



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL CASE NO. 35 OF 2013**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**AMOS GITAU MACHARIA..... 1<sup>ST</sup> ACCUSED**

**DAVID MWANGI KIBUE.....2<sup>ND</sup> ACCUSED**

**EMMANUEL MWANGI LUBISIA.... 3<sup>RD</sup> ACCUSED**

**RULING**

1. The accused persons **AMOS GITAU MACHARIA**, **DAVID MWANGI KIBUE** and **EMMANUEL MWANGI LUBISIA** faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that on the 12<sup>th</sup> day of March, 2013 at Ruai Trading Centre, Ruai Location in Njiru District within Nairobi County murdered **DIANA KATONI KINGOO**.

2. The 1<sup>st</sup> and 2<sup>nd</sup> accused first appeared in court on 7/3/2013 before Muchemi J. and on 25/4/2013 their case was consolidated with that of the 3<sup>rd</sup> accused at which they all pleaded not guilty. On 9/5/2013 they appeared before Korir J. for directions on their application to be released on bond and by a Ruling dated 14<sup>th</sup> day of August 2013 the Judge declined to release them on bond for reasons stated therein. The accused persons thereafter filed application for review and by a Ruling dated 12<sup>th</sup> day of May 2014 Justice Korir reviewed her orders thereon and granted each of the accused person bonds of Kenya shillings one million (Kshs.1,000,000/=) with one surety of like amount among other terms and conditions.

3. For record purposes and judicial accountability the 2<sup>nd</sup> and 3<sup>rd</sup> accused managed to secure bond and were released on bond pending hearing and determination of the cause while the 1<sup>st</sup> accused was unable to do so. After several adjournments and false start, on 13/4/2016 their trial commenced before me in the course of which on 19/10/2016 while granting the prosecution adjournment I reviewed bond terms in respect of the 1<sup>st</sup> accused to Kenya shillings one hundred thousand (Kshs.100,000/=) with one surety of similar amount which he was once again unable to secure. On 9/10/2017 the 1<sup>st</sup> accused through his Advocate on record sought reduction of his bond terms to free bond or to a sum of Kenya shillings twenty thousand (Kshs.20,000/=). The court having looked at the circumstances of the case and how long it had taken reduced the bond to Kenya shillings fifty thousand (Kshs.50,000/=).

4. The court's reduction did not go down well with the accused who in his mind expected the court to extend the door of mercy to him regardless of the interest of the victim and the nature of the offence he was facing and in typical Kenya fashion where a judge is expected not to make any comment in respect of the conduct of the parties before them, the 1<sup>st</sup> accused under Certificate of Urgency by-passing his Advocate on record filed an application dated 11<sup>th</sup> June 2018 seeking that the file be transferred from me to any other court within the local limit of the jurisdiction as he had lost faith in the current trial court. It should be noted that the said application was opposed by among others the prosecution and the 2<sup>nd</sup> accused.

5. On 18/10/2018 the 1<sup>st</sup> accused withdrew his said application thereby allowing the court to conclude the hearing of the prosecution case, having called and examined a total of nine (9) witnesses and the end of which the prosecution chose not to file any submissions while all the accused persons filed written submissions which they relied upon.

**SUBMISSIONS**

6. On behalf of the 1<sup>st</sup> accused it was submitted that the same was arrested on 28<sup>th</sup> February 2013 at Ruai Police Station while in possession of the deceased phone make Samsung Duos B77222 which he offered to sell to **PW7** and that his conduct of going to Ruai Police Station

demonstrated that he did not have knowledge of the previous owner of the phone. On behalf of the 2<sup>nd</sup> accused it was submitted that as per the evidence of **PW10**, he was arrested because he introduced the person who sold the deceased's phone to the 1<sup>st</sup> accused which evidence was confirmed by **PW11** the investigating officer. It was therefore submitted that there was no evidence linking the 2<sup>nd</sup> accused to the death of the deceased and therefore no *prima facie* case was established.

7. On behalf of the 3<sup>rd</sup> accused it was submitted that he was only arrested because the deceased used his phone to call her brother and that the DNA profile conducted did not link him to the offence and that as per the evidence of **PW10** he was not the last person to be seen with the deceased. It was submitted that the prosecution had not established any intention on his part to cause death of the deceased. It was therefore submitted that the charge was a mere fabrication for which the cases of **REPUBLIC v ATTORNEY GENERAL EXP KIPNGENO ARAP NGENY, HIGH COURT CIVIL APPL. NO. 400 OF 2001** and **NAIROBI HCCC NO. 1729 OF 2001, THOMAS MBOYA OLUOCH & ANOTHER v LUCY MUTHONI STEPHEN & ANOTHER** were submitted.

#### ANALYSIS AND DETERMINATION

8. At this stage of the proceedings all that the court is called upon to determine is whether a *prima facie* has been established to enable the court put the accused persons on their defences as was stated in the case of **RAMANLAL TRAMBAKLAL BHATT v REPUBLIC (1957) EA 332** 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.”*

*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)*

9. 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** had this to say on *prima facie* case:-

*“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).*

10. To prove its case against the accused person on a charge of murder, the prosecution is expected to prove the following elements of the offence:-

a. *the fact and cause of death,*

b. *that the said death was caused by unlawful act on the part of the accused person,*

c. *that it was caused with malice aforethought.*

11. The prosecution case against the accused persons in summary was as follows:- **PW1 CORP. PETER KANYI** took photographs at the scene in Ruai near the market of the deceased's body with a belt tied around her neck. **PW2 KELVIN MUTISYA KINGOO** a brother of the deceased was on the material day with her until 7.00 p.m. when she left the house to go buy an alcoholic drink and after thirty minutes she came back with the drink. Their house help known as **Joshua** tried to grab one glass from the deceased causing it to spill over. The deceased then got a phone call which she answered after which she told him that her friend was around and she was going to meet him shortly. He then spoke with **Joshua** who agreed to open for her the gate. He later on tried to call the deceased but her phone was off. He was thereafter called by a number unknown to him which when he answered the caller did not speak to him.

12. It was his evidence that he gave the phone to his girl friend **PW6 RUTH WAITHERA NGANGA** who spoke with the deceased before handing over the phone to him and the deceased told him that she was at mosque a hundred meters from their home. He could hear people laughing at the background as she spoke with him. That was the last time he spoke with her alive. He later on identified her recovered mobile phone. **PW6** further in cross-examination confirmed that there was a grudge between the deceased and Joshua their house help over the drink.

13. **PW3 CORP. MUTHONI ERUSTUS** received report from the father of the deceased on the recovery of her body and proceeded to the scene where her body was positively identified. **PW4 PAUL WAMBULWA WASIKE** corroborated **PW3's** evidence and stated that he knew the 1<sup>st</sup> accused as a *boda boda* operator. **PW7 JAMES WAKABA NJIRU** testified that he met the 1<sup>st</sup> accused who informed him that he had collected Kshs.50/= during the scuffle caused by Sonko's money and that he had a mobile phone which he was selling which he wanted to buy but they differed on price. He then heard that the 1<sup>st</sup> accused had an accident and went to visit him. He later on heard that the

2<sup>nd</sup> accused had been arrested over the said mobile phone.

**14. PW8 HENRY KIPTOO SANG** collected samples from the deceased and the accused person for analysis and concluded that there was no semen in the vaginal swab and the clothes of the deceased. **PW9 MARTIN WAITHAKA KIMANI** confirmed that on the material day the deceased bought a bottle of 'Visa' Brandy at his Wine and Spirit Shop at 5.30 p.m. **PW10 INSP. CHARLES MURIITHI** testified that on 28<sup>th</sup> February 2013 he received information from an informer on the deceased's mobile phone and had been given the name of Amos Gitau the 1<sup>st</sup> accused who stated that the phone was brought to him by David Mwangi. He further stated that the 3<sup>rd</sup> accused was the boy friend of the deceased who was last with her before putting her on *boda boda*. It was his evidence that one person who was with the 3<sup>rd</sup> accused and who had been arrested was released by the OCS.

**15. PW11 CORP. WELDON KOECH** testified that the phone of the deceased was found in possession of the 1<sup>st</sup> accused who said that the 2<sup>nd</sup> accused bought it from him while the 3<sup>rd</sup> accused was the last person with the deceased before she died. He stated that one Peris who was with the 3<sup>rd</sup> accused slapped the deceased because the 3<sup>rd</sup> accused who was her boyfriend had brought her to his house. She was arrested but later on released.

**16. PW5 DR. JOHANSEN ODUOR** conducted post-mortem examination on the body of the deceased which had peripheral cyanosis, multiple bruises on the anterior neck and as a result of his examination formed an opinion that the cause of death was asphyxia due to manual strangulation. He noted that the ligature must have been tied after death.

**17.** From the evidence herein the fact and the cause of death was not disputed and was proved through evidence beyond reasonable doubt. The only issue in dispute is whether the said death was caused by the accused persons either jointly or severally and whether the prosecution has made *prima facie* case against them to enable the court put them or any of them on defence.

**18.** As regards the 1<sup>st</sup> accused, the evidence linking him to the matter was that of **PW7** and **PW10** having been found with the phone of the deceased which was positively identified by **PW1** and **PW6** as belonging to the deceased. On the doctrine of possession of recently stolen item and without saying much thereon, I am satisfied that a *prima facie* case has been proved against him to enable the court call upon him to offer some explanation on how he came into possession of the said phone, of which if not then based upon the evidence on record the court properly directing its mind can convict the same.

**19.** As regards the 2<sup>nd</sup> accused, save for the hearsay evidence of **PW10** and **PW11** there is no evidence connecting him to the mobile phone of the deceased. As submitted by the 2<sup>nd</sup> accused, there is no evidence that he knew the deceased or had any intention to cause her death. I would agree with his submissions that putting him on his defence would amount to asking him to fill the gap in the prosecution case as regards him. There is no evidence pointing out that the same caused the death of the deceased or had the necessary intention to do so. He has not been through evidence placed with the deceased or his co-accused. I am therefore satisfied that no *prima facie* case has been established against him and therefore find the same not guilty and consequently acquit him under **Section 306** of the **Criminal Procedure Code**.

**20.** As regards the 3<sup>rd</sup> accused, there is evidence tendered through **PW1** and **PW11** that he was the last person to had been seen with the deceased alive, based upon the doctrine of last seen, and without commenting further on the said evidence so as not to prejudice his defence, I am satisfied that a *prima facie* case has been made against him to enable the court put him on his defence which I hereby do.

**21.** In the final analysis I find and hold that *prima facie* case has been established against the 1<sup>st</sup> and 3<sup>rd</sup> accused persons and accordingly place both of them on their defence and are advised of their rights under **Section 307** of the **Criminal Procedure Code**. It is for them through the advice of their Advocate on record to choose how they intend to defend themselves.

**22.** The 2<sup>nd</sup> accused having been found not guilty should be set free forthwith unless otherwise lawfully held and it is so ordered.

**Dated, delivered and signed at Nairobi this 19<sup>th</sup> day of June, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Naulikha for the State*

*Mr. Wamwayi for the 1<sup>st</sup> accused*

*Mr. Kinyanjui for the 2<sup>nd</sup> accused*

*No appearance by Ms. Kali for the 3<sup>rd</sup> accused*

*All 3 Accused persons – present*

