



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL CASE NO. 80 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ANDREW MUSAINA KIHUGWA.....ACCUSED**

**RULING**

[1] This is a case in which the Prosecution called a total of 7 witnesses to prove the Charge of Murder that was laid herein against the Accused Person on **16 November 2011**. The Accused was arraigned before the Court on a Charge of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It was alleged in the particulars thereof that, on the **12<sup>th</sup> day of November 2011** at Kaptogongeni Sub-location in Nandi County within Rift Valley Province, he murdered **Sydney Khaisha**; allegations which he denied.

[2] At the close of the Prosecution Case, it a requirement of the law that the Court be satisfied that a *prima facie* case has been established by the Prosecution before the accused person can be placed on his defence to answer the Charge against him. Hence, in **Ramanlal Trambaklal Bhatt -Vs- Republic [1957] EA 332** it was held thus:

**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 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.”**

[3] According to **Section 203** of the **Penal Code**, **Chapter 63** of the **Laws of Kenya**, any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder. Thus, the ingredients that the Prosecution needed to show, albeit on a *prima facie* basis are: the fact of death; that the death was caused by the Accused by an unlawful act; and malice aforethought on the part of the Accused Person. Thus, in **Republic vs. Andrew Omwenga [2009] eKLR**, it was held thus:

**“...for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-**

**(a) The death of the deceased and the cause of that death.**

**(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought."**

[4] The evidence adduced by the Prosecution is that the Deceased and the Accused herein were in a relationship as girlfriend and boyfriend; and had had a child out of the relationship. The father of the Deceased testified as **DW1**, saying that he had sent the Deceased to the shop at about 12.00 noon to buy for him insecticide. On arrival there, she called him through the mobile phone of the Accused, which he knew; as he was aware of their relationship. The message was that the products were expensive and so he directed her to the right shop. She did not come back immediately or at all. He further stated that at 5.00 p.m. when his son, **Maccomarc Adoli (PW4)** was sent to the shops by his brother, he returned with the products that he had sent the Deceased to buy. His son reported that he had left the Deceased with the Accused near the church. His last born son, **Abi Mwanika** then went to call the Deceased and twice he returned without her, saying that they were still talking with the Accused. He was thereafter to be informed that the Deceased had been stabbed and was lying down near the church.

[5] On going to the scene, he found the Deceased and she reported to him that she had been stabbed by the Accused, who they referred to as **Baba Rebo**. The weapon used by the Accused, a kitchen knife was beside her. He took the Deceased to hospital, where she died the following day while undergoing treatment. He also took possession of the knife and had it handed over to the Police. He identified the knifed before the Court and it was marked the **Prosecution's Exhibit No. 1**.

[6] **PW2, Monica Samoei** was in her shop at **Chebil Trading Centre**. She testified that he saw the Accused, who she knew by the nickname "**Boiro**" outside her shop in the company of the Deceased; and that they talked for a long time; and that the Accused carried a knife which he identified as the **Prosecution's Exhibit No. 1**. That after some time, they left and she assumed the Deceased was being escorted home given that they headed towards the direction of the Deceased's parents' home; only to be told that she had been stabbed. The same evidence was given by **Susana Wasilwa (PW3)** and her granddaughter **Sophia Kareji (PW5)**.

[7] For the foregoing reasons, it is my finding that the Prosecution has established a *prima facie* case in this matter to warrant the placement of the Accused Person on his defence. He is accordingly placed on his defence to answer the Charge of Murder pursuant to **Section 306(2)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF MARCH, 2019**

**OLGA SEWE**

**JUDGE**