REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 40 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

STEPHEN NGOTOWA.....ACCUSED

RULING

1. The accused is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code.** The State has called and examined eight (8) witnesses at the end of which the State submitted that a case to answer has been established while the defence has submitted that the case based on purely circumstantial evidence has not been established.

2. At this stage of the proceedings all that the court is required to do is not to find whether a case has been proved beyond reasonable doubt but whether there is enough evidence to enable the court call upon the defence to offer some explanation as was stated in the **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** case 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)***

3. 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)***

4. The court can only put the accused on his defence if there is enough evidence tendered so as should the accused exercise his right under **Article 50(2)(i)** of the **Constitution** to remain silent, the court may safely convict him.

5. Based on the evidence tendered before me and in particular the fact that it is the accused who was last seen with the deceased while he was alive looked against the evidence of **PW1** and without saying much thereon so as not to compromise the defence the accused is likely to offer as was stated by 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** as follows:-

> ***"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. I am satisfied and find that *prima facie* case has been made against the accused person to enable me put him on his defence which I hereby do. The accused is therefore advised on his rights under **Section 306** and **307** of the **Criminal Procedure Code** as read with **Article 50(2)(i) (k)** and **(l)** of the **Constitution** of **Kenya 2010** and it is now upon him to choose how he wishes to defend himself.

Dated, delivered and signed at Nairobi this 28th day of May, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Ndungu for the accused

Accused present

Court assistant: Karwitha