



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 94 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSEPH MARANGU M'MURIITHI ALIAS KIHARA ALIAS**

**JAMES MWANGI NDIRANGU.....1ST ACCUSED**

**GERALD WAHOME MAINGI.....2ND ACCUSED**

**RULING**

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, the particulars of which were that on 13/9/2012 at 5<sup>th</sup> Parklands Avenue in parklands within Nairobi County jointly with others not before the court murdered OMIT SHAH.
2. They both pleaded not guilty before Ombija J as he then was on 19/11/2012 and during the period when this case was still pending, the 2<sup>nd</sup> accused died and therefore the case against him was withdrawn.
3. On 26<sup>th</sup> October, 2016 the trial of the accused herein commenced before me and to prove its case, the prosecution called and examined a total of seventeen (17) witnesses. At the close of the prosecution case, the accused through his Advocate on record filed written submissions which he relied upon while the prosecution through Ms Gikonyo made oral submissions.
4. It was submitted by Ms Gikonyo that the cause of death of the deceased was proved to be gunshot wound and that the ballistic report produced implicated the accused person who was picked out at an identification parade proving that he was present at the scene.
5. Mr. Wakaba on behalf of the accused submitted that none of the prosecution witnesses identified the accused at the scene and further that there was no evidence that he was in possession of a gun and that none of the exhibits collected from his house pointed out that he had a gun. It was submitted in the written submissions that the prosecution failed to call the witness who allegedly identified the accused at the identification parade and no reason was given why he was not procured so that the accused could exercise his right under Article 50(2)(k) of the constitution to cross examine him.
6. It was submitted that the motor vehicle identified at the scene and at the police station had different registration numbers and that PW11 admitted that Toyota 110 was a popular brand of motor vehicle which had been bought by many people. It was submitted further that the prosecution failed to prima facie establish a conspiracy between the accused and one **PETER KANYUIRA** to cause the death of the deceased and further that they were at the scene together. It was therefore submitted that no prima facie case was established to enable the court place the accused on his defence.
7. 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)*

8. 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).*

9. The position by Justice Ojwang finds support in the determination by Justice Odunga in **REPUBLIC v JONES MUTUA ANTHONY & 3 OTHERS [2019] eKLR** as follows: -

*“That there is a danger in making definitive finding at this stage, especially where the court finds that there is a case to answer is not farfetched and the reason for not doing so are obvious. As was appreciated by Trevelyan and Chesoni, JJ in Festo Wandera Mukando v Republic (1980)Eklr 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 the extreme case may require an appellate court to set aside an otherwise sound judgment 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 them that is the end of the case or the court or courts concerned.”*

10. With the injunction by Justices Ojwang and Odunga on the need not to make a detailed analysis on the nature of evidence tendered if the accused person is to be placed on his defence, I have looked at the prosecution case and in particular the evidence of **PW2 JOSEPH MICHAEL OTUTU, PW 9 PETER WACHIRA NDUNGU** and **PW10 CI JOSEPH MUTUA** and without saying too much thereon so as not to compromise the defence the accused is likely to offer if he so wishes find and hold that the prosecution has proven prima facie case to enable me put the accused on his defence which I hereby do.

11. The accused is therefore advised of his rights under Article 50 of the Constitution and Section 306 and 307 of the Criminal Procedure Code and is therefore through the advice of his Advocate on record called upon to decide how he wishes to defend himself.

**Dated, Signed and Delivered at Nairobi This 28<sup>th</sup> Day of October, 2020 Through Microsoft Teams.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of: -**

*Mr. Okeyo for the State*

*Mr. Wakaba for the Accused*

*Accused present*

*Court clerk Karwitha*