



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 77 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

RAPHAEL MUOKI KALUNGU.....ACCUSED

RULING

1. The accused **RAPHAEL MUOKI KALUNGU** 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 between the 6th and 7th July 2014 near Imara Daima Railway Station along Mombasa Road within Nairobi County jointly with others not before the court murdered **MARY WARUGURU MAINA**.

2. He pleaded not guilty to the said charges and to prove its case against him the prosecution called and examined a total of twenty two (22) witnesses, at the close of which both the Prosecution and Advocate watching brief for the family filed written submissions while Ms Kilonzo for the accused submitted orally that the Prosecution had not established a *prima facie* case to enable the court put the accused on his defence who should therefore be acquitted of the charge.

3. On behalf of the Prosecution it was submitted that on 6th July 2014 the deceased person woke up while healthy and with no injuries as per the evidence of **PW4** and **PW20**. The deceased and the accused argued and the accused allegedly threatened to kill her as per the evidence of **PW20** and corroborated by **PW5** via telephone call with the deceased. It was submitted that the last time the deceased was seen alive was by **PW10** at 3.00 p.m. and that the last telephone call the deceased made was to the accused at the said time for which this court's Judgment in **CRIMINAL APPEAL NO.14 OF 2018** at Lodwar **LOKITO EPEYON & ANOTHER v REPUBLIC** was submitted in support. It was submitted that the conduct of the accused person during the investigations went a long way into establishing culpability on his part as per the evidence of **PW16**, his affidavit in **CHILDREN CASE NO. 1048 OF 2014, MILIMANI** when he deponed that the deceased died following a road traffic accident on 6th July 2014 among other constituted circumstantial evidence pointing irresistibility to his guilt. It was therefore submitted that *prima facie* case had been established along the line of the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** and **REPUBLIC v JAGJIVAN M. PATEL & OTHERS (1) TLR 85** and called upon the court to place him on his defence so as to offer certain explanation.

4. On behalf of the deceased family, it was submitted that under **Article 50 (A)** of the **Constitution** and **Section 9 (1)** of the **Victim Protection Act** they have a right as stipulated in **Section 4 (2) (b)** to be heard and accorded an opportunity to respond before any decision affecting their rights is made. It was submitted that **PW10 BONIFACE WACHIRA** placed the accused as the last person seen together with the deceased and that **PW3 JOSEPH MAINA KIMANI** and **PW5 JOYCE WANJIRU NJOROGI** established additional circumstantial evidence that the union between the accused and the deceased was characterized by the accused constantly assaulting and causing bodily injuries to the deceased. It was submitted that at this stage the standard of proof is not that beyond reasonable doubt as the court has not had the advantage of the defence.

5. It was submitted that there were enough circumstantial evidence tendered before the court which proved malice aforethought on the part of the accused person who visited his anger against the deceased and strangled her. It was further stated a cousin of the deceased one **Joseph Mutuku Kalovi** who had been with the accused as per the evidence of **PW4** and **PW6** is at large to date having not reported to work on the 7th July 2014. It was contended that the accused was not concerned about the whereabouts of the deceased on the said date. In support of the submissions herein the following decision of this court were submitted:-

1. **Republic v Boniface Kabucho Kuria [2018] eKLR.**

2. **Republic v Jackson Muimi Tuma [2018] eKLR.**

3. **Republic v Marcel Jumanne Dalance [2018] eKLR.**

4. Republic v Antony Mwangi Muchiri & 3 others [2019] eKLR.

5. Republic v James Nganga Gachuru [2018] eKLR.

6. As I have stated in the above authorities, at this stage the issue is not whether or not the prosecution has established a case against the accused person beyond reasonable doubt but whether a case has been made out to justify calling upon the accused person to offer an explanation as was stated 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)

7. If the court is going to put the accused on his defence then as stated by Justice Ojwang, as he then was, in **REPUBLIC v SAMUEL KARANJA KIRIA CR. CASE NO.13 OF 2004 NAIROBI** reported in [2009] eKLR a detailed analysis of the evidence tendered by the court is not desirable.

8. The only question the court ought to answer at this stage is whether the court based upon the evidence so far placed before it by the prosecution will be prepared to convict the accused on the same should he opt to exercise his constitutional right under **Article 50 (2) (i) & (l)** of the **Constitution** that is to say, the right to remain silent and refuse to give self-incriminating evidence?

9. I have looked at the evidence on record guided by the wise decision of Justice Ojwang herein above and in particular the evidence of **PW10** who placed the accused and the deceased together at 3.00 p.m. on the material day and as corroborated with the call data records placing the accused and the deceased within the same locality when she was last seen alive, thereby placing the accused within the doctrine of last seen which requires him to offer some explanation under the provisions of **Section 111** of the **Evidence Act**, together with the circumstantial evidence tendered in evidence and without saying much thereto so as not to compromise the defence the accused person may wish to offer, I am satisfied that a *prima facie* case has been established by the Prosecution to enable me put him on his defence which I hereby do.

10. The accused is therefore advised of his rights under the **Constitution Article 50** (supra) and **Sections 306** and **307** of the **Criminal Procedure Code** read together with **Section 111** of the **Evidence Act** and is therefore called upon to state his side of the story should he wish to do so through the able advise of his Advocate on record and it is so ordered.

Dated, Signed and Delivered at Nairobi this 25th day of June, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Mwenda for the State

Ms. Kilonzo for the accused person

Mr. Karigi for the family

Accused present

Court Assistant: Karwitha