



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 52 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CATHRINE NDUNGE MUTHOKA.....ACCUSED**

**RULING**

1. The accused, **Cathrine Ndunge Muthoka**, was charged with two counts of murder contrary to section 203 as read section 204 of the **Penal Code**. In count I, it is alleged that on the 15<sup>th</sup> August, 2011 at Athi River Bridge, Kabaa Sub-location Mbiuni Location of Mwala District within Machakos County, the accused murdered **AM**. In count II, it is similarly alleged that on the 15<sup>th</sup> August, 2011 at Athi River Bridge, Kabaa Sub-location Mbiuni Location of Mwala District within Machakos County, the accused murdered **ANN**.

2. PW1, **Dr Simon Kioko Muli**, on 26<sup>th</sup> August, 2011 carried out post mortem examination of the bodies of the deceased persons. In his evidence there were no external bodily injuries on both bodies but both bodies had peripheral and central cyanosis. Though he was unable to carry out internal examination of the bodies due to the decomposed status of the same, he formed the opinion that both the deceased died due to asphyxia secondary to drowning. PW2, **Sgt Charles Baraza**, testified that on 15<sup>th</sup> August, 2011, he had visited the scene when a report had been made by the accused that a child that she had she had thrown her two children in the river. On that day, only the body of one child, **A M**, aged 5 years, was found. According to PW1, the accused had reported that she had found a new lover who gave her, as a condition for their marriage, that the accused gets rid of her children. had been drowned in Athi River.

3. On 23<sup>rd</sup> August, 2011, PW2 was instructed by the OCS Yatta Police Station to proceed to the same river and on 24<sup>th</sup> August, 2016 he proceeded there and the accused informed them that she had thrown the second child on the lower side of the river towards Kitui. After searching for the child, they recovered the body of a three-year-old girl called Agnes, whose body had started decomposing.

4. PW3, **Cpl Michael Shikuku**, testified that on 23<sup>rd</sup> August, 2011 he was at Yatta Police Station when the accused was taken to the station on allegation of having killed her two children. On 24<sup>th</sup> August, 2016 they carried a search and recovered the body of **AN** aged 3 years old. It was his evidence that the accused confessed to the killing of the said children though he was not present during the confession. PW4, **Nyenyeu Kombo**, the accused grandmother testified that in August, 2011, the accused went and informed her that she would be going to Nairobi and had gone to collect her children, **M** and **N**, who had been staying with PW4 for a long time. After the accused had been given the children she left with them. PW4 however testified that the children were recovered in the river though she was not present when their bodies were recovered. **Roze Nzilani Muthoka**, PW5, the accused's sister testified that on 15<sup>th</sup> August, 2011 at about 10.00 pm the accused went to her home alone and informed her that the accused had come from their home and wanted to spend the night at PW5's house on her way to Nairobi and the following day the accused left for Nairobi but did not confirm whether she had arrived in Nairobi. The witness confirmed that the accused had three children, **M**, **N** and **N**. She however confirmed that PW4 went asking for the accused the following day though she was not aware of the reason. On 23<sup>rd</sup> August, 2011 PW5 heard from her grandmother that the children had been thrown into Athi River and she was present when the bodies were recovered and also identified the bodies at the mortuary.

5. PW6, **Joseph Mwange**, a *boda boda* rider, testified that on 15<sup>th</sup> August, 2011, the accused who was related to him, had come from Nairobi and wanted him to drop her home which he did. 30 minutes later the accused came out with a bag and two children, a boy and a girl aged 3-4 years and informed him to return them to a place called **Bishop Ndingi** Stage where he left them waiting for a vehicle and went back to his work. However, later after one hour when he went back the accused informed him that she had not gotten a vehicle and told him that she wanted to be dropped at Kalaa Market to buy some things to take to her sister Rose's house and proceed to Nairobi the following day. By that time, she was still with the children, one of whom he knew as **Mutinda**. PW6 left the accused at the said market and went back to his work. On 23<sup>rd</sup> August, 2011 he was informed by the *bodaboda* riders that the accused had thrown the children in Athi River and upon searching the river they recovered the body of the boy wearing the same clothes that he had on 15<sup>th</sup> August, 2011. The following day he was informed that the body of the girl was found.

