



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 86 OF 2014**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**EDWIN ONYANGO alias RCCS.....ACCUSED**

**RULING**

1. The accused was charged with the offence of murder to which he pleaded not guilty. To prove its case against him, the prosecution called and examined a total of ten witnesses.

2. At the close of the prosecution case, the accused through his Advocate on record filed written submissions in which it was submitted that the burden of proof in criminal trial solely rests with the prosecution to prove its case beyond reasonable doubt as was stated by Lord Denning in the case of **MILLER V MINISTER OF PENSIONS 1947 2 ALLER 372**

*“That degree is well settled it needs not reach certainty but must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law could prevail to protect their community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed witnesses the sentence of course it is doubt but nothing short of that will suffice.”*

3. It was submitted that whereas the fact and cause of death of the deceased was established, there was dispute as to whether the said death was caused by an act of omission or commission on the part of the accused as there was evidence tendered to show that the accused was arrested at a later stage after **PW2 MICHAEL OTIENO NYAKAM** had been arrested, released and turned into a prosecution witness. It was stated that **PW1 BILLY ODHIAMBO** a brother of the deceased did not mention the accused as present among the group of friends who took **PW4 RASHID SIMONI** who was creating disturbance outside their club. It was submitted further that the prosecution did not prove malice aforethought on the part of the accused.

4. The State opted not to make submissions at that stage and adopted the evidence on record.

5. At this stage of the proceedings all that the court has to determine is whether the prosecution has established a *prima facie* case to enable the court place the accused person on his defence. *Prima facie* case has been defined in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** 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)*

6. Justice J.B. Ojwang as he then was in the case of **REPUBLIC v SAMUEL KARANJA KIRIA CR. CASE NO.13 OF 2004 NAIROBI [2009] eKLR** had this to say on *prima facie* case:-

*“The question at this stage is not whether or not the accused is guilty as charged but whether there is such cogent evidence of his connection with the circumstances in which the killing of the deceased occurred, that the concept of prima facie case dictates as*

*a matter of law that an opportunity be created by this court for the accused to state his own case regarding the killing. The governing law on this point is well settled . . .*

**The Court of Appeal Criminal Appeal No. 77 of 2006, the Court of Appeal expressed that *too detailed analysis of evidence, at no case to answer stage is undesirable if the court is going to put the accused onto his defence as too much details in the trial court's ruling could then compromise the evidentiary quality of the defence to be mounted.*" (Emphasis added).**

7. With the injunction by Justice Ojwang in mind and without saying much on the evidence tendered before me so as not to compromise the defence the accused person is likely to offer, I have looked at the evidence of **PW2 MICHAEL OTIENO NYASAM** who put the accused together with the deceased outside the bar. **PW4 RASHID SHIM SIMONI** and **PW5 2 EBBY ABDUL ZIM** both who corroborated the said evidence and **PW3 Corp. STEPHEN KOSGEI** who arrested the accused following a report and **PW8 INSPECTOR JOSEPH MULI** who visited the scene when he was told that the deceased had been stabbed by the accused and find and hold that the prosecution has established a prima facie case to enable me put the accused on his defence which I hereby do.

8. The accused is therefore advised of the rights under Section 306(2) and (3) and it is now upon him through the advice of his advocate on record to elect how he intends to defend himself being alive to his constitutional rights under Article 50(2)(g)(k) and (l) of the Constitution of Kenya 2010.

Dated, signed and delivered at Nairobi this 29<sup>th</sup> day of **January**, 2020

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of**

*Mr. Okeyo for the state*

*Ms Hamba for Ms Mageto for the accused*

*court clerk – Karwitha*

*Accused present*