7) witnesses to prove their case against the accused person. After hearing the testimony of the seven witnesses, this court is now being called upon to determine if the evidence tendered by the prosecution is sufficient enough to warrant the accused person being placed in his defence in accordance with **Section 211 of the Criminal Procedure Code** or there is no case made out to require him make a defence.

3. The Accused person through learned Counsel A.M. Kilonzi & Co. Advocates has submitted the prosecution failed to call witnesses to connect him with the injuries that the deceased sustained. He contends that he should be presumed innocent as stipulated under **Article 50 (2) (a)** of the Constitution.

4. He further submits that the law places the burden of proof on the prosecution who must satisfy the threshold of prima facie case. In his view there is no prima facie case made out against him to be called to answer. He has pointed out two gaps in the prosecution's case which are: -

a. He says the evidence tendered did not place him at the scene of crime.

b. He also says that the prosecution's case did not establish the elements of **actus reus** and malice aforethought.

5. The defence submits that this court should proceed under **Section 306(1) (2)** of the **Criminal Procedure Code**.

He has cited two authorities to support his contention and the two authorities are: -

i. Ramanlal Bhat –vs- Republic (1957) EA 332 which inter alia made the following observations: -

> **"All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a 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 conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conclusion."**

ii. Republic –vs-Galbraith (1981) MLR 1039 in that case the court stated as follows: -

> **"(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."

6. In the two authorities the court illustrated the standard of proof required or the threshold required to place an accused person on his defence. It is true that at this stage of proceedings, the standard of proof is not as high like at the conclusion of trial when a court is being called upon to determine the guilt of an accused person. At this stage the threshold is on a prima facie basis and the prosecution has the burden to put such evidence that is sufficient enough to make an accused answer to it.

7. This court has carefully considered the evidence tendered by the seven witnesses called to testify and I am persuaded that the prosecution has established a prima facie case against the accused person to place him on his defence. In order to avoid prejudicing his defence this court does not wish to go into the details of what the witnesses stated during trial but is suffices to say that this court is satisfied based on the evidence tendered that the accused has a case to answer. As stipulated under **Section 211**, the accused persons are given options open to him in his defence.

Dated, Signed and **Delivered** at **Kitui** this **22nd** day of **February, 2021.**

HON. JUSTICE R. K. LIMO

JUDGE