6. PW7, PC **Sammy Mukula Kimatu**, testified that on 23<sup>rd</sup> August, 2011 he was at Pangani Police Station where he was attached when he was asked by the OCS to accompany the accused to Yatta Police Station. According to him, upon interrogation by the OC Crime, the

accused confessed that she had thrown the children into the river at the bridge.

7. In this case it is submitted that no prima facie case has been made out to warrant placing the accused on her defence. It was submitted that the alleged confession by the accused is inadmissible since it did not comply with the rules relating to confessions. To the learned counsel for the accused, the case is merely premised on confessions and no cogent evidence that the accused was seen committing the offences in question hence there is no evidence linking the accused to the death of the deceased.

8. The prosecution on the other hand submitted that based on the evidence on record, a prima facie case has been made out warranting placing the accused on her defence.

9. In this ruling the court is being called upon to decide whether or not the prosecution has made out a *prima facie* case against the accused that would warrant this court to call upon the accused to give his defence. In other words, does the accused have a case to answer? In **Republic vs. Abdi Ibrahim Owl [2013] eKLR** a *prima facie* case was defined as follows: -

**“Prima facie” is a Latin word defined by Black’s Law Dictionary, 8<sup>th</sup> Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “Prima facie case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:**

**“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 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.”**

10. The question that this court has to deal with and answer at this stage is therefore whether based on the evidence before this Court, the Court after properly directing its mind to the law and the evidence can convict if the accused chose to give no evidence. It was therefore held in **Ronald Nyaga Kiura vs. Republic [2018] eKLR** wherein paragraph 22 it is stated as follows:

**“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of RAMANLAL BHAT -VS- REPUBLIC [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”**

11. That there is a danger in making definitive findings at this stage, especially where the Court finds that there is a case to answer is not farfetched and the reasons for not doing so are obvious. As was appreciated by **Trevelyan and Chesoni, JJ** in **Festo Wandera Mukando vs. The Republic [1980] KLR 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 an extreme case, may require an appellate court to set aside an otherwise sound judgement. 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 then that is the end to the case or the count or counts concerned.”**

12. According to the defence, through **Mr Musya**, since there is no direct evidence linking the accused to the killing of the deceased or the commission of the offence and all the prosecution is relying on is circumstantial evidence without any evidence of a single eye witness, there is no evidence at all to put the accused on his defence.

13. The prosecution, though Learned Prosecution Counsel, **Ms Mogoi**, on the other hand, submitted that the fact that there is evidence that the accused was the last person to be seen with the deceased alive, was sufficient to warrant placing the accused on his defence in order for her to explain what happened between the time PW6 left her with the children and when she arrived at PW5’s house alone.

14. In my view, where clearly the prosecution’s case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution’s case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless or a case that is dead on arrival. I therefore agree with the position adopted by the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 – **Public Prosecution vs. Zainal Abidin B. Maidin & Another** that:

**“It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See *Magendran a/***

*Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805. Further, in*

*Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 Sharma J had occasion to observe:*

**‘It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.’”**

15. Having considered the material placed before me I am unable to find, at this stage, that the accused has no case to answer. Whereas upon consideration of the totality of the evidence at the end of the trial, the court may well find that the prosecution has failed to prove its case beyond reasonable doubt, it is my view that that is not the same thing as saying that a *prima facie* case has not been made out. As has been said time and again a *prima facie* case does not necessarily mean a case which must succeed. In other words, despite finding that a *prima facie* case has been made out, the Court is not necessarily bound to convict the accused if the accused decides to maintain his silence. At the conclusion the Court will still evaluate the evidence as well as the submissions and make a finding whether, based on the facts and the law, the prosecution has proved its case beyond reasonable doubt, which is not the same standard applicable to the finding of existence of a *prima facie* case for the purpose of a case to answer.

16. Accordingly, I will refrain from delving further in this matter. I am however satisfied that the prosecution has established a *prima facie* case based on the allegation, whose definitive finding cannot be determined at this stage, that it was the accused who was the last person to be seen with the deceased alive. I accordingly find the accused has a case to answer and put her on her defence.

17. It is so ordered.

**Ruling read, signed and delivered in open Court at Machakos this 27<sup>th</sup> day of May, 2019.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Muli for Mr Muia for the accused**

**Ms Mogoi for the State**

**CA Geoffrey**