REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL (MURDER) CASE NO. 11 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

JOSIAH MUTHIANI MAWEU.....ACCUSED

RULING

1. The accused herein, **Josiah Muthiani Maweu,** was charged with two counts of Murder contrary to sections 203 as read with section and 204 of the ***Penal Code***, Cap 63. It is alleged that the accused person, **Josiah Muthiani Maweu,** on the 25th day of November, 2012 at Ndela Village, Mananja Location in Masinga District within Machakos County murdered **Wanza Tuta** and **Tuta Ndinda** (the Deceased). The Accused person denied having committed this offence and as such, a plea of not guilty was entered.

2. I have considered the material on record as well as the submissions made on behalf of the accused in this ruling where the court is being called upon to decide whether or not the prosecution has made out a *prima facie* case against the accused that would warrant this court to call upon him to give their defence. In other words, does the accused have a case to answer? 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:**
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> > **"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."**

3. The question that this court has to deal with and answer at this stage is therefore whether based on the evidence before this Court, the Court after properly directing its mind to the law and the evidence may, as opposed to will, convict if the accused chose to give no evidence. It was therefore held in **Ronald Nyaga Kiura vs. Republic [2018] eKLR** wherein paragraph 22 it is stated as follows:

> **"It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of RAMANLAL BHAT -VS- REPUBLIC [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence."**

4. 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:

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5. ***Oxford Companion of Law at pg 907*** defines *"prima facie"* in the following terms:

> **"A case which is sufficient to all an answer while prima facie evidence which is sufficient to establish a fact in the absence of any evidence to the contrary is not conclusive."**

6. That there is a danger in making definitive findings at this stage, especially where the Court finds that there is a case to answer is not farfetched and the reasons for not doing so are obvious. As was appreciated by **Trevelyan and Chesoni, JJ** in **Festo Wandera Mukando vs. The Republic [1980] KLR 103**:

> **"…we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of "no case" is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned."**

7. In my view, where clearly the prosecution's case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution's case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival. It was therefore held by the Court of Appeal decision in the case of **Anthony Njue Njeru vs. Republic Crim. App. No. 77 of 2006, [2006] eKLR** that:

> **"Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt's case…, we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused."**

8. I therefore agree with the position adopted by the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 – **Public Prosecution vs. Zainal Abidin B. Maidin & Another** that:

> **"It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See *Magendran a/l Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805*. Further, in**
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> ***Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16*** **Sharma J had occasion to observe:**
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> > **'It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.'"**

9. The court in **Republic vs. Prazad [1979] 2A Crim R 45, King CJ** held the very same standard on a prima facie case in the following terms:

> **"I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it."**

10. In this case, the evidence of PW1 and PW2 was that the accused retained the services of the deceased in Count I, **Wanza Tuta**, a

traditional doctor, to go and "treat" him at his home. After discussion the said deceased, accompanied by the deceased in Count II, **Tuta Ndinda**, left with the accused after informing PW1 and PW2 that they were proceedings to Kangundo. The understanding was that the deceased persons would return the following day. However, the deceased did not return and the accused was not reachable on phone despite several attempts to contact him. Following a report made to the police, the deceased persons bodies were discovered having been strangled.

11. From the evidence on record, it is clear that no one witnessed the circumstances under which the deceased met their death. It is however clear that the prosecution's evidence is based, partly, on the allegation that it was the accused who was last seen with the deceased persons. Regarding the doctrine of "last seen with deceased" I will quote from a Nigerian Court case of **Moses Jua vs. The State (2007) LPELR-CA/IL/42/2006**. That court, while considering the *'last seen alive with'* doctrine held:

> **"Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased."**

12. In yet another Nigerian case the court considering the same doctrine, in the case of **Stephen Haruna vs. The Attorney-General of the Federation (2010) 1 iLAW/CA/A/86/C/2009** opined thus:

> "**The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased."**

13. Whereas upon consideration of the totality of the evidence at the end of the trial, the court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a *prima facie* case has not been made out. As has been said time and again a *prima facie* case does not necessarily mean a case which must succeed. In other words, despite finding that a *prima facie* case has been made out, the Court is not necessarily bound to convict the accused if the accused decides to maintain his silence. At the conclusion the Court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a *prima facie* case for the purpose of a case to answer.

14. In **May vs. O'Sullivan [1955] 92 CLR 654** it was therefore held that:

> **"When at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a really question of law."**

15. The test in such matters was therefore laid down in **Republic vs. Galbraith [1981] WLR 1039** in the following words:

> **"(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.**
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> **(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."**

16. Accordingly, I will refrain from delving further in this matter. Having considered the material placed before me I am unable to find, at this stage at least, that the accused has no case to answer. Based on the doctrine of "last seen with" I am satisfied that the prosecution has established a *prima facie* case for the purposes of a finding that the accused has a case to answer. As to whether the said evidence meet the threshold for convicting an accused based on circumstantial evidence is a matter that will have to be considered at the end of the trial.

17. I accordingly place the accused on his defence.

18. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd day of July, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Tamata for the accused

Mr Ngetich for the State

CA Geoffrey