REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 61 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

BBOSA GIANT.....ACCUSED

RULING

1. The accused **BBOSA GIANT** a Uganda National living in Kenya was 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 the 14th day of July, 2014 at Muthurwa Estate within Nairobi County murdered **PAUL BAGANYI ABDU.**

2. He pleaded not guilty and to prove its case against him the prosecution called a total of six (6) witnesses and at the close of the prosecution case both the prosecution and the defence opted not to make submissions as required in law and left it to the court to determine whether the prosecution has established *prima facie* case to enable me put the accused on his defence.

3. 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."***
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> ***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)***

4. In the case of **REPUBLIC v JAGJIVAN M. PATEL & Others (1) TLR** as follows:-

> ***"All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt. A ruling that there is a case to answer would be justified, in my opinion, in a borderline case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction." (Emphasis added)***

5. 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).

6. In the Botswana Case of **STATE v GURA 1990 BLR 102 (HC)** it was held that a submission of no case to answer would be held only:-

"1 (a) where there is no evidence that the accused committed the offence charged in the indictment or summons; or

(b) any other offence of which he might be convicted thereon.

2. The question which the judge has to consider at the close of the prosecution case was whether the prosecution has given reasonable evidence of the matters in respect of which it has the burden of proof. It was for the judge as a matter of law to determine whether the evidence adduced has reached that standard of proof prescribed by law. The standard of proof required by law at this stage of proceedings was not proved beyond reasonable doubt which only comes after the conclusion of the whole case.

3. A submission of no case ought to be upheld if the judge was of the view that the evidence adduced would not reasonably satisfy a jury, that is to say when the prosecution has not led any evidence to prove an essential element or ingredient in the offence charged and secondly, where the evidence adduced in support of the prosecution's case had been so discredited as a result of cross-examination, or is so contradictory, or was manifestly unreliable that no reasonable tribunal or jury might safely convict upon it."

7. With these principles in mind I ask myself whether the prosecution has placed before me enough material upon which I can safely convict the accused should he opt to exercise his constitutional right under **Article 50(i)** and **(l)** that is to say the right to remain silent and refuse to give self-incriminating evidence. I have taken into account the evidence of **PW2** who placed the accused person at the scene of the offence and without saying much thereon so as not to compromise the defence the accused might wish to offer, I find and hold that a *prima facie* case has been established to enable me put the accused on his defence which I hereby do.

8. The accused is therefore advised on his rights under **Section 306** and **307** of the **Criminal Procedure Code.**

Dated, delivered and signed at Nairobi this 21st day of February, 2019.

…….

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Masara for the accused

Accused present

Court assistant: Karwitha