REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER NO. 9 OF 2014

REPUBLIC.....PROSECUTOR

V E R S U S

JAMES KARIUKI DAVIS.....APPELLANT

RULING

1. The accused person James Kariuki Davis charged with the murder of Martin Muchiri Wambui contrary to **Section 203 as read with Section 204 of the Penal Code Cap 63**. He denied the charge. The prosecution called 8 witnesses in efforts to prove the charge against him. At the close of the case for the prosecution, the parties made submissions and took a date for ruling on whether or not the accused has a case to answer.

Whether or not the accused has a case to answer

The **Criminal Procedure Code Section 306** provides as follows:

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit recording a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court on his own behalf or make unsworn statement and to call witnesses in his defence…..

2. The Court has to make a finding based on the evidence tendered by the prosecution at the close of their case. It is for the prosecution to establish a prima facie case to warrant the court to call upon the accused to respond and address the court in his defence. The threshold of prove by the prosecution is beyond any reasonable doubts. This has been stated in a line of authorities.

The standard of proof as to whether the prosecution has established a prima facie case was laid down in the celebrated case of RAMANLAL TRAMBAKLAL BHATT –v- REPUBLIC (1957) E. A. 332 as follows:-

"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not 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.

(ii) The question whether there is a case to answer cannot depend 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."

Further in the case of R –v- JAGJIVAN M. PATEL & OTHERS *1, TLR,85* the learned Judge said;

"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 border line 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 conclusion."

In **Republic v Benson Ochieng Oyungi [2016] eKLR**

The Court held;

> **A definition as to what amounts to a prima facie case was given in the case of *Bhatt –vs- R [1957] EA 332*. In that case the Court of Appeal expressed itself on this issue:**
>
> ***"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 on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near to 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 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 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."***

3. The evidence adduced by the prosecution witnesses can be summarized as follows:

4. PW 1 – Paul Nzami, the deputy head teacher. He proceeded to school and got pupils outside class 7 and was informed they were ordered out by teacher Simon Makau for making noise. He told them to kneel down and went to the office. The accused who was the Director of the school came and the pupils named the 5 culprits who were canned by the accused. The deceased was among those canned and he appeared to dodge but the stick got him below the neck. Later he was informed that the deceased had fallen down in class and accused took him to hospital but he passed away.

5. PW 2 – Simon Makau Kariuki, a teacher. He found class 7 pupils outside the class and was informed the accused had ordered them. Later, the pupils mentioned to him the culprits among them being the deceased. The accused came and canned them 3 strokes, the girls on their hands and the boys at the back. The deceased was the last one to be canned and they went back to class. He was called later on and found accused vomiting through the nose and mouth. Together with the accused, they took him to hospital but he passed away. He stated that the decease dhad complained of headaches before the incident.

6. PW 3 – Mercy Wambui Muchiri, the deceased's mother. She was informed by the accused to go to school and she sent her brother Mureithi. He was told that her son had passed away but was not the circumstances. The deceased was a boarder and had never been sick.

7. PW 4 – Wilfred Kangangi, the deceased's uncle. He attended the post mortem of the deceased.

8. PW 5 – Dr. Joseph Thuo, a psychiatrist. He examined the accused and found him fit to stand trial.

9. PW 6 – Dr. Sylvester Maingi. He conducted the post mortem and the cause of death was subdural hemorrhage due to blunt trauma to the head. He had abrasions on the head above the right ear but could not tell the cause. He also discovered contusion behind the left ear when they opened the head.

10. PW 7 – PC Michael Kanairu, the investigating officer. On 10/04/2014, he took over the file from Cpl Oroko whereby the deceased was alleged to have been rushed to hospital by the accused where he died. He proceeded to the mortuary where post mortem was conducted and he also received a stick from Cpl Oroko which was alleged to have been used to cane the deceased. he requested for all exhibits and bonded the witnesses though they could not get one by the name Lewis Ndegwa who did not come back to the school for the 2nd term.

11. PW 8 – Cpl Oroko, at the time he worked at Kangaru DCIO. On 02/04/2014, he was instructed to take over the matter which had been reported by the accused. The accused reported that on the incident date while at home he heard noise from class 7 and the class pointed out 7 pupils who were making noise. He canned them and went back to class but was called later that the deceased had fainted. He took him to hospital but he died while undergoing treatment. The accused showed him the stick he used and they proceeded to the mortuary. He then placed the accused in the cell and later handed the file over to PC Kimaru.

12. From the evidence placed before court and considering the test of a prima facie case in terms expressed in ***Bhatt –vs- R*** case has been met by the prosecution to warrant the accused person to be called upon to defend himself.

13. My view is that at this stage all the court is supposed to do is make a finding based on the evidence as to whether the accused has a case to answer. The court need not give reasons for the finding as that would prejudice the defence of the accused at a stage where it is not making a final determination. Though I have considered the lengthy submissions made at the close of the prosecution case, having found that the evidence tendered has established a prima facie case, it would be pre mature to make a finding on them. I will a finding on the submission at later stage.

In Conclusion:-

14. Having considered the evidence tendered, I make a finding that the accused has a case to answer on the charge of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. He will proceed as provided under Section 306(2) of the Criminal Procedure Code.

Dated at Kerugoya this 21st day of February 2019.

L. W. GITARI

JUDGE