



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 6 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**THOMAS CHENGO MWAMBIRE.....ACCUSED**

**Coram: Hon. Justice R. Nyakundi**

**Ms. Sombo for DPP**

**Ms. Ruttoh for accused**

**RULING**

**Thomas Chengo**, the accused person was charged with the offence of murder contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code. The brief particulars of the charge is that on 21<sup>st</sup> June, 2016 at Kibao Cha Ngombe Village, Magarini sub-County, within Kilifi County he murdered **Getrude Sidi Garama**. On arraignment he pleaded not guilty.

In this trial he is represented by **Ms Ruttoh** while **Ms. Sombo** appears on behalf of the State. The prosecution under Section 107(1) of the evidence Act summoned 3 witnesses. At the conclusion of the evidence by the state defence counsel urged this court to make a finding on a no case to answer in relation to the charge.

It is a requirement of the law and a feature of criminal administration that at the conclusion of prosecution case, the court is under a duty to make a finding on whether a prima facie case has been established to warrant the accused to be called upon to answer in rebuttal. The operative provisions are as expressed in Section 306 (1) & (2) of the Criminal Procedure Code.

Whether there is consequential evidence that establishes a prima facie case is as well laid down in the English case of **May v O' Sullivan 1955 95 CLR 654**. The scope of a no case to answer was formulated in the following passage: -

***“When at the close of the case for the prosecution, a sentence is made that there is no case to answer, the answer to be decided by the judge is not whether on the evidence as it stands the defendant ought not to be convicted, but whether on the evidence as it stands he could be lawfully convicted. This is really a question of law. The question to be decided in the end by the tribunal that is after all the evidence is, whether on the contents of the evidence before it is subjected beyond reasonable doubt that the defendant is guilty. This is a question of fact in the trial.”***

Whereas in the case of **R. T. Bhatt v R 1957 E.A. the Eastern Court of Appeal dealing with the same question held inter alia, that in determining whether the prosecution has established a prima facie case to warrant the accused to be called upon to answer the following distinguishing feature is critical: -**

***“A prima facie case is one which a reasonable tribunal properly directing its mind to the law and the evidence would convict if no explanation is given by the defence.”***

For the application I am asked to consider, is grounded in Section 306(1) of the CPC. It provides inter alia that if at the close of the prosecution case and upon submissions by the defence or prosecution counsel, the court considers that there is no evidence that the accused committed the offence referred to the charge or any offence or in relation the evidence fails to establish any of the elements of the stated offence the court is entitled to exercise discretion to enter a verdict of not guilty and to discharge the accused person.

It is also a legitimate expectation of the law under subsection (2) that if the evidence adduced by the prosecution meets the threshold of a prima facie case, the accused would be called upon to state his defence.

In the instant case I have reviewed the evidence by the prosecution witnesses and I hold the view that there is sufficient evidence for the accused person to be placed on his defence.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF JANUARY, 2020**

.....

**R. NYAKUNDI**

**JUDGE**