



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAPENGURIA**

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NO. 2 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CYRUS OCHIENG OLWAL.....ACCUSED**

**RULING**

**Introduction**

1. Cyrus Ochieng Olwal is charged with *murder contrary to Section 203 as read with Section 204 of the Penal Code*. The particulars of the offence as contained in the information dated 24<sup>th</sup> May 2018 are that on the 15<sup>th</sup> December 2017 at Kapenguria Government Quarters within West Pokot County, he murdered SHADRACK KIPLIMO KIGEN.

2. The accused took plea on 28th May 2018 and denied committing the offence. Hearing commenced on 3<sup>rd</sup> July 2019. The prosecution summoned 15 witnesses most of whom were fellow police officers of the accused person, working with either the regular police or with the Administration Police where the accused worked. PW1 was number 253463 APC Fredrick Mulala Muendo, no. [xxx] APC Roland Likhanga Ambani, PW2, No. [xxxx]APC Philp Ngemu Malalo, PW3, No. [xxxx] Sgt Kipsang Sumukwo Matui, PW4, No. 2011319087 APC Arnold Mongovya Ombati, PW5, Christine Chepoon, PW6 Josephine Amoding, PW7, No. [xxxx] APC Gideon Mutai, PW8, No. [xxxx] APC Haron Kiptoo Cheruiyot, PW9, Kimaiyo Kigen Cherop, PW10, No. [xxxx] Inspector Oduor Kennedy Wanjala, PW11, No. [xxxx] CPL Mohamed Noor, PW12, Dr Jotham Mukhola, PW13 and No. [xxxx] SP Alex Mudindi Mwandawiro PW14 who is a ballistic expert. PW15 was no. [xxxx]Senior SP James Lelia. PW12 and PW13 investigated the case at different stages of the investigations.

**Submissions on No Case to Answer**

3. At the close of the prosecution case, the defence submitted that the prosecution had failed to establish a prima facie case against the accused to warrant his being placed on his defence. I however note from the submissions by the defence that they are addressing final issues in the case. Those submissions are therefore for another time and not now.

4. The prosecution on the other hand has submitted that the evidence on record meets the threshold of a prima facie case and that the accused should be placed on his defence.

**Analysis and Determination**

5. From the outset, it is to be noted that at this stage, this court is not required to give a detailed assessment of the evidence on record, and that is why I am of the considered view that the submissions by the defence on no case to answer are beyond what is expected of the defence at this stage. In *Bhatt vs Rex [1957] EA 332, 335*, the Court of Appeal for East Africa had this to say on what amounts to a prima case:-

**“A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It is true, as Wilson J, said that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It 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.”**

6. In the persuasive decision in *Republic versus Wachira [1975] EA 262*, Trevelyan and Hancox JJ stated the following:

**“[I]t has been settled for many years that the sufficiency or otherwise of the evidence at close of prosecution case, so as to require an accused to make his defence thereto, is a matter of law. A court is only entitled to acquit at that stage if there is no evidence of a material ingredient of the offence or if the prosecution has been so discredited and the evidence of their witnesses so incredible and untrustworthy that no reasonable tribunal, properly directing itself, could safely convict, ..... Apart from these two situations, a tribunal should not in general be called upon to reach a decisions of conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.”**

7. Applying the above stated principles to the evidence on record, this court is satisfied that the prosecution has established a prima facie case against the accused person requiring him to be placed on his defence. Accordingly, the accused is placed on his defence.

8. In defending himself, the accused may give sworn or unsworn evidence and call witnesses. If he chooses the former, he will be subjected to cross examination by both the court and the prosecutor. If he gives unsworn evidence no-one will ask him any questions. The accused may also choose, as a mode of defending himself, to remain silent and let the court decide the matter on the evidence that is before it.

9. The accused may now indicate to the court how he will proceed with his defence

10. Orders accordingly.

**Ruling delivered, dated and signed in open court at Kapenguria on this 5<sup>th</sup> day of August 2020**

**RUTH N. SITATI**

**JUDGE**

**In the presence of:**

M/S Kiptoo present for state

M/S Chebet present for accused

Mr. W. Juma – court assistant