



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 99 OF 2015

REPUBLIC.....RESPONDENT

VERSUS

MICHAEL WAITHAKA *alias* LEBA.....1ST ACCUSED

JEFF OCHIENG AYOO.....2ND ACCUSED

RULING

1. The accused persons were 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, on the 19th day of March, 2014 at Madoya Huruma Area in Starehe sub-county within Nairobi County, murdered **ALOISE OBONGE ODENY**.

2. They pleaded not guilty to the charges and to prove its case, the prosecution called and examined a total of seven (7) prosecution witnesses. At the close of the prosecution case both the prosecution and the defence opted not to make any submissions and left it to the court to decide whether the prosecution had established *prima facie* case to enable the court put the accused persons on their defence.

3. 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.”

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)

4. 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).

5. With that in mind and without saying much thereon so as not to compromise the defence the accused persons might wish to tender while alive to their constitutional rights under **Article 50 (2):-**

(i) to remain silent, and not to testify during the proceedings,

(k) to adduce and challenge the evidence and

(l) to refuse to give self-incriminating evidence.

I have looked at the evidence of **PW2 ROSE ANYANGO WAORE** and **PW4 MARY ANYANGO** both who placed the accused persons at the scene, **PW6 DAVID OUMA OTIENO** who identified and placed the 1st accused at the scene, **PW3 MICHAEL SIMBIRI ODENY** and **PW5 DAVID OUMA OTIENO** both who received the deceased dying declaration and without saying much thereon, I find and hold that the prosecution has established *prima facie* case to enable me put the accused persons on their defence which I hereby do.

6. The accused persons are therefore advised of their constitutional rights under **Article 50 (2)** and **Sections 306 to 311** of the **Criminal Procedure Code** and are called upon to choose through the advice of their Advocate on record how they wish to defend themselves.

Dated, delivered and signed at Nairobi this 24th day of September, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Mr. Mburu for the 1st accused

Mr. Mburu for Mrs. Kinyori for the 2nd accused

Accused present

Court assistant: Karwitha