**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCR NO. 1 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**TABITHA KANGARIA KIONDO.....1ST ACCUSED**

**SAMMY MWENDA MPUKU.....2ND ACCUSED**

**R U L I N G**

The accused person Tabitha Kangaria Kiondo and Sammy Mwenda Mpuku were charged before this court on 18/2/2019 with the offence murder contrary to **Section 203 of the Penal Code**. It is alleged that on the night of 17th and 18th day of December 2018 at Kelenge village, Kanjoro Location, Tharaka Nithi County, jointly with others not before court, the two unlawfully murdered Simon Mpuku Kathare

1. The accused person(s) pleaded not guilty and full trial was conducted. The prosecution in a bid to prove the charge against the accused called seven witnesses and closed their case.

2. This is a ruling as to whether the prosecution has made out a case against the accused person(s) which is sufficient upon which they should be called to give them. The procedure is laid down under **Section 306 of the Criminal Procedure Code** which provides:-

> **" (1) 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.**
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> **(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, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.**
>
> **(3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence."**

3. The leading authority on the subject has over the years been the case of ***Ramanlal Bhatt -v- Republic (1957) E.A 332*** where it was stated that a prima facie case is one on which a reasonable tribunal properly addressing its mind to the law and evidence could convict if no explanation is offered by the defence, This has been buttressed by the court of Appeal in ***Anthony Njue Njeru -v- Republic.***

4. The question which this court has to deal with and answer at this stage is whether based on the evidence tendered before this court and the court properly directing its mind to the law and evidence, can convict if the accused opts not to give any evidence when put on his defence. See ***Robert Nyaga Kiura -v- Republic (2018) eKLR.***

5. At this the court must be cautious not to make a definitive finding at this stage, for two reasons. Firstly such a finding would prejudice the defence of the accused and secondly it would amount to condemning the accused without giving an opportunity to be heard. It would be sufficient to conclude that the accused has a case to answer without giving reasons. In ***Festo Wandera Mukando-v- Republic (1980) KLR 103***.

It was stated:

> **"We once more draw attention to the in advisability of giving reasons for holding that an accused person has a case to answer. It can prove embarrassing to the court and, in extreme case, may require an appellate court to set aside an otherwise said Judgment. Where a submission of no case to answer is rejected, the court should say no more than that. It is otherwise where the submission is upheld when reasons should be given, for then that is the end of the case or the court or the courts concerned."**

In this case no submissions were made at the close of the prosecution. Parties relied on the evidence and urged the court to give a ruling. I have carefully considered the evidence which was tendered by the prosecution. For the court to make a finding that there is a *prima facie* case, it has to be based on the consideration of the prosecution's case which may probably lead to conviction. A *prima facie* case is defined as one which is sufficient to call an accused person to answer. There must therefore be evidence which is sufficient to establish a fact in the absence of any evidence to the contrary.

6. Having considered the evidence I am satisfied that the prosecution has established a *prima facie* case to warrant the accused person to be placed on their defence as charge. I find that the accused person(s) have a case to answer.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 24TH DAY OF JUNE, 2021**

**L.W. GITARI**

**JUDGE